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JIM CROW AS KAFKA: VOTER SUPPRESSION ON THE GROUND

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JIM CROW AS KAFKA: VOTER SUPPRESSION ON THE GROUND

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Requiring photo identification before voting has generated fiercely contested litigation and scholarly literature. This Article attempts to move the debate forward by examining how precisely Voter ID works on the ground. It investigates the precise mechanics of Voter ID in North Carolina, one of the states at the heart of the controversy, and scrutinizes precisely how a low-income voter of color without ID could obtain one. It finds not only that prospective low-income voters will face a series of debilitating costs in gaining the required ID, but that the mechanism of voter suppression turns on the creation of chaos and the transformation of a voter from a rights-holder into a bureaucratic supplicant.

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Would it not...be simpler for the government to dissolve the people and elect another?

--Bertolt Brecht, *Die Losung* (The Solution), 1953¹

There is great disorder under the heavens, and the situation is excellent.

--Mao Zedong²

INTRODUCTION

It seems simple and straightforward. When a registered voter appears at the polls on Election Day (or earlier), she presents a photo ID to the poll worker, who checks it against the voter rolls. In the likely event of a match, the poll worker gives the voter her ballot, and she exercises her right to the franchise.

It is neither simple nor straightforward. And it is probably invidious.

For the last two decades, many – overwhelmingly Republican -- state legislatures have enacted voter identification requirements, ostensibly as a way of ensuring the integrity of the ballot. The litigation response was immediate, one prominent case reaching the United States Supreme Court.³ This process accelerated rapidly, however, in the wake of Barack Obama's election, and particularly after the 2010 midterms, in which Republicans flipped twenty state legislative chambers nationwide, giving them full control of

¹ Brecht wrote his poem about the 1953 uprising in East Germany, which was crushed by Soviet forces. See *The Cambridge Companion to Brecht*, Cambridge University Press, 2006, p. 239.

² Quoted in Jay Mathews, *Peking's Foreign Policy Lacks Mao's Old Flamboyance*, WASH. POST, Apr. 2, 1978, at <https://www.washingtonpost.com/archive/politics/1978/04/02/pe-kings-foreign-policy-lacks-maos-old-flamboyance/d9dbb455-d256-4318-8d65-813ff0cf0bd3/>; Bill Brubaker, *Mao Zedong: King of Kitsch*, Smithsonian, March 2009, at <https://www.smithsonianmag.com/arts-culture/mao-zedong-king-of-kitsch-53275572/>

³ Crawford v. Marion County Election Bd., 553 U.S. 181 (2008). An excellent summary of Voter ID litigation can be found in Justin Levitt, *Voter Identification in the Courts*, in COUNCIL OF STATE GOVERNMENTS: THE BOOK OF THE STATES 237-40 (2015).

eleven more state legislatures than they had previously and control of one chamber in Colorado, Iowa, and New York.⁴

These new requirements – which I shall call “Voter ID” -- achieved greater public notice in the wake of the 2016 and 2018 elections, when some observers argued that it accounted for the distortion of results, particularly in Donald Trump’s Wisconsin victory, and Stacey Abrams’ narrow loss in the Georgia gubernatorial race. Others rejected such claims.

The fractious litigation, on-the-ground organizing, and high-stakes political warfare entering the 2020 election cycle will no doubt continue. In this Article, I hope to add to a fuller picture of Voter ID’s impact by examining it closer to the ground, in North Carolina, a state at the center of the voting wars.⁵ Put another way, I hope to show more precisely *why* Voter ID, which seems simple and straightforward, is neither, by revealing the precise ways in which Voter ID can and does suppress the vote. Most succinctly, suppression occurs via complexity and chaos. Potential voters will find no Bull Connors or Klansmen either at polling places or in local elections boards.⁶ Instead, when they seek to vote, they will encounter confusion and ambiguity, or often not encounter the appropriate information at all. It is not Jim Crow but Kafka. Voter ID turns the exercise of a constitutional right into a supplication for a government benefit. The voting booth becomes the welfare office.

I do not claim that this qualitative detail proves conclusively that Voter ID will change election results, but despite various claims, no other study has done so, either. Rather, I appeal to readers’ common sense: if similarly situated to the people most burdened by Voter ID laws, how sure are they that they would overcome legally-created barriers and exercise their constitutional rights? And if they are uncertain, should the exercise of the franchise be similar uncertain?

I. WHY VOTER ID MATTERS: THE NATURE OF ADMINISTRATIVE BURDEN

Voter ID, by its very nature, generates inconvenience, annoyance, and difficulty for low-income citizens. “Inconvenience” and “annoyance” seem

⁴ See, e.g., Tim Storey, *GOP Makes Historic State Legislative Gains in 2010*, Dec. 10, 2010, at http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_tim_storey/gop_makes_historic_state_legislative_gains_in_2010 (last visited Nov. 12, 2019).

⁵ I spent most of the past summer volunteering in the Raleigh-Durham area with community based organizations seeking to provide appropriate IDs to low-income voters in order to enable them to vote.

⁶ It should be noted, however, that the racial animus of the North Carolina legislative majority was amply demonstrated by the Fourth Circuit’s opinion. See *infra*.

like minor distractions, but they can form formidable barriers to participation in any government or private program. Thinking about the problem economically⁷ quickly reveals that inconvenience, annoyance, and difficulty are costs: they demand resources of time, energy, and money that are scarce for everyone, and especially for low-income people.

Pamela Herd and Donald Moynihan have recently broken down the notion of “administrative burden” in a useful three-part typology⁸:

Learning costs i.e. “the time and effort expended to learn about the program or service, ascertaining eligibility status, the nature of benefits, conditions that must be satisfied, and how to gain access;

Compliance costs i.e. the “provision of information and documentation to demonstrate standing; financial costs to access services (such as fees, legal representation, travel costs); avoiding or responding to discretionary demands made by administrators”; and

Psychological costs i.e. “Stigma arising from applying for and participating in an unpopular program; loss of autonomy that comes from intrusive administrative supervision; frustration at dealing with learning and compliance costs, unjust or unnecessary procedures; stresses that arise from uncertainty about whether a citizens can negotiate processes and compliance costs.”

These costs can carry major weight when it comes to voting. Rational-actor social scientists have wondered why anyone votes at all because the tangible benefits to doing so appear trivial to nonexistent individually. Even those social scientists who argue that voting can be rational concede that “[i]t is well-known that voting in large elections cannot be explained in terms of the selfish benefits of voting to the individual: the probability that a vote is decisive is too low for voting to be “worth it” in an expected utility sense.”⁹

⁷ I do not in any way mean to suggest that this is the best way to conceive of the problem, but rather that it is congenial to many. For the dangers of economic thinking, see BINYAMIN APPELBAUM, *THE ECONOMISTS’ HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY* (2019).

⁸ PAMELA HERD AND DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* 23 (2018).

⁹ Voting as a Rational Choice: Why and How People Vote to Improve the Well-Being of Others Aaron Edlin, Andrew Gelman, and Noah Kaplan NBER Working Paper No. 13562 October 2007 JEL No. H0,K21.

Like recycling or any “large-number small-payoff” problem, people lack strong incentives to perform a particular act.¹⁰ But if that is the case, then raising the costs of voting, particularly for those who lack resources to begin with can achieve a significant reduction in voting.

Since nationwide, about 12 percent of the voting age population lacks an acceptable form of identification required by Voter ID laws¹¹, requiring such IDs could dramatically affect election outcomes. In North such a possibility looms large. Elections in the Tar Heel State, as in so many swing states, can be very, very close. Of particular interest for this Essay is that in 2016, Democrat Roy Cooper defeated incumbent Republican Pat McCrory by 10,277 votes out of a total of more than 4.6 million cast – a margin of approximately 0.2%.¹²

II. NORTH CAROLINA VOTER ID: A POLITICAL HISTORY

North Carolina has long held a reputation for political moderation – at times deserved, at times brutally false. By mid-century, figures such as Franklin Porter Graham and Terry Sanford pioneered a centrist faction in the Democratic Party – then the only party that mattered – that rejected massive resistance to civil rights. But they were a distinct minority. While the Tarheel State did not feature the consistent lawless brutality of a Mississippi or brutal racist law enforcement figures like Alabamians Eugene “Bull” Connor and Jim Clark, white supremacy reigned supreme, even if it came in the more genteel guise of a Sam Ervin.¹³

¹⁰ An excellent survey of much of the literature can be found in Ann E. Carlson, *Recycling Norms*, 89 CALIF. L. REV. 1231 (2001).

¹¹ See Commission on Federal Election Reform, “Building Confidence in US Elections: Report of the Commission on Federal Election Reform,” 2005, at <https://www.eac.gov/assets/1/6/Exhibit%20M.PDF> (last visited Sept. 1, 2019).

¹² North Carolina State Board of Election, “11/08/2016 Official General Election Results - Statewide,” at https://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=COS&contest=0 (last visited Aug. 21, 2019). The most recent peer-reviewed study of the Wisconsin Presidential election found that it reduced turnout by up to 1% -- a finding that, if replicated in North Carolina, would have tilted the election to McCrory. See Michael G. DeCrescenzo and Kenneth R. Mayer, Voter Identification and Nonvoting in Wisconsin—Evidence from the 2016 Election, *Election L.J.* (November 2019), No. 4, at https://www.liebertpub.com/doi/pdf/10.1089/elj.2018.0536#utm_source=FastTrack&utm_medium=email&utm_campaign=elj (last visited Nov. 19, 2019).

¹³ See WILLIAM H. CHAFE, *CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA AND THE STRUGGLE FOR BLACK FREEDOM* (1981); KARL E. CAMPBELL, *SENATOR SAM ERVIN: LAST OF THE FOUNDING FATHERS* (2007) (noting how Ervin used a “soft southern

In the post-Civil Rights Era, the looming presence of Jesse Helms turned the Republican Party into the successor of segregationism, but the pattern of partisan moderation held, in no small part due the balance of power: not until 1995 did the Republican Party achieve the majority in the state House of Representatives, where it faced Democratic Governor James Hunt. The Democratic Party grew increasingly reliant on African-American votes, and so had little interest in suppressing them; indeed, an African-American Democrat, Dan Blue, became Speaker in 1991.

In addition, Section 5 of the Voting Rights Act of 1965 mandated that any changes in selected states' voting laws had to be approved by the Civil Rights Divisions of the US Department of Justice, a provision known as "pre-clearance." North Carolina as a state was not covered by pre-clearance provisions, but 40 of its 100 counties were,¹⁴ and DOJ frequently reject the state's proposed voting law changes. For example, in 1981 and 1982, DOJ rejected proposed redistricting laws because they "resulted in a submergence of black voting strength in several covered areas of the state."¹⁵ A decade later, DOJ again rejected the state's initial maps.¹⁶ And in 1993, DOJ blocked a proposed delay in allowing mail-in voter registration.¹⁷

strategy" in line with the North Carolina tradition, upholding and defending segregation on "constitutional" grounds without resort to crude calls for violence or the most egregious racial stereotypes).

¹⁴ See United States Department of Justice, "Jurisdictions Previously Covered by Section 5," <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>

¹⁵ See Letter from William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice to Jerris Leonard. Apr. 19, 1982, at <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/NC-1180.pdf> (last visited Nov. 15, 2019). Leonard had submitted North Carolina's proposed redistricting plans, and North Carolina had chosen someone with important connections: he had served as Richard Nixon's first head of the Civil Rights Division himself, and had a good record on civil rights. See RICHARD H. SANDER, YANA A. KUCHEVA, & JONATHAN M. ZASLOFF, *MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING* 146 (2018).

¹⁶ Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Tiare B. Smiley, Special Deputy Attorney General, Dec. 18, 1991, at <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/NC-1500.pdf> (last visited Nov. 15, 2019).

¹⁷ See Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice to Charles M. Hensey, Special Deputy Attorney General, Elections Section, North Carolina Department of Justice, Nov. 16, 1993, at <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/NC-1520.pdf> (last visited Nov. 15, 2019). 67 voting determination letters for North Carolina can be found at <https://www.justice.gov/crt/voting-determination-letters-north-carolina> (last visited Nov. 15, 2019).

This pattern changed during the second decade of the 21st century. The midterm elections of 2010 saw massive Republican gains throughout the nation, giving the GOP control of 19 legislative houses,¹⁸ and North Carolina was typical: for the first time in more than a decade, Republicans controlled both houses of the General Assembly. And unlike previous Republican legislative leaders, the new GOP bosses were dedicated political right-wing revolutionaries. Thom Tillis, elected House Speaker in 2010, made waves by arguing for repeal of public health laws requiring restaurant employees to wash their hands after using the restroom.¹⁹

For the first two years of the new order, legislative radicals were unable to accomplish most of their goals due to the opposition of Democratic Governor Beverly Perdue. But in 2012, the Tar Heel State's voters chose to entrust the Governor's Mansion to Pat McCrory, giving Republicans their first triumvirate since Reconstruction.²⁰ McCrory had a reputation as an affable, non-ideological mayor,²¹ but he and the Legislature quickly instituted a sort of extreme right-wing politics that the state had not seen since the Jim Crow Era.

When the United States Supreme Court held 5-4 that Section 5's preclearance provisions were unconstitutional because of the "equal dignity of the states,"²² Republicans at the state house immediately – in less than 24 hours – swung into action. Senate President Phil Berger announced the day after the decision that the Legislature would write a more comprehensive bill.

¹⁸ See Dan Balz, *the Republican Takeover in the States*, WASH. POST, Nov. 14, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/13/AR2010111304276.html> ("Republicans picked up at least 675 state legislative seats Nov. 2. As with the increases in the House, that gain is the biggest any party has made in state legislative seats since 1938 and is far larger than the GOP's tally in its 1994 landslide. Given the distribution of those gains, Republicans have the power to work their will in the states in ways they can't begin to think about doing in Washington.").

¹⁹ Colby Itkowitz, *Senator Says Restaurant Employees Shouldn't Be Required To Wash Their Hands*, WASH. POST, Feb. 3, 2015, at <https://www.washingtonpost.com/blogs/in-the-loop/wp/2015/02/03/the-next-public-health-debate-hand-washing/> (last visited Sept. 4, 2019). Tillis argued that if restaurants were forced to post whether they required employees to wash their hand, market forces would ensure public health.

²⁰ See Michael A. Fletcher, *In North Carolina, Unimpeded GOP Drives State Hard to the Right*, WASH. POST, May 25, 2013, at https://www.washingtonpost.com/business/economy/in-north-carolina-unimpeded-gop-drives-state-hard-to-the-right/2013/05/25/a9c9ccd2-c3c7-11e2-914f-a7aba60512a7_story.html (last visited Sept. 4, 2019).

²¹ See, e.g., Erik Spanberg, *Pat McCrory Elected NC Governor*, CHARLOTTE BUS. J., Nov. 7, 2012 (noting that McCrory said, "We won the right way. We're going to govern together....we're going to bring this state together" and campaigned on economic issues such as lower taxes and regulation).

²² *Shelby County v. Holder*, 570 U.S. 529 (2013).

Republicans remained silent for 18 days, and then rushed through a bill in less than 48 hours.

That bill, the Fourth Circuit famously noted, “target[ed] African Americans with almost surgical precision.”²³ It ended same-day registration, severely curtailed early and out-of-precinct voting, and (crucial for our purposes) imposed a strict Voter ID requirement.

These changes disproportionately affected African-American voters, and the Fourth Circuit ruled that this represented precisely the GOP Legislature’s purpose. As the court explained, legislators explicitly asked staff for racial data on early voting; told that African-Americans disproportionately used the first week of early voting; they then eliminated that week in the legislation. Republicans asked for the sorts of IDs that African-Americans were most likely to have, received answers from staff, and then explicitly forbade the use of those IDs as a way of complying with the Voter ID requirement. Race was not incidental: “the legislature requested and received racial data as to usage of the practices changed by the proposed law.”²⁴

The Legislature’s justification for these provisions were almost comically inadequate, particularly when it came to Voter ID. Voter ID provisions target *in-person* fraud, i.e. someone impersonating someone else at the polling place. Yet the Legislature presented no evidence that such fraud occurred. There was fraud in *absentee* voting – several cases, as the district court found – yet the Legislature did nothing to address that sort of fraud. Not coincidentally, absentee ballots were used disproportionately by whites. Given the massive factual record demonstrating not only illegal invidious discrimination from the Legislature, but also its significant burden on voting, the Fourth Circuit enjoined the entire legislation in the summer of 2016 – preventing its use in elections that autumn.

North Carolina Republicans appealed to the United States Supreme Court in December 2016, when after the November election it became clear that Donald Trump would appoint a justice to fill the seat of Antonin Scalia. But newly-elected Democratic Governor Roy Cooper and newly-elected Democratic Attorney General Joshua Stein *opposed* the petition as soon as they took office in January 2017. The Supreme Court denied certiorari,²⁵ with Chief

²³ North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

²⁴ 831 F.3d at 216.

²⁵ North Carolina v. North Carolina State Conference of the NAACP, 581 U.S. – (May 15, 2017)(denial of certiorari).

Justice John Roberts – the author of the *Shelby County* decision that had arguably caused the problem in first place – emphasizing in a separate statement that “[g]iven the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that [t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.”²⁶ Still, as of mid-2017, North Carolina remained without a Voter ID law.

Tar Heel Republicans, however, did not give up; indeed, in the wake of the Fourth Circuit’s comprehensive rebuke, they tried even harder. In June 2018, North Carolina Speaker Tim Moore introduced HB 1092, a constitutional amendment that would require voters in the state to present photo identification before voting. With the a Republican super-majority – brought about in no small party because of racial gerrymandering – as several federal courts had already found – Moore’s bill easily passed on a strict party-line vote and was placed on the November ballot.

The pathway was devious because at least when it came to Voter ID, it appeared so bland. The proposed North Carolina Voter ID Amendment simply stated: “Voters offering to vote in person shall present photo identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.” By not stating which IDs were acceptable, how they could be acquired, and which exceptions “may” be included, the provision appealed to many voters’ perceptions that Voter ID was simply common-sensical. Reverend Anthony Spearman of the state NAACP said the vaguely worded amendment would “enshrine discrimination in the constitution” without telling voters exactly what they’re voting for²⁷ – a provision that for the state GOP was a feature, not a bug.

When asked if there was anything in the voter ID amendment that would prevent the legislature from simply rewriting the old law, Rep. David Lewis, the Republican chair of the House Elections Committee, said that “the short answer would be no.”²⁸ Lewis insisted that whatever the Legislature might do would be constitutional – a claim that gained strength after Justice Anthony Kennedy retired and was replaced by Brett Kavanaugh.

²⁶ Id. (statement of Roberts, C.J.).

²⁷ Billy Corriher, *N.C. Legislature Targets Constitution to Grab Power, Impose Voter ID*, FACING SOUTH, June 29, 2018, at <https://www.facingsouth.org/2018/06/nc-legislature-targets-constitution-grab-power-impose-voter-id> (last visited Sept. 8, 2019).

²⁸ Id.s

What followed was perhaps the most explicitly partisan election in North Carolina history since the “white supremacy campaign” of 1898, when segregationist Democrats engaged in a systematic campaign of violence and intimidation to crush African-American and Republican political power.²⁹ Here, the partisan roles were reversed, and direct violence did not occur; rather, the weapon of choice was deception. The GOP advanced two measures promising a “Bipartisan Board of Ethics and Elections,” and a “Nonpartisan Judicial Merit Commission,” which sounded attractive to a voter encountering them for the first time. But since under existing law similar boards were controlled by the Governor, the measures in reality represented a blatant effort to strip Democratic Governor Cooper of authority and hand it to Republican lawmakers entrenched in one of the most gerrymandered legislatures in the country. For their part, Democrats campaigned on depriving the state GOP of its veto-proof majority – created in no small part by the gerrymandering – and thus forcing legislators to negotiate with the Governor.

As expected, Voter ID passed – although four of the legislature’s six proposed amendments failed, and even the Voter ID provision got only 55.49%,³⁰ demonstrating the cleverness of the Legislature’s strategy of vagueness. The two other provisions, concerning “bipartisan” and “nonpartisan” commissions were specific enough that voters could understand what they did – and not surprisingly, both were overwhelmingly rejected. Similarly, voters stripped GOP legislators of their veto-proof supermajority.

Once again, North Carolina Republicans swung quickly into action, enacting a new Voter ID that in crucial respects matched the old one. And importantly, they did so in November 2018 – *before* the new Legislature was to be inaugurated the following January, and thereby allowing them to override Cooper’s inevitable veto. The next few weeks played out the string – Cooper vetoed the bill on December 14th, and the Legislature overrode the veto less than 48 hours later. By the time the new North Carolina Legislature met on January 3rd, Voter ID was once again North Carolina law.

And so the action shifted once again to the courts. Shortly after the New Year, voting rights groups brought suit against the new law – one in federal

²⁹ A good summary of that campaign and its impact can be found in ERIC ANDERSON, *RACE AND POLITICS IN NORTH CAROLINA, 1872-1901*, at 252-295 (1981).

³⁰ North Carolina State Board of Elections, *11/06/2018 Official General Election Results – Statewide*, at https://er.ncsbe.gov/?election_dt=11/06/2018&county_id=0&office=REF&contest=0 (last visited Sept. 8, 2019).

court³¹ and two in state courts -- and at least one North Carolina trial court agreed, holding that because the General Assembly that placed the amendments on the ballot was itself illegally racially gerrymandered, it lacked the authority to move forward with the amendment process.³² As of this writing, this case is now on appeal. The federal case attacked Voter ID on the grounds that it violated the Voting Rights Act. The other state case³³ argued that not only did Voter ID violate state equal protection law, but also the state's right to vote provisions as well as free speech and assembly; a three-judge panel accepted motions to dismiss on some claims but denied them on others, leading a predictable set of appeals by both plaintiffs and defendants.

With so many legal issues pending, Governor Cooper and the state legislature reached what was so far their only compromise, agreeing to postpone implementation of the Voter ID law in 2019 (when many local elections would be held).³⁴ But this legislation did apply to 2020 – when not only the Presidential, but also a US Senatorial, gubernatorial, and state legislative elections were scheduled. For now, the State Board of Elections, one hundred County Boards of Elections. The state Department of Motor Vehicles, and more than 100 local DMV offices must gear up for a complex, at-times unclear, legally uncertain new initiative, carrying the greatest political sensitivity in the midst of what will be one of the most divisive elections in US history – with no new resources.

III. THE SPREAD THE VOTE MODEL

Skeptics might wonder if any of this matters. At least some empirical studies have shown that Voter ID laws have not affected election outcomes as much as Democrats feared or Republicans hoped.³⁵ Since in that year the

³¹ In July, the federal court denied state defendants' motion to dismiss. See *North Carolina State Conf. of NAACP v. Cooper*, -- F.Supp.3d --, 2019 WL 2772580 (M.D.N.C. July 2, 2019).

³² See *North Carolina State NAACP et al. v. Tim Moore et al*, 18 CVS 9806 (N.C. Super. Ct. Feb. 23, 2019), https://www.southernenvironment.org/uploads/words_docs/doc03389420190222171503.pdf (last visited Sept. 9, 2019).

³³ *Holmes v. Moore* (Wake Cty. Sup. Ct. 18-cvs-15292), at <https://www.brennan-center.org/analysis/state-voting-rights-litigation-july-2019> (last visited Sept. 12, 2019).

³⁴ See North Carolina State General Assembly Legislative File for Senate Bill 214/SL 2019-4, at <https://www.ncleg.gov/BillLookUp/2019/S%20214> (last visited Sept. 12, 2019).

³⁵ See, e.g., Jacob Nieheisel and Rich Horner, *Voter Identification Requirements and Aggregate Turnout in the U.S.: How Campaigns Offset the Costs of Turning Out When Voting Is Made More Difficult*, 18 ELECTION L.J. (Sept. 11, 2019), at https://www.liebertpub.com/doi/pdf/10.1089/elj.2018.0500#utm_source=ETOC&utm_medium=email&utm_campaign=elj (last visited Sept. 15, 2019).

Fourth Circuit's decision prohibited the use of Voter ID, it is highly plausible that the absence of Voter ID enabled Cooper's victory. Put another way, even if Voter ID's results are not statistically significant – and the jury is still out on that question – they might very well be politically significant, which, since this all occurs in the realm of politics, is more important.

Second, skeptical scholars maintain that belief because they argue that parties and nonprofit voting rights organizations can work around the problem. They can invest in getting IDs for those most likely to vote, and increasing their voter registration and outreach efforts. If that is the case, however, they will need to know the specifics about how Voter ID works in practice, and the location of key points where advocacy can matter.

A variety of nonprofits have been on the ground in North Carolina for a while; the author worked with Spread The Vote, which focuses on all states with Voter ID. Spread The Vote's model focused on partnering with community based nonprofits serving low-income clients. Nonprofit staff could provide facilities for Spread The Vote volunteers to work with clients on getting the documents necessary for Voter ID; Spread The Vote staff hoped that these partnerships would yield more efficient volunteer time than door-knocking, and that working with reputable community-based organizations would enhance trust with potential clients.

Spread The Vote's model hinged on obtaining birth certificates online; it would pay the fees, and obtaining birth certificates would be the crucial step in getting state IDs at the DMV. Since these state IDs can also be used for obtaining employment as well as certain other benefits, then clients normally uninterested in voting might be better engaged because they would see the concrete benefits. Then, as the election year proceeded, volunteers could stay in touch with clients for whom they had gotten IDs, keep them educated about important policy issues, and provide information about and transportation to polling on Election Day.

IV. VOTER SUPPRESSION ON THE GROUND: THE WELFARIZATION OF VOTING

At least in North Carolina, the implementation of Voter ID essentially represents the “welfarization” of the franchise. Potential voters – who in light of Voter ID must, like welfare recipients, “apply” for permission to gain their rights – face a bewildering gauntlet of rules, forms, and tasks to achieve what should be simple, and do it in the face of bureaucratic hostility – a smorgasbord of learning, compliance, and psychological costs. This was no accident. From the beginning, it became clear that the model in theory and in practice not only was costly in terms of time, money, and deterrence, but also in terms of other processes that made these costs even greater than on paper.

A. Joseph Heller, Call Your Office

Consider the example of someone who wants to get an ID through the North Carolina Department of Motor Vehicles. In order to do this, the DMV requires first, a birth certificate.³⁶ But how does one obtain a birth certificate?

According to the North Carolina State Department of Vital Records, one can obtain a birth certificate via mail – but in order to do so, a person must provide a copy of his currently issued State ID.³⁷ Since the very purpose of attempting to obtain a birth certificate is to obtain one of these IDs, these requirements will effectively prevent someone from getting a birth certificate.

The state does provide workarounds: those applying for a birth certificate can provide alternate ID, such as pay stubs, utility bills, bank statements, and/or W-2s.³⁸ All of which seems reasonable, except that these are the sorts of things that many low income people are not likely to have: they might work off the books (thus not having employment documentation)³⁹ or live with others (thus not having utility bills), and are unlikely to have bank statements. The approved list does include, “letter from government agency dated within the last six months and showing current address” – perhaps a Medicaid or

³⁶ See <https://www.ncdot.gov/dmv/help/Pages/proving-identity.aspx>. (last visited Aug. 28, 2019). Other documents can be used, such as a passport or military ID, but for the vast majority of voters attempting to get an ID, the birth certificate will be the key document.

³⁷ <https://vitalrecords.nc.gov/documents/ApplicationStandardVRFillableBirth122818.pdf> (last visited Aug. 21, 2019).

³⁸ *Id.*

³⁹ Cite. **(Maybe):** See, e.g., KATHRYN EDIN & H. LUKE SCHAEFER, \$2 A DAY: LIVING ON ALMOST NOTHING IN AMERICA (2015); MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

Medicare card -- but this only constitutes one of two types that are allowed.⁴⁰ The final North Carolina example -- State-issued concealed weapon permit showing current address -- does not figure to be particularly helpful.⁴¹ Of interest here is that the one proof-of-residence or identity that many if not most low-income people have -- their rental agreement with their landlord -- is **not** acceptable as underlying document.

Even assuming that a person could go to the trouble of getting two of these forms of ID, this only begins the process. The state charges \$24 in order to obtain even one form of birth certificate, without any guarantee of when it will arrive (fifteen more dollars will gain "expedited processing"). For middle-class people, this might not seem like much, but could represent a significant expenditure for low-income applicants. Pulitzer Prize-winning report David Shipler asked a low-income worker about her budget: "Nobody really wants to know that sometimes \$2 is a significant amount, and \$25 always it tremendous."⁴² Similarly, "the clerk who files cancelled checks at the bank has \$2.02 in her own account."⁴³ Kathryn J. Edin and H. Luke Shaefer's monograph, entitled *\$2.00 a Day: Living on Almost Nothing in America*, expresses the problem succinctly. Their subjects -- the poorest of the poor -- had to survive virtually cashless, which meant going without daily necessities such as clothing, utilities, and personal care items.⁴⁴ And since one cannot send cash through the mail, paying the State Department of Vital Records will cost at least another dollar for the money order.

As noted above, private companies offer online services in order to get birth certificates. VitalChek, Spread The Vote's favored provider, arranges for delivery and will accept credit cards. But of course few low-income voters have credit cards (if they did, finding ID will already have been taken care of), and in any event, each birth certificate request will cost around \$20.

Suppose, then, that after all of this a person can acquire her birth certificate. This does not mean that she can get a standard state ID. One also needs some sort of document with a Social Security number. This could be a Social Security Card, a 1099 or W-2 form, a payroll record, a letter from, Social

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² DAVID K. SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA* 25 (2004);

⁴³ *Id.* at 3.

⁴⁴ See EDIN & SHAEFER, *supra* note --, *passim* and especially at 105-12. The need for cash is so desperate, Edin and Shaefer explain, that many very low income people must take the illegal step of selling their Food Stamp, always at a steep discount, which means that for several days of the month they go without food. This population will not have the \$24 to acquire birth certificates.

Security indicating a Social Security number or some other federal government document indicating a Social Security number – for example, a Medicare or Medicaid card. Will that suffice to get someone their State ID? No. Potential North Carolina voters will also need at least two of these documents:

Any document issued by the state of North Carolina or a county or city in North Carolina or the federal government

- Utility bill or cable bill
- Housing lease or contract, mortgage statement, property or income tax statement
- Preprinted financial statement
- School records
- Letter from homeless shelter.⁴⁵

If, then, a person has acquired all of these documents, *then* she must go to the Department of Motor Vehicles office in order to actually obtain the State ID. This will likely require an entire day. Not only will a person have to take public transportation to the DMV – perhaps changing the bus once or twice – but after getting there, she will likely have to wait in line for roughly three hours.⁴⁶ Since studies have demonstrated that moving polling places even slightly further away significantly reduces turnout,⁴⁷ one can easily imagine the effect of the inconvenience of transport and then waiting in line only to get the ID.

We must also consider the time and inconvenience costs for all of these activities. Let us assume that a person knows all these requirements: she must nevertheless get to the library to access the State Vital Records Birth Certificate order form, then pay for printing that form, then – in the far-from-unlikely event that she lacks one of the underlying documents, must then go to the bank to get them. Then she must wait for weeks (if not months) to get her birth certificate. Then she must also obtain a Social Security card, requiring

⁴⁵ North Carolina also allows for these documents, which are less relevant for low-income voters: North Carolina Vehicle Registration Card, insurance policy or title, North Carolina Voter Precinct Card, Military orders or military documents.

⁴⁶ During August 2019, the author accompanied several people attempting to get State non-operator IDs in Durham County. Each time, they arrived before the office opened, at roughly 6:45 a.m., and finally were able to leave with temporary IDs slightly before 10 a.m. The DMV promised to send the permanent ID in the mail within two weeks.

⁴⁷ Moshe Haspel and H. Gibbs Knotts, *Location, Location, Location: Precinct Placement and the Costs of Voting*, 67 J. POL. 560-73 (2005); John E. McNulty, Conor M. Dowling and Margaret H. Ariotti, *Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters*, 17 POL. ANALYSIS 435-55 (2009).

more time and money. **Then** she must go to the DMV, wait in line for several hours to finally get her ID. This all assumes that the process works smoothly.

At times, DMV personnel seemed unsure of the precise Voter ID requirements, leading to confusion on all sides. The author came to the office and waited for more than three hours with a client⁴⁸ who not only had the required Social Security documentation and North Carolina state documentation, but could not find his birth certificate. He had, however, an *expired* North Carolina non-operator ID with his photograph on it. The clerk at the desk refused to accept it because it was expired, but then insisted, in the absence of a birth certificate, that the client needed to have something to indicate he was truly the person who was indicated on the Social Security and North Carolina state documentation – even though the expired North Carolina state identification sufficed for that purpose. The client then found in his wallet a Durham discount bus pass with his photograph on it, which the clerk accepted – even though *that* document does not suffice for any element of the DMV regulations.

These sorts of interactions – and indeed, the entire experience of the DMV – increase the psychological costs faced by potential voters. Herd and Moynihan observe that “[w]elfare office waiting spaces tend to be systematically designed to convey certain messages to those who use them. The simple act of waiting communicates that the state believes that individuals’ time is of little value.”⁴⁹ The DMV powerfully communicates these symbolic messages. The most-heavily used office in Durham is quite small, generating a waiting area virtually always inadequate for the numbers of people needing services: thus, most of them waiting must line up outside the office on the sidewalk outside – even those arriving at 6.45 am, 15 minutes before the office opens.⁵⁰ As a general matter, personnel are not particularly rude or surly, but they stand behind partitions, often behind bulletproof glass – a pattern sending an unmistakable signal that people are not welcome.

In one interaction, the author accompanied a disabled client who was forced to stand on the sidewalk outside on his crutches for more than one hour. Finally, the author endeavored to get a folding chair for him, only to be

⁴⁸ Here, “client” is a term of art: it simply means someone whom the author assisted, but does not imply a lawyer-client relationship – especially since the author is admitted in California but not North Carolina.

⁴⁹ HERD AND MOYNIHAN, *supra* note --, at 27.

⁵⁰ To note the obvious: even early on a steamy North Carolina summer morning, this is not a particularly pleasant experience, although it can at times generate a community of commiseration.

told by the clerk that the office did not have such chairs. The author then asked the clerk to turn around, revealing a folding chair in plain sight, at which point the clerk, somewhat nonplussed, handed over the chair. It is not clear if the clerk was purposefully attempting to deny the chair; rather, the point is that the overall culture of the office made the default answer to any request, no matter how minor, to be “no – we cannot do that.”⁵¹

The description and analysis of such office interactions have become a staple of scholarship on welfare and public benefits. Here, however, those standing in line were not applying for cash aid – they were attempting to be able to vote. Whatever one might think of welfare and public benefits policy, it is not a constitutional right⁵²; voting is.⁵³ But welfarization proceeds apace. It is surely no accident that whereas North Carolina allows those whose *driver’s licenses* are about to expire to renew them online, those with state *non-operator IDs* – essentially, identification for those who do not own automobiles, and thus are far more likely to be low-income and people of color – must go to the DMV in order to acquire their cards.⁵⁴

B. In Through the Out Door

⁵¹ Personal experience of the author, Aug. 2, 2019, North Carolina DMV Office, South Roxboro Ave., Durham,.

⁵² Even when the Supreme Court was most sympathetic to welfare rights, it pointedly refused to constitutionalize them. See *Dandridge v. Williams*, 397 U.S. 471 (1970). The Court in *Dandridge* wrote:

The intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad potential recipients.

Id. at 487. See also 397 U.S. 471, 508 (Marshall, J., joined by Brennan, J., dissenting)(decrying “the Court’s emasculation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration.”).

⁵³ U.S. CONST. Amdt. XV. At times, the Supreme Court has called this right “fundamental,” see, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966). See also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (stating that voting “is regarded as a fundamental political right, because preservative of all rights.”).

⁵⁴ See <https://www.ncdot.gov/dmv/license-id/identification/Pages/default.aspx> (last visited Sept. 1, 2019). This appears to be a DMV administrative policy. See N.C.G.S.A. §20-37.7 (allowing the state DMV to issue non-operator identification cards but setting no policy regarding on-line or in-person renewal).

North Carolina law provides for an alternative way to get a photo ID. The Voter ID statute establishes that if a person provides her name, date of birth, and last four digits of her Social Security number to the County Board of Elections, then she may receive a Voter Photo ID.”⁵⁵

There are some important advantages for a voter to acquire an ID in this way. County Boards of Elections’ computer systems are linked to those of the Social Security Administration, which enables them to confirm the name, date of birth, and social security number of someone claiming to be that voter.⁵⁶ It thus allows for identification without such burdensome requirements – and **not** incidentally casting doubt on the entire Voter ID requirement. Furthermore, at least in Durham County, lines are essentially nonexistent, allowing for much less burdensome process.

But such advantages pale in comparison to the drawbacks. Most importantly, virtually no one knows about the availability of County Boards. These Boards have no public relations budget and are not even instructed by the voter ID law to advertise these options. Importantly, although the law and State Board materials state that potential voters must present their name, date of birth, and last 4 digits of a Social Security number, it does **not** state that County Boards can check these facts against the Social Security Administration database, suggesting that even County Boards will require actual birth certificates and Social Security cards, and thus potentially depressing any interest that potential voters might have.

Second, in rural counties, the County Board only exists at the county seat, making it much further away than a DMV office. This is true even in relatively small rural counties. In Alamance County, for example, in order to get by public transportation from Walter M. Williams High School in Burlington, the county’s largest city,⁵⁷ to the County Elections Board, it will take more

⁵⁵ See N.C. G.S. § 163A-869.1(a).

⁵⁶ Personal Conversation between author and Durham County Board of Elections Registration Clerk, July 31, 2019.

⁵⁷ I use this address because it is where State and County Elections officials conducted their public outreach meeting on July 16, 2019. See “Seminar on New NC Voter ID Rules Tuesday in Alamance County,” *Times-News*, July 13, 2019, at <https://www.thetimesnews.com/news/20190713/seminars-on-new-nc-voter-id-rules-tuesday-in-alamance-county> (last visited Aug. 23, 2019). See <https://www.abss.k12.nc.us/wwh> (website of high school).

than an hour each way at the fastest.⁵⁸ At other times of day, each way could approach two hours.⁵⁹ Or consider Bladen County, heart of the hotly-contested 9th Congressional District, where egregious electoral fraud by the Republican congressional campaign in 2018 forced a special election.⁶⁰ If one wanted to get from the appropriately-named town of Tar Heel to the county seat of Elizabethtown, it is a 15-mile automobile trip – but public transportation between the two towns is nonexistent.

Third, the North Carolina voter ID law specifies that County Board IDs shall be used “for voting purposes only.”⁶¹ This obscure language can serve as an important deterrent for low-income citizens to acquire them. Identification documents are useful – indeed, critical – for a number of purposes, most importantly, getting a job and some forms of housing. Employers for obvious reasons are interested in checking the background of prospective employees, and landlords want to run credit reports. If County Board IDs can be used for voting purposes “only,” then they are not available for these other crucial purposes, which loom large in the lives of everyone but particularly for low-income people (who might lack other documentation). Thus, low-income registered voters might not want to take the time and energy to get one of these voter-only IDs if they will not serve these other crucial purposes. (And that is especially true if the lines at County Boards begin to lengthen out of frustration with the DMV⁶²). The author encountered instances of potential voters declining to go to the County Elections Board “because it won’t work for a

⁵⁸ See <https://www.google.com/maps/dir/1307+S+Church+St,+Burlington,+NC+27215/115+S+Maple+St,+Graham,+NC+27253/@36.078368,-79.4954803,13z/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x88532bc5e8eedc87:0x5c9c197690aa408d!2m2!1d-79.4543311!2d36.0884929!1m5!1m1!1s0x88532b420f513e09:0xcc06e9446bfb6e2a!2m2!1d-79.4025561!2d36.0682388!3e3> (setting out the public transportation routes for the trip.).

⁵⁹ *Id.*

⁶⁰ See, e.g., Amy Gardner, *N.C. Board Declares a New Election in Contested House Race After the GOP Candidate Admitted He Was Mistaken in His Testimony*, WASH. POST, Feb 21, 2019, at https://www.washingtonpost.com/politics/candidate-says-new-congressional-election-warranted-in-north-carolina/2019/02/21/aca4482-35e0-11e9-854a-7a14d7fec96a_story.html (last visited Aug. 23, 2019).

⁶¹ N.C. G.S. § 163A-869.1(a).

⁶² The suspicious reader might wonder, in the event that Elections Boards’ lines lengthen, whether the gaps in usefulness for “voting purposes only” actually exist. After all, longer lines show that potential voters actually *do* want these cards. We must recall, however, that we are talking about leakage in the voter rolls: as the 2016 gubernatorial campaign demonstrated, only a few thousand votes can determine the outcome of an election.

job.”⁶³ Misinformation abounds; one thought that these IDs did *not* contain a photograph.

C. Unreasonable Issues with “Reasonable Impediments”

Contrary to popular belief, in one non-trivial sense, a voter does **not** need a Photo ID to vote. The North Carolina Voter ID law provides that if a registered voter lacks a valid Photo ID, he may vote by signing an affidavit that he is the person on the registration form and “suffers from a reasonable impediment that prevents the registered voter from presenting photograph identification.” These reasonable impediments include: disability or illness; lack of birth certificate or other underlying documents required; work schedule; family responsibilities; lost or stolen photo identification; and photo identification applied for but not yet received by the registered voter voting in person.⁶⁴ The law directed the State Board of Elections to design and produce a uniform affidavit form for use by elections workers.

Importantly, signing this affidavit should allow not only for the voter to cast a ballot, but also to have that ballot count. Although the law specifies that at the time of casting the ballot will be provisional, “[i]f the county board of elections determines that the registered voter voted a provisional ballot only due to the inability to provide proof of identification and the required affidavit required in subsection (d) of this section is submitted, the county board of elections shall find that the provisional ballot is valid unless the county board has grounds to believe the affidavit is false.”⁶⁵ The well-named North Carolina voter advocacy group You Can Vote has mounted a significant campaign to let voters know that they can cast a ballot even if they do not have Photo IDs precisely due to this reasonable impediment language.⁶⁶

It takes little imagination, however, to see the myriad ways in which such “reasonable impediment” language can fail. First, the County Board of Election must accept the legal mandate, both to provide appropriate affidavits and to accept them without adopting “grounds” to believe them false. Then, it must ensure that all of its precinct election workers understand and accept the mandate as well, making sure that the affidavits are present in adequate numbers for potential voters to use them. Perhaps most importantly, voters must

⁶³ Personal Conversation between author and potential clients, August 2019.

⁶⁴ N.C. G.S. 163A-914(d).

⁶⁵ N.C. G.S. 163A-914(e).

⁶⁶ See <https://www.youcanvote.org/> (last visited Aug. 22, 2019).

be aware of the possibility of using these affidavits if they do not have the appropriate Voter ID. And they must know this before they go to the polls, so they will not be deterred from voting in the first place.

Now consider Union County, in the southwestern part of the state on the South Carolina border, a rapidly growing exurban area outside of Charlotte. Union's county seat is Monroe, famous for being a flashpoint of the 1960's Freedom Rides and also the home of Jesse Helms. Seventy-nine percent white and with the second-highest per capita income of any North Carolina county, it has not voted Democratic in a Presidential election since 1980. No GOP statewide candidate received less than 63% of the vote in 2016.⁶⁷ Even those who do not consider themselves cynics might suppose that the Union County Board of Elections is not going to aggressively let low-income and voters of color know about the reasonable impediment option.

In order to determine with more precision whether my skepticism was true, I contacted the election board in 93 out of North Carolina's 100 counties, 88 through e-mail and five through online forms on the respective counties' websites.⁶⁸ Within two weeks, I received answers from 52 counties⁶⁹ – a responsiveness that speaks well of county staff. The substance, however, revealed not so much attempts at suppression but rather confusion and a seeming desire to do the minimal amount required. Of the 52 who sent back the questionnaire, 19 responded with either precisely the same or similar language – suggesting the existence of canned talking points designed to forestall investigation.⁷⁰ Even there, it seemed to be a bureaucratic response, not a substantive one. Thus, in answer to the question, "Has the county implemented, or does it plan

⁶⁷ Matt Shipman, "Five Counties to Watch in North Carolina Politics," June 25, 2018, at <https://news.ncsu.edu/2018/06/5-counties-in-nc-politics/> (last visited Aug. 24, 2019).

⁶⁸ From a total of 100 counties in North Carolina, seven counties had no email address available on their websites: Duplin, Lenoir, Onslow, Tyrrell, Vance, and Yancey. The five counties with only online forms for contacting them were: Camden, Clay, Davidson, Forsyth, and Perquimans.

⁶⁹ Alamance, Alexander, Alleghany, Avery, Beaufort, Brunswick, Burke, Cabarrus, Caldwell, Carteret, Caswell, Catawba, Chatham, Clay, Craven, Cumberland, Dare, Davie, Durham, Franklin, Gates, Graham, Granville, Guilford, Haywood, Henderson, Hoke, Hyde, Johnston, Jones, Lee, Madison, Mecklenburg, Mitchell, Montgomery, Pasquotank, Pender, Person, Pitt, Polk, Richmond, Rowan, Rutherford, Scotland, Stanly, Surry, Union, Wake, Warren, Washington, Wayne, Yadkin.

⁷⁰ Seven – Allegheny, Johnston, Lee, Montgomery, Pasquotank, Pender, and Person – sent a paraphrased identical response; Six – Carteret, Clay, Dare, Henderson, Mitchell, and Rown – wrote the same response; and as noted below, six identified themselves as Beaufort County.

to implement an outreach campaign to inform voters of this provision?”, seven counties sent us this answer:

Yes. The state will conduct statewide education and we will be available to the voters of [Name] County for ID information. Two County ID Seminars have already been held and it is my understanding that two seminars will be held in each of the 100 counties. The State would have more information on those. More specific efforts will be decided closer to the election. The State has already prepared posters and information handouts which we have had at each precinct over the last several elections informing them of the requirement. ID requirements and instructions are currently being added to all voter forms.

In many of these counties, the language offered came in two different fonts and colors, suggesting cut-and-paste procedures. **Six** counties referred to themselves as Beaufort County!⁷¹ Several others refused to answer and referred us to the State Board of Elections – even though County boards select and train poll workers.

Suffice it to say that this is not the most robust voter outreach campaign that could be envisioned. In the seminar that I attended in Alamance County – which was advertised in the local newspaper⁷² – the presentation was professional and clear, but hardly represented the sort of sustained engagement that actual organizing would provide. One cannot necessarily blame the beleaguered and under-resourced county staff for this state of affairs. As noted above, the statutory provisions mandating an “aggressive outreach campaign” provided no new funding for such campaigns. As the Alamance County elections director stated at the presentation, “we depend a lot on local organizations to get the word out.”⁷³

⁷¹ Including, fortunately, Beaufort County itself. These counties were Alamance, Beaufort, Cabarrus, Davie, Graham, Wayne.

⁷² See *Seminars on New NC Voter ID Rules Tuesday in Alamance County*, (Burlington) TIMES-NEWS, July 13, 2019, at <https://www.thetimesnews.com/news/20190713/seminars-on-new-nc-voter-id-rules-tuesday-in-alamance-county> (last visited Oct. 21, 2019).

⁷³ Statement of Kathy Holland, executive director, Alamance County Board of Elections, public outreach meeting, Burlington NC, July 16, 2019.

In any event, many counties are unsure what “the word” is. The majority who responded said that they are awaiting guidance from the state. Several counties told us that they do not know what would be the appropriate justifications for a reasonable impediment – even though many of those reasons are directly written into the statute. Johnstone County reported that “we do not have the new forms yet.” Yadkin County simply stated, “Stolen or lost Id, Natural disaster, to name a few.” Haywood County: “Statutory guidance as to reasonable impediment can be obtained at the North Carolina state board of elections website.” Granville County: “The State Board of Elections can provide information on this for you.”

So then what guidance has the State Board of Elections provided? As of this writing, nothing, generating even more confusion. To be fair, it might be unfair to expect this one year out from a general election. But if the word will get it out, it needs time to do so, and the State Board has not provided it. This cannot be ascribed to partisan voter suppression: the Board has a 3-2 majority of the Governor’s party, now of course held by a Democrat.

Such confusion has legal impact – or at least it should. In the initial Fourth Circuit decision striking down Voter ID, where the now-famous accusation of “almost surgical precision” was used, Judge Motz argued that the provisions should not be struck down precisely because of the “reasonable impediment” language. Instead, she argued, Voter ID should only be temporarily enjoined and remanded back to the district court for fact-finding on the actual implementation of the reasonable impediment requirement – the *same* district court that found no discriminatory intent in the first place.

One need not be too cynical to see where this is going, both on the trial court level and perhaps higher than the circuit. Judge Motz is a Democrat, appointed by President Clinton.⁷⁴ If she can argue that the reasonable impediment language can save the statute, then it will be even easier for Republican judges to find the same.

⁷⁴ As with many Clinton appointees, Judge Motz is a moderate Democrat. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 188 (2003) (noting moderate ideology of many judges appointed by President Clinton). Interestingly, her husband, J. Frederick Motz, was appointed by President Reagan to the federal district court. See David G. Savage and Ronald J. Ostrow, *THE JUDICIARY: Clinton's Big Bench: Judges of All Stripes and Colors Appointed: Blacks, Latinos, women, even Republicans fill federal vacancies. It is the most diverse group named by any President*, L.A. TIMES, Nov. 16, 1994:

““Diana Gribbon Motz of Baltimore and her husband are believed to be the first married couple to sit on the federal bench.

V. COULD VOTER ID WORK?

The irony is that if well-run, Voter ID could actually enhance civic participation, engagement, and even confidence.

Consider the state Department of Motor Vehicles, which the Voter ID statute essentially established as a roadblock to the franchise. North Carolina has operated the same number of drivers' license offices since the initial enactment of Voter ID. This is not as bad other states, most infamously Alabama, which closed dozens of DMV offices across the state, particularly in predominantly African-American areas. But it still represents an intentional effort to overload state services and then deny the right to vote based upon state malfeasance.

The state could, however, increase the number of DMVs, and push through an (already-promised) expansion of mobile DMV services. This would not only make it easier to vote, but might encourage those disengaged from the political process to register – particularly if DMVs facilities were co-located with other state services that low-income people use. Put another way, it could form a sort of advertising.

Similarly, a well-designed Voter ID campaign could generate interest by allowing other state agencies to provide Photo ID. Public school photo IDs already provide the basis to allow teenagers to get state IDs: why not simply make them the relevant ID for voting purposes? Public libraries already carry voter registration forms; if they also could provide adequate Photo IDs for voting, then more people might also register. In the same fashion, North Carolina has 979 post offices,⁷⁵ all of which of course deliver mail to people at physical addresses: they should have the authority to issue Photo IDs as well.

There is literally no reason why any of these other government agencies should lack the capacity to issue Voter ID. That is especially so given the experience in County Boards of Election, which issue Voter ID upon a per-

'Yes, it's true: He's a Republican,' she said. 'It's his only flaw.'"

⁷⁵ A complete list of all US post offices in North Carolina may be found at <https://northcarolina.hometownlocator.com/features/cultural,class,post%20office,alpha,wxyz.cfm> (last visited Nov. 20, 2019).

son giving them their name, date of birth, and last 4 digits of their Social Security number – *without* the burdensome documentation required at DMVs. How can they do this? As noted above, they have links with the Social Security Administration’s computer system, which allows them to confirm the identities of voters. If similar links were established with all relevant federal, state, and local agencies, then they all could confirm and issue Voter IDs to eligible voters.

Of course, all of these things would cost money. And as noted above, the Legislature failed to appropriate a dime for any such activities – even as its leaders advocated a large tax cut for wealthy North Carolinians. So perhaps there is one crucial reason why a broader, civic-engagement form of Voter ID could never occur: it would defeat the entire purpose for Voter ID in the first place.

CONCLUSION

In 2010, political scientists Steven Levitsky and Lucan Ahmad Way coined the phrase “competitive authoritarianism” to describe a civilian regime in which democratic institutions exist in form but not in substance, because the electoral, legislative, judicial, media, and other institutions are so heavily skewed in favor of current power holders.⁷⁶ But at the time, Levitsky and Way didn’t imagine that their framework could be so easily applied to the United States.⁷⁷

In retrospect, the North Carolina GOP’s political efforts represent an attempt at achieving this sort of primacy for their party. Between gerrymandering, Voter ID, and pliable courts, they hoped to achieve similar results to the Republican Party in Wisconsin, where similar tactics allowed the GOP to achieve a supermajority in the 2012 state legislative elections – even though it received a *minority* of votes – and where its strict Voter ID law probably gave the Badger State’s 2016 electors to Donald Trump. In the Tar Heel State, these efforts have so far failed, in no small part because of the efforts of North Carolinians at the polls in 2016 and 2018, and the courts.

⁷⁶ See STEVEN LEVITSKY AND LUCAN A. WAY: COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010).

⁷⁷ Indeed, as late as January 2015, they denied the existence of a global democratic crisis. See Steven Levitsky & Lucan Way, *The Myth of Democratic Recession*, 26 J. DEMOCRACY (January 2015), No. 1.

But they have not given up, continuing in the face of hostile state courts to tilt the playing field as much as possible. Voter ID is a key part of those efforts. We are long past the time when anyone can say that voter suppression has been relegated to the past⁷⁸: Jim Crow inside a velvet glove is still Jim Crow.

Perhaps, at the end of the day, it will not matter. Perhaps those scholars who argue that Voter ID has no effect on elections will be proved right. Or perhaps one side will win elections in the Tar Heel State no convincingly that election skewing will be irrelevant. As the saying goes, lucky is better than smart.

Whether it happens or not, however, we might want to reflect on the meaning of a system that purposefully makes it difficult and costly for the poor and the black to exercise their constitutional rights, and to treat the franchise as something closer to a gift to be granted upon good behavior – all for justifications that are transparently false. Voter ID in its current form sends an unmistakable method about who belongs and who does not. And despite claims of how much the nation has changed, it demonstrates how Trumped-up those claims are.

⁷⁸ *But see* Shelby County, *supra* note --, at 531, which stated:

Nearly 50 years later, things have changed dramatically. Largely because of the Voting Rights Act, “[v]oter turnout and registration rates” in covered jurisdictions “now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels...The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years. Yet the Act has not eased § 5’s restrictions or narrowed the scope of § 4’s coverage formula along the way. Instead those extraordinary and unprecedented features have been reauthorized as if nothing has changed, and they have grown even stronger.

In light of state actions in North Carolina and elsewhere, such a rosy picture seems comically naïve.