

## **“The 28<sup>th</sup> Amendment”**

by Rep. Jim Cooper<sup>1</sup>

Nashville Bar Association

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Aretha Franklin was right: it’s all about R-E-S-P-E-C-T. Everyone deserves respect, even people we hate... *especially* people we hate. *Disrespecting* people is the quickest way to end a friendship or start a fight.

Of course, we are *not* identical and *not* equally deserving of respect—even children sense that—but sensible adults choose to overlook some of our differences in order to get along. Lawyers call this non-discrimination; ministers call us God’s children. This is why statues of Justice are blindfolded—not to the facts of our case but to our social standing.<sup>2</sup> We call this equality under the law.

Today’s laws do not overlook *all* of our differences, of course, just those that are most likely to be used against us such as race, gender, ethnicity, national origin, religion, age, disability, and sexual orientation. We know the list.<sup>3</sup> These are accidents of birth or aspects of ourselves that we cannot, or should not be forced to, change. As civilization advances, the list of protections grows. We need protection against blood libels like nigger, bitch, bastard, half-breed, wetback, geezer, cripple, faggot. Equality under the law is the slow triumph of hope over history.

It is too early to declare victory. Many people have trouble letting go of their hatred long enough to be polite. Fortunately, overt racism, sexism, anti-Semitism, xenophobia and homophobia are diminishing but, nevertheless, you and I both may be “accidental racists,” as Brad Paisley sings.<sup>4</sup> Politicians are quick to exploit our fears by using code words, like starting a fire by dropping a match. Don’t act shocked; the purpose of politics is, after all, “the systematic organization of hatreds.”<sup>5</sup>

One political trick is to make equality look like the enemy. You do this by defining protection of the weak as either raising your taxes, ruining your neighborhood school, preventing your promotion, or coddling criminals. Of course, equality under the law doesn’t do any of these things; it means equal opportunity, not outcomes, but it can be painted to look like a Cadillac-driving welfare queen or a drug dealer with an Obamaphone.<sup>6</sup> These are cruel distortions. When government programs are abused, blame elected officials and bureaucrats; don’t blame the poor. Many government programs *are* out of control, so let’s fix them, not trash our fellow citizens. Being respectful of others does not hurt you, or the U.S.<sup>7</sup> Paying respect is not a tax. Tolerance and diversity make us stronger, not weaker. My proof? Two hundred and twenty-six years of American history.

But before we get to that, let me tell you my family’s story.

## Personal

My father was racist. Of course, he did not think of himself that way—no respectable person does. In his day, the Ku Klux Klan was racist. My father was an attorney who never considered wearing a white hood.

My dad *could not* be racist because, just like Atticus Finch in *To Kill a Mockingbird*, he had defended a black man accused of raping a white woman. During the 1934 trial in Shelbyville, a lynch mob formed, defeated the Tennessee National Guard, killed two bystanders and burned the courthouse to the ground.<sup>8</sup> My father barely escaped with his life.

Nevertheless, my father remained a son of the South. He supported segregation and poll taxes. He opposed busing and intermarriage. In short, he was just like most of your parents and grandparents. That's why they elected him governor of Tennessee three times.

I sometimes wonder what *my* children will say about me because the definition of racism expands over time, covering more and more behavior and creating more thought crimes. They probably won't be satisfied that I was state campaign chairman for Barack Obama if I fail a flip-chart test for subconscious racial bias. They will wonder why Nashville, a health care capital, allowed black and brown babies in our state to die at third-world rates.

This isn't just my problem. How do *you* feel when Middle Tennesseans question whether Islam is a religion, stop mosque construction, and try to fire a governor's aide because she is Muslim?<sup>9</sup> And what about the Sixth Circuit naming a local country club "invidiously discriminatory"?<sup>10</sup> But we also have good qualities, of course. Remember the superhuman effort of Rev. Ed Sanders, a local African-American minister? His church hosted the funeral for James Earl Ray, the assassin of Dr. Martin Luther King, Jr. His church turned respect into action when no other church, black or white, volunteered.<sup>11</sup>

There's more to worry about than lingering racism; you and I are guilty of other prejudices, now or in the future. Future generations *will* ask tough questions, but St. Peter will be tougher. Did I really *love* my neighbor as myself? How about loving people outside my comfort zone like the people Jesus loved: beggars, prostitutes, lepers, tax collectors? The New Testament is very demanding. Gandhi once said that he might have converted to Christianity if he had ever met a practicing Christian.<sup>12</sup>

## Historical

The acid test of your support for equality *under* the law involves voting rights because voting offers power *over* the law. Should every adult citizen be allowed to vote for our lawmakers? For most of American history, the answer has been a

resounding “No” due to fear that the wrong kind of citizen would vote. It’s one thing to protect vulnerable populations; it’s another to share power with them. You might end up giving your country away. As a result of these fears, Americans still have no U.S. Constitutional right to vote.<sup>13</sup>

The United States was *not* founded on the idea of equality, either *under* or *over* the law. True, the Declaration of Independence had some high-flown rhetoric about “all men are created equal” but those words were aspirational, at best.<sup>14</sup> Remember: the operative legal document, the Constitution, condoned slavery. Our earliest elections restricted voting to the landed gentry, offering slave owners a three-vote bonus for every five slaves.

In fits and starts during the next 226 years, America has gradually allowed white men without property to vote, white men in new states, former male slaves, men of color, women, women of color, native Americans, poor people, Asian-Americans, non-English speakers, short-term residents, young adults, disabled people, and now even selected felons.<sup>15</sup> Each advance has been a battle; once a war.<sup>16</sup>

Abraham Lincoln led the centuries-long process of redeeming America by giving meaning to the fine words of the Declaration. Lincoln first redeemed himself by overcoming his own racial doubts<sup>17</sup> and by discarding notions of forced resettlement in Africa.

Granting voting rights to African Americans was even more controversial than ending slavery but the South was too exhausted after the Civil War to mount armed resistance, so it resorted to Jim Crow laws.<sup>18</sup>

How many of you realize that, after the first ten amendments to the Constitution, the Bill of Rights, *seven of the seventeen* remaining amendments were necessary to expand voting rights?<sup>19</sup> No other part of the original Constitution was so broken or so hard to fix. And more repairs are needed.

Here in Nashville, TSU student Wilma Rudolph could win gold medals at the 1960 Rome Olympics but she could not eat at a Nashville lunch counter, ride a Greyhound bus, go to the hospital, sleep in a motel, or use a women’s restroom.<sup>20</sup> She lived under American apartheid. Until the Voting Rights Act of 1965, she had no assurance that she could vote, despite what the Constitution said. My father, a Harvard-trained lawyer, did nothing to help, just like many members of the Bar.

John Lewis, who attended American Baptist College and Fisk University during the same years, learned civil disobedience so well that he became a civil rights hero and, later, a member of Congress.<sup>21</sup> John still knows how to face down harassment. I was standing near him this year at President Obama’s Second Inaugural when two Republican colleagues amused themselves with “birther” jokes. John did not dignify their insults with a response.

## Politics

Although today almost every American *can* vote, tens of millions of us don't show up for elections. An additional 51 million Americans are not even counted as missing because they are not registered to vote.<sup>22</sup> Many of you think that you are regular voters but you are probably forgetting all the elections you've missed. Your absence is public record.<sup>23</sup>

Voting has increased from roughly 6% of the population during the American Revolution to roughly 60% today—the lowest of any advanced democracy—and that's during high-turnout presidential elections.<sup>24</sup>

Did the Freedom Riders risk their lives to empower a maximum of 60% of voters? That fraction is hauntingly close to the 3/5 treatment of slaves in the original Constitution. *Do we even have majority rule in America* when no U.S. candidate has ever received majority support of all the adults whom he or she represented?<sup>25</sup>

One explanation for America's low voter turnout is apathy, which may imply consent. That's certainly what incumbents like me want to believe, that a majority of Americans think the U.S. is on the right track so there's no need to vote. Of course, opinion polls indicate the opposite.<sup>26</sup> So why don't people vote to throw the bums out?

One answer is that voting is a nuisance. There are 13,000 voting districts in America, each with its own rules, and 110,000 precincts.<sup>27</sup> Instead of being as quick and easy as shopping on Amazon.com, voting requires registration months in advance<sup>28</sup> and then waiting in line on exactly the right day at exactly the right location, a makeshift, pop-up DMV. Error rates in elections are high—and there are no receipts. You have to trust a system run by the most partisan people in America, local election commissions.

A great deal of underground legal thought involves ways of *lowering* voter turnout, not raising it.

You might think I am exaggerating but election abuses have occurred here in Nashville as recently as last year. Read the new report of the State Election Commission.<sup>29</sup> For example, our local election commission paid almost \$800,000 for voting software that “pre-selected” every primary voter for the Republican Party, automatically turning Democrats into Republicans.<sup>30</sup> People are shocked that this could happen anywhere in America, much less in Nashville.

As a political strategy, voter suppression laws like overly strict voter ID probably backfired. Evidence from the 2012 election indicates that minorities and students voted at higher rates because they were offended by the new rules,<sup>31</sup> while surprisingly large numbers of seniors, likely Republican voters, were discouraged

from voting. Nevertheless, Republicans still like strict voter ID laws because they anger Democrats, not because they work.

## **Political Theory**

The idea of easier voting scares many of today's conservatives.<sup>32</sup> For example, columnist George Will believes that federalizing voter registration or, even worse, mandating voting, would help too many citizens vote.<sup>33</sup>

The father of modern American conservatism, William F. Buckley, Jr., had a different view. He famously said that he'd rather be governed by the first 2,000 names in the Boston telephone book than by the faculty at Harvard University.<sup>34</sup> Unfortunately, Buckley's brand of conservatism is out of fashion today. His successors think that empowering average citizens is dangerous.

As the poem on the Statue of Liberty says, "Give us your tired, your poor, your huddled masses... your wretched refuse..."<sup>35</sup> Does this sound like the recruitment policy of the greatest nation on earth or a plan to recycle garbage? We are a nation of immigrants and descendants of immigrants, people who had reason to leave their old country, people who are diamonds in the rough. Here in America we have created a melting pot that is the envy of the world. To say we are a mongrel, middle-class nation is a compliment, not a criticism. Why not encourage every one of us to vote?

If you've seen the movie "42," today's elites can get as angry as the old Brooklyn Dodgers when Jackie Robinson joined the team. If, like even PeeWee Reece, you are feeling disadvantaged as a white male, realize, for example, that you have six years longer to complain, six more years of life expectancy,<sup>36</sup> perhaps because you were spared a life of discrimination and self-doubt. If you think that minorities get better treatment, trade places for a day. You will quickly ask for your old life back and start counting your blessings. Did you know, for example—since today is college decision day, that white males get preferential treatment in college and law school admissions over women and over Asian- and Jewish-Americans?<sup>37</sup> How do you feel about affirmative action when you are receiving it? From this angle, life in America turns out to be, not a zero-sum game, but a pretty darn good deal.

## **Conclusion: The 28<sup>th</sup> Amendment**

The federal government has done everything possible to help states improve elections and voter turnout during the last several decades.<sup>38</sup> We have spent billions of dollars to encourage states to streamline voter registration, buy better voting machines, shorten lines at the polls, and produce more accurate, timely results. Despite all this effort, we have failed.

It's as if states have a deliberate policy to keep most Americans from voting and the feds are powerless to help.<sup>39</sup> If you believe that more citizens should vote, we need major legal changes.

One idea is mandating voting,<sup>40</sup> but I believe that coercion would backfire. America has a genius for volunteerism; Tennessee in particular. We could also nudge people toward voting by penalizing people who fail to show up at the polls (as in Australia) or rewarding those who do.<sup>41</sup> That would be intrusive and probably very expensive. Or, we could simply clear out the obstacles to voting.

My preference is to clear out the obstacles. Under my proposal, for the first time in our history, Americans would have an explicit Constitutional right to vote.<sup>42</sup> My text for the 28<sup>th</sup> Amendment could not be simpler.

The right of adult citizens of the United States to vote shall not be denied or abridged by the United States or any State.

This proposed amendment bans voter suppression, leaving it up to Congress and to federal judges to define abridgement.<sup>43</sup> Any future restriction on voting would have to survive "strict scrutiny" by the judiciary.<sup>44</sup>

Lincoln told us that government was supposed to be "of the people, by the people and for the people."<sup>45</sup> Recognizing that everyone has something valuable to contribute to society will help us improve elections and society as a whole. Voting rights can turn equality-under-the-law into reality.

One day, perhaps, our statues of Justice will not *need* a blindfold because everyone is respected. After the Tucson shooting of my dear colleague Gabby Giffords, commentator Mark Shields said, "We saw a white, Catholic, Republican federal judge murdered on his way to greet a Democratic, woman member of Congress, who was his friend and was Jewish. Her life was saved initially by a twenty-year-old Mexican American gay college student... and eventually by a Korean American combat surgeon... And then it was all eulogized... by our African American president."<sup>46</sup>

Only in America. Only in America.

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<sup>1</sup> I would like to thank Ashley Shelton, J.D., Counsel in my congressional office, for her research assistance and helpful discussion of the issues involved in this speech. Useful general books on the topic of this speech are: J.R. Pole, *The Pursuit of Equality in American History* (U.C. Press, 1993, 2<sup>nd</sup> Ed. Revised and Extended); Robert William Fogel, *The Fourth Great Awakening and the Future of Egalitarianism*, (Univ. Chicago Press, 2000); Michael J. Sandel, *Justice: What's the Right Thing to Do?* (Oxford, 2007); Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books, rev. ed. 2009); and George Rutherglen, *Employment Discrimination, Law and Theory, 2011 Supplement* (with John J. Donohue III) (Foundation Press, 2011).

<sup>2</sup> “Lady Justice herself is often represented as blindfolded when she balances her scales. She cannot factor in people’s money, status, or power, and she cannot play favorites.” Stephen T. Asma, *Against Fairness* (Univ. Chicago Press, 2013), p. 15.

<sup>3</sup> See, for example, Mack A. Player, *Federal Law of Employment Discrimination in a Nutshell* (West Publishing 6<sup>th</sup> Ed., 2004).

<sup>4</sup> For the lyrics of the song, see

<http://www.azlyrics.com/lyrics/bradpaisley/accidentalracist.html>.

<sup>5</sup> Henry Adams, *The Education of Henry Adams* (1907) (“Politics, as a practice, whatever its professions, had always been the systematic organization of hatreds, and Massachusetts politics had been as harsh as the climate.”)

<sup>6</sup> President Ronald Reagan is often credited with creating the welfare queen story, and, more recently Tea Party activists have spread the Obamaphone story.

<http://www.snopes.com/politics/taxes/cellphone.asp>

<sup>7</sup> See for example, Richard V. Reeves, “Shame Is Not a Four-Letter Word: Why liberals should embrace non-coercive moral regulation,” *The New York Times*, March 16, 2013.

<sup>8</sup> The defendant’s name was E.K. Harris. For information regarding the 1934 riot, see “Watch Old Justice Burn,” an oral history project of Cascade High School, Bedford County, Tennessee, 1973. Available in the Shelbyville, Tennessee, Public Library.

<sup>9</sup> Chas Sisk, “Anti-Muslim activists take aim at Haslam hire,” *The Tennessean*, June 13, 2012.

<sup>10</sup> Brandon Gee, “Judges question Belle Meade Country Club membership after colleague’s reprimand,” *The Tennessean*, Dec. 21, 2011.

<sup>11</sup> For a marvelous commentary on this May, 1998 funeral, see Bo Roberts, “White People Too: No Exceptions,” *The Tennessean*, Feb. 21, 2013.

<sup>12</sup> Gandhi was not alone. Philosopher Bertrand Russell “generally thought that Christian virtue was too extreme—demanding charity for everyone, including one’s enemies. Confucian ethics, on the other hand, is more moderate and therefore more attainable. Instead of loving one’s enemies and treating everyone as equals, the Chinese person, according to Russell, is expected ‘to be respectful to his parents, kind to his children, generous to his poor relations, and courteous to all. These are not very difficult duties,’ Russell observes, ‘but most men actually fulfill them, and the result is perhaps better than that of our higher standard, from which most people fall short.” Asma, *supra*, p. 15.

<sup>13</sup> There may be a right to vote under state constitutions, but there is no clear federal right to vote. *George W. Bush et al. v. Albert Gore*, 531 U.S. 98 (2000). The context of the quotation involves voting for presidential electors, a power which is held by state legislatures and may be delegated to the voters or reclaimed by the legislature. “The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, §1. This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the State legislature’s

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power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by State legislatures in several States for many years after the Framing of our Constitution. *Id.*, at 28—33. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.*, at 35 (“[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated”) (quoting S. Rep. No. 395, 43d Cong., 1st Sess.).

“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”). It must be remembered that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).”

<sup>14</sup> “We hold these truths to be self-evident, that all men are endowed by their creator with inalienable rights.’ That’s a beautiful creed. America has never lived up to it.” Dr. Martin Luther King, Jr. as quoted in Jonathan Rieder, “Dr. King’s Righteous Fury,” *The New York Times*, April 16, 2013.

<sup>15</sup> The most comprehensive overview of expansion of the franchise in America is by Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books, rev. ed. 2009). Concerning the voting rights of felons, the NAACP is currently engaged in a public-relations campaign to allow the estimated 4.4 million convicted felons who have served their time the right to vote.

<sup>16</sup> “In the time that has passed since our founding document was adopted, nothing has been more sharply disputed than our voting rights.” Victoria Bassetti, *Electoral Dysfunction* (The New Press, 2012), p. 6.

<sup>17</sup> See Eric Foner, “The Emancipation of Abe Lincoln,” *The New York Times*, Jan. 1, 2013. To see how far he had come, compare Lincoln’s own words in one of the famous Lincoln-Douglas debates, “I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races, that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And in as much as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race. I say upon this occasion I do not perceive that because the white man is to have the superior position the negro should be denied everything. I do not understand that because I do not want a negro woman for a slave I must necessarily want her for a wife. My understanding is that I can just let her alone.” Debate at Charleston, Illinois, Sept. 18, 1858.

<sup>18</sup> “Between 1863 and 1870, fifteen *northern* states and territories rejected granting blacks the right to vote.” (Emphasis added.) Bassetti, *supra*, p. 28.



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<sup>19</sup> The seven Constitutional amendments expanding suffrage are: 15<sup>th</sup> Amendment allowing former slaves to vote; the 17<sup>th</sup> Amendment – the right to vote for U.S. Senators directly instead of by state legislatures; 19<sup>th</sup> Amendment – the right for women to vote; the 23<sup>rd</sup> Amendment– right of D.C. residents to vote for president; the 24<sup>th</sup> Amendment – bans poll taxes; the 26<sup>th</sup> Amendment – right of 18-year-olds to vote. Finally, the 14<sup>th</sup> anticipated the need to punish states that would prevent former slaves from voting. Section 2 reads, in part: “But when the right to vote at any election... is denied to any of the male inhabitants of such State... or in any way abridged... the basis of representation therein shall be reduced in the proportion of which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”

<sup>20</sup> David Maraniss, *Rome 1960: The Summer Olympics that Stirred the World* (Simon & Schuster, 2008).

<sup>21</sup> See John Lewis, with Michael D’Orso, *Walking with the Wind: A Memoir of the Movement* (Simon & Schuster, 1998).

<sup>22</sup> See Victoria Bassetti, *Electoral Dysfunction* (The New Press, 2012), p. xi.

<sup>23</sup> Memo by Robin Alberts-Marigza on selected Nashville zipcodes. Available from the author.

<sup>24</sup> Bassetti, *supra*, pp. 53-55.

<sup>25</sup> See Bassetti, *supra*, p.

<sup>26</sup> Liz Marlantes, “Congress less popular than Donald Trump, head lice...” *CSMonitor*, Jan. 13, 2013. [www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2013/0109/Congress-more-unpopular-than-Donald-Trump-head-lice](http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2013/0109/Congress-more-unpopular-than-Donald-Trump-head-lice)

<sup>27</sup> Bassetti, *supra*, p. 101. *Tennessee Election Laws, 2011 Ed.* (LexisNexis, Matthew Bender, 2011) reprinting T.C.A. Title 2, Chapters 1-20.

<sup>28</sup> “Today’s system of individualized, self-initiated voter registration was first created a century ago in an explicit effort to keep former slaves and new European immigrants from voting.” Michael Waldman, “Playing Offense: An Aggressive Voting Rights Agenda,” *Democracy: A Journal of Ideas*, Spring 2013, p. 13.

<sup>29</sup> Michael Cass, “Davidson election ‘marred’,” *The Tennessean*, April 26, 2013.

<sup>30</sup> Brian Wilson, “Election Commission reconsiders use of electronic poll books,” *The Tennessean*, Sept. 13, 2012. Tennessee is one of several states known for not testing the election software it buys. Bassetti, *supra*, p. 137.

<sup>31</sup> AP, “White apathy, energized black voters doomed GOP’s Romney in 2012 as black turnout hit highs,” updated April 29, 2013. [http://www.washingtonpost.com/politics/white-apathy-energized-black-voters-doomed-gops-romney-in-2012-as-black-turnout-hit-highs/2013/04/26/93e63ac8-ae72-11e2-b240-9ef3a72c67cc\\_story.html?tid=pm\\_politics\\_pop](http://www.washingtonpost.com/politics/white-apathy-energized-black-voters-doomed-gops-romney-in-2012-as-black-turnout-hit-highs/2013/04/26/93e63ac8-ae72-11e2-b240-9ef3a72c67cc_story.html?tid=pm_politics_pop)

<sup>32</sup> New classes of voters have rarely been welcomed. Existing voters often feel they are ceding power when other Americans come to the polls. These former elites believe that their votes will be diluted and diminished, resulting in their own decline as well as the downfall of America. Even groups that fought to win the right to vote have often resisted adding newer voters, preferring to pull up the ladder behind them.

<sup>33</sup> George F. Will, “Mountain Out of a Molehill,” *The Washington Post*, Dec. 19, 2012.

<sup>34</sup> [http://en.wikiquote.org/wiki/William\\_F.\\_Buckley,\\_Jr.](http://en.wikiquote.org/wiki/William_F._Buckley,_Jr.)

<sup>35</sup> Emma Lazarus, “The New Colossus,” written in 1883 and installed at the base of the Statue of Liberty in 1903. [en.wikipedia.org/wiki/The\\_New\\_Colossus](http://en.wikipedia.org/wiki/The_New_Colossus).

<sup>36</sup> The life expectancy of a white male at birth was 76.1 years in 2008, versus 70.6 years for black males. [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_03.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_03.pdf)

<sup>37</sup> Female undergraduates are now such a large share of the student population at colleges (around 60%) that colleges accept male students with lower grades and test scores than

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female applicants. The same is true for white students, male and female, over Asian and Jewish applicants with better credentials.

<sup>38</sup> The National Voter Registration Act (“Motor Voter or NVRA”) of 1993. The Help America Vote Act (“HAVA”) of 2002. The constitutionality of NVRA is currently challenged by the Supreme Court case of *Arizona v. ITCA*. The Court heard the oral arguments on March 18, 2013.

<sup>39</sup> Political scientist Robert Dahl noted that “the shadow theory of democracy is that only some people are competent to rule [by voting].” As quoted in Bassetti, *supra*, p. 57.

<sup>40</sup> For the first English-language book on the subject in 50 years, see Sarah Birch, *Full Participation: A comparative study of compulsory voting* (United Nations University Press, 2009). See also Note, “The Case for Compulsory Voting in the United States,” *Harvard Law Review*, Vol. 121:591 (2007), *supra*; Peter Orszag, “Make Voting Mandatory,” June 19, 2012.

<sup>41</sup> For various ways of encouraging citizens to change their behavior, see Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale, 2008).

<sup>42</sup> Keyssar, *supra*, pp. 291-2913 for former Rep. Jesse Jackson Jr.’s efforts to pass a Constitutional amendment creating a right to vote, beginning in 2001, after the 2000 presidential election and the Supreme Court’s controversial *Bush v. Gore* ruling. Jackson’s wording was as follows: “All citizens of the United States who are eighteen years of age or older shall have the right to vote in any public election held in the jurisdiction in which the citizen resides. The right to vote shall not be denied or abridged by the United States, any State, or any other public or private person or entity, except that the United States or any State may establish regulations narrowly tailored to produce efficient and honest elections.” See also Jamin B. Rasking, “What’s Wrong with *Bush v. Gore* and Why We Need to Amend the Constitution to Ensure It Never Happens Again,” *Maryland Law Review*, Vol. 61, Issue 3, Oct. 22, 2012.

<sup>43</sup> Congressional legislation on equality has not always followed a sensible course. For example, gender equity was included in the Civil Rights Act by opponents of black voting as a way to kill the legislation. The CRA passed Congress, despite the inclusion of women. The ban on age discrimination was originally only to protect people *under* 65 years of age, not over. And the Americans with Disabilities Act was crafted so poorly that it has been hollowed out by repeated Supreme Court decisions. See George Rutherglen, *Employment Discrimination, Law and Theory, 2011 Supplement* (with John J. Donohue III) (Foundation Press, 2011).

Judge-made standards can evolve as lifestyles and technologies change. For example, Internet voting may come sooner than we think;<sup>44</sup> Oregon already has mail-in ballots and very high voter participation; North Dakota has done away with voter registration entirely. States will still have an important role to play, just not an abusive role. My proposal will not produce national elections, or even uniform elections, but elections with fewer glitches and embarrassments, as well as the potential for increased voter participation.

<sup>44</sup> For example, a state could still prevent felons from voting if that state’s requirement was supported by a compelling state interest and narrowly tailored to meet that interest. The same is true of other restrictions on voting such as mental incompetence. Federal judges would be the decision makers, a group more experienced with criminal sentencing and conservatorship than are partisan election commissions.

<sup>45</sup> Abraham Lincoln, Gettysburg Address.

<sup>46</sup> PBS Commentator Mark Shields,

[http://www.bilerico.com/2011/01/great\\_american\\_melting\\_pot.php](http://www.bilerico.com/2011/01/great_american_melting_pot.php)