

DEFINING “PARTISAN” LAW ENFORCEMENT

Michael J. Pitts*

I. INTRODUCTION

A revised map for congressional districts adopted by the State of Texas in an unusual mid-decade redistricting. A requirement that registered voters present photo identification at the polls enacted by the State of Georgia. A congressional redistricting plan ordered into effect by a state trial court in Mississippi. These three seemingly unrelated events are linked by a single common bond. All three represent voting changes submitted to the U.S. Attorney General for approval, commonly known as “preclearance,” under Section 5 of the Voting Rights Act,¹ and all three have generated intense charges that this core civil rights provision has been misused for partisan purposes by a Republican-controlled U.S. Department of Justice (DOJ).²

* Associate Professor of Law, Indiana University School of Law-Indianapolis. J.D., Georgetown University Law Center, 1999; B.S.J., Northwestern University, 1993. This work was made possible through the generosity of Indiana University School of Law-Indianapolis Interim Dean Susanah Mead, who provided a summer research grant. Special thanks are also owed to Dean Steve Willborn and the faculty of the University of Nebraska College of Law, who kindly provided space and resources to write during the summer of 2006. Thanks to Jocelyn Benson, Bob Berman, Andy Klein, Dan Tokaji, and George Wright for helpful comments. This work benefited from the invaluable research assistance of Kimberly Loontjer.

1. 42 U.S.C. § 1973c (2006). In a nutshell, Section 5 requires certain state and local governments (primarily located in the South and Southwest) to garner federal pre-approval of voting changes to ensure that no change is made that will discriminate against voters who are members of certain racial and ethnic groups. This pre-approval can be garnered from either of two sources: the U.S. Attorney General or the U.S. District Court for the District of Columbia. *Id.* However, as a practical matter, the vast majority of state and local governments seek preclearance of their voting changes from the Attorney General. Drew S. Days III, *Section 5 and the Role of the Justice Department*, in *CONTROVERSIES IN MINORITY VOTING* 52, 53 n.2 (Bernard Grofman & Chandler Davidson eds., 1992). For a much more detailed explanation of Section 5, see Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy*, 81 *DENV. U. L. REV.* 225, 231-37 (2003).

2. See, e.g., Ralph Blumenthal, *Little Surprise at Redistricting Document from Democrats Who Lost 2004 Race*, *N.Y. TIMES*, Dec. 3, 2005, at A14 (quoting former Democratic Congressman Martin Frost as saying DOJ’s decision regarding the Texas redistricting was “totally political”); David E. Rosenbaum, *Justice Dept. Accused of Politics*

In Texas, Representative Tom DeLay sought to solidify the Republican party's majority in the U. S. House of Representatives by means of a rare mid-decade congressional redistricting designed to unseat several long-time, Democratic incumbents.³ DeLay's mechanism for unseating these Democratic incumbents was through the partisan manipulation of district lines, and, after a long, politically-charged process, the Lone Star State adopted a redistricting plan suited to DeLay's purposes.⁴ This redistricting plan was then forwarded to Republicans in the Bush Administration who gave Section 5 approval despite the fact that career employees of DOJ viewed the plan as racially and ethnically discriminatory.⁵

In Georgia, a state government that had been completely dominated by Democrats since the end of Reconstruction suddenly turned overwhelmingly Republican.⁶ Armed with the ability to control all three levers of Georgia's government, Republicans decided to put their own unique stamp on the state's election administration by requiring Georgia's registered voters to present a government-issued photo identification prior to casting a ballot⁷—a requirement with a seemingly strong potential to disproportionately

in Redistricting, N.Y. TIMES, May 31, 2002, at A14 (describing partisan politics in DOJ's decision involving Mississippi's congressional districts); Press Release, Am. Civil Liberties Union, ACLU Condemns U.S. Justice Department Decision To Approve Georgia Photo ID Law (Aug. 26, 2005) ("It is quite alarming to see such obvious political partisanship impact the fundamental voting rights of citizens of the state.").

3. David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1 (quoting Delay as saying "I'm the majority leader, and we want more seats.").

4. *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2606 (2006) ("After a protracted partisan struggle, during which Democratic legislators left the State for a time to frustrate quorum requirements, the legislature enacted a new congressional district map in October 2003."); *see also* Seth C. McKee & Daron R. Shaw, *Redistricting in Texas: Institutionalizing Republican Ascendancy*, in REDISTRICTING IN THE NEW MILLENNIUM 275, 293-95 (Peter F. Galderisi ed., 2005).

5. *Compare* Memorandum from Robert S. Berman et al., Voting Section, United States Dep't of Justice, on Section 5 Recommendation, Re: H.B. 1 and H.B. 3 (Dec. 12, 2003), available at <http://www.lonestarproject.net/file1.pdf> (recommending that the federal government deny approval to the Texas redistricting plan), with Letter from Sheldon T. Bradshaw, Principal Deputy Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice to the Honorable Geoffrey S. Connor, Sec'y of State, State of Tex. (Dec. 19, 2003) (approving the Texas redistricting plan). It should be noted that the Bush administration has vehemently denied the decision in Texas was a partisan law enforcement decision. *See, e.g.*, Todd J. Gillman & Michelle Mittelstadt, *AG Says Remap Approval Not Political; Democrats Hoping Leaked Justice Memo Will Help Their Case Before Supreme Court*, DALLAS MORNING NEWS, Dec. 3, 2005, at 1A.

6. Nancy Bedertscher & James Salzer, *Election 2004: Historic Shift*, ATLANTA J. & CONST., Nov. 3, 2004, at EX12 (describing how, in 2004, Republicans completed a "shocking two-year takeover" of the executive and legislative branches of Georgia's government).

7. H.B. 244, 148th Gen. Assem., Reg. Sess. (Ga. 2005).

disenfranchise reliably Democratic, African-American voters.⁸ Faced with a decision on whether to allow Georgia Republicans to implement what is perhaps the most restrictive and racially discriminatory voter identification law in the nation, Republican political appointees again ignored the advice of DOJ's career employees and approved Georgia's photo ID law.⁹

In Mississippi, the state legislature failed to agree on a post-2000 congressional redistricting plan, leaving the matter in a complex judicial limbo between two parallel proceedings—one in state trial court and one in federal district court. Initially, the Republican appointees on the three-judge federal panel deferred to the state trial court,¹⁰ allowing that court to order into effect a congressional redistricting plan favorable to Democrats.¹¹ The State of Mississippi then, as it was required to do, submitted the state court's redistricting plan to Attorney General John Ashcroft for Section 5 approval.¹² But while Ashcroft mulled over his decision, the three federal judges grew impatient and threatened to order into effect their own version of Mississippi's congressional district lines if the Attorney General did not meet a firm deadline for providing Section 5 approval.¹³ Faced with the federal court deadline,

8. See Memorandum from Robert Berman et al., Deputy Chief, Voting Section, United States Dep't of Justice, on Section 5 Recommendation, Re: Act No. 53 (Aug. 25, 2005), available at http://www.washingtonpost.com/wp-srv/politics/documents/dojgadocs1_11.pdf (recommending that the federal government deny approval to Georgia's voter ID law). As with the Texas redistricting decision, Bush administration officials have actively defended DOJ's decision regarding Georgia's voter ID law. See Letter from William E. Moschella, Assistant Att'y Gen., Office of Legislative Affairs, U.S. Dep't of Justice to the Honorable Christopher S. Bond, U.S. Senate (Oct. 7, 2005) (arguing that African-Americans would not be disproportionately impacted by Georgia's voter ID law).

9. Dan Eggen, *Justice Plays Down Memo Critical of Ga. Voter ID Plan*, WASH. POST, Nov. 18, 2005, at A03. Currently, the State of Georgia is enjoined from implementing its voter ID law. *Lake v. Perdue*, No. 2006-CV-119207 (Fulton County Super. Ct. Sept. 19, 2006) (state court order granting permanent injunction), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/StateInjunction.pdf>; *Common Cause v. Billups*, No. 4:05-cv-00201-HLM (N.D. Ga. Sept. 15, 2006) (federal district court order granting preliminary injunction), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/georgia9-15-06ordergrantingpreliminaryinjunction.pdf>.

10. *Smith v. Clark*, 189 F. Supp. 2d 503 (S.D. Miss. 2002) (three-judge panel). The three judges in *Smith* were Circuit Judge E. Grady Jolly and District Judge Henry T. Wingate (both appointed by President Ronald Reagan), and District Judge David C. Bramlette (appointed by President George H.W. Bush).

11. *Mauldin v. Branch*, 866 So. 2d 429, 432 (Miss. 2003) (describing how the state chancery court adopted a plan); see also David E. Rosenbaum, *Justice Dept. Accused of Politics in Redistricting*, N.Y. TIMES, May 31, 2002, at A14 (describing how the state court plan was favorable to Democrats).

12. *Branch v. Smith*, 538 U.S. 254, 260 (2003). Under Section 5, voting changes ordered by state courts must be approved by the federal government. See *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982).

13. *Smith v. Clark*, 189 F. Supp. 2d 529, 531 (S.D. Miss. 2002).

Ashcroft now had three options—approve the state court’s plan, reject it, or do nothing and allow three Republican federal judges to impose their own plan. Ashcroft chose the course of inaction, allowing the federal court to draw Mississippi’s congressional redistricting plan—a plan that just so happened to be favorable to Republicans.¹⁴

To be fair to the current Bush administration, the events in Texas, Georgia, and Mississippi by no means represent the entire body of allegations of partisan law enforcement that have surfaced during the more than forty-year lifespan of Section 5. In the 1980s round of redistricting, DOJ stood accused of rendering a partisan law enforcement decision when it precleared a congressional redistricting plan for the State of Louisiana,¹⁵ and, in the 1990s round of redistricting, charges of partisanship were hurled at what the U. S. Supreme Court characterized as DOJ’s “max-black” policy.¹⁶ Yet it is the more recent decisions of the Bush administration (combined with a rekindled academic focus on partisan gerrymandering)¹⁷ that have raised more than a few eyebrows among commentators, causing them to refocus on partisanship in the executive branch’s administration of Section 5.¹⁸

14. Jeffrey Toobin, *Poll Position*, THE NEW YORKER, Sept. 20, 2004, at 61-62 (describing how DOJ stalled its preclearance decision so that a “pro-Republican redistricting plan went into effect by default”). As with the Texas and Georgia decisions, Bush administration officials have denied acting inappropriately with regard to the Mississippi decision. See Ralph F. Boyd, Jr., Letter to the Editor, *Explanations from Justice*, WASH. POST, March 27, 2002, at A20 (Assistant Attorney General for Civil Rights justifying Mississippi preclearance decision).

15. See SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 642-71 (2d ed. 2002).

16. *Miller v. Johnson*, 515 U.S. 900, 924-27 (describing DOJ “policy of maximizing majority-black districts”); see also Abigail Thernstrom, *A Republican Civil Rights Conspiracy*, WASH. POST, Sept. 23, 1991, at A11 (harshly criticizing DOJ’s role in furthering the aims of the Republican National Committee).

17. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

18. See Anthony A. Peacock, *From Beer to Eternity: Why Race Will Always Predominate Under the Voting Rights Act*, in REDISTRICTING IN THE NEW MILLENIUM 119, 120 (Peter F. Galderisi ed., 2005) (accusing the Bush administration of using Section 5 in a partisan manner); MARK A. POSNER, THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO? (2006), <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf>; Samuel Issacharoff, *Is Section 5 of the Voting Rights Act A Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004); Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785 (2006); Stuart Taylor, Jr., *More Racial Gerrymanders*, NAT’L J., May 15, 2006, available at http://www.theatlantic.com/doc/200605/nj_taylor_2006-05-16 (describing how the administration of Section 5 has “sometimes been partisan”); Abigail Thernstrom & Edward Blum, *Gerrymander Slander*, NAT’L REV. ONLINE, Dec. 6, 2005, <http://article.nationalreview.com/?q=Ndc4MWI1MTJhZDNjYzdlY2NkNDU0YzNkMjYyMDg0MGY=> (“We are happy to concede that the pre-clearance provision of the Voting

But all the academic literature related to the recent Section 5 determinations seems to be lacking in a very important respect. So far there has been an absence of any sort of in-depth consideration of exactly what amounts to a "partisan" decision in the administration of Section 5 or, for that matter, any other federal voting law. For the most part, the commentators have assumed federal law has been (or could be) enforced in a partisan manner and then skipped to their bottom-line proposals for preventing partisanship.¹⁹ To date, no one has established the parameters of what amounts to a partisan law enforcement decision so that we will all know what a partisan law enforcement decision looks like when we see it. Put somewhat differently, the term "partisan" gets bandied about without putting much definitional content into the concept.

In truth, no commentator should be faulted for this elision.²⁰ For starters, there is a practical problem. The secretive nature of DOJ's enforcement decisions creates an informational void that curtails the ability of outside observers to arrive at any definitive conclusions as to which law enforcement

Rights Act has become a partisan gerrymandering tool that has been used by both parties to further their electoral interests.").

19. Professor Tokaji talks about "the risk of partisan manipulation." Tokaji, *supra* note 18, at 824 (emphasis added). Professor Issacharoff discusses "charges of partisan misuse of the preclearance process." Issacharoff, *supra* note 18, at 1714 (emphasis added); *see also On the Reauthorization of Section 5 of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2 (2006) (testimony of Professor Samuel Issacharoff) ("Unfortunately, the emergence of real bipartisan competition in covered jurisdictions has brought with it concerns of preclearance objections motivated by political gain, particularly in the highly contested area of redistricting.") (emphasis added). Former DOJ attorney Mark Posner relates that "it appears that there is a real and significant, but at the same time, limited concern that the Justice Department's Section 5 decisionmaking has in the past, and may potentially in the future, be guided by political considerations." Posner, *supra* note 18, at 1 (emphasis added); *see also* Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 120, 192 (2006) (noting that the Texas and Georgia voting changes "apparently were precleared as a result of partisan political concerns within the Justice Department . . .") (emphasis added). In addition, several other commentators have similarly invoked the risk or potential for partisanship. *See Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 2 (2006) (testimony of Professor Nathaniel Persily) ("For changes at the state level, the potential for partisan infection of the preclearance process grows . . .") (emphasis added); David Epstein & Sharyn O'Halloran, *A Strategic Dominance Argument for Retaining Section 5 of the VRA*, 5 ELECTION L. J. 283, 292 (2006) (describing how "partisanship may taint the administration of Section 5") (emphasis added).

20. I, too, have engaged in this dialogue about solutions to partisanship in the Attorney General's administration of Section 5 without truly defining the scope of what we should consider to be a partisan law enforcement decision. *See* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5*, 84 NEB. L. REV. 605, 623-30 (2005).

decisions made by the DOJ have been overly infected by partisan politics.²¹ More fundamentally, it would seem a sure wager to presume the existence of partisanship in the enforcement of federal voting laws because, to paraphrase the first great Justice Marshall: “It is upon politicians we are expounding.”²² Politicians will, by their very definition, take action for self-interested partisan reasons, rendering as almost presumptively partisan any decision made by a political actor. Moreover, because partisan actors are presumed always to be motivated on some level by partisan politics and because any decision made in the electoral realm has the potential for partisan gain, it is by no means easy to theorize a standard to separate “malevolently” partisan law enforcement decisions from typical or “acceptably” partisan law enforcement decisions; witness, for an analogous example, the federal courts’ struggle to develop manageable standards that would allow the judicial system to identify partisan gerrymanders.²³

This Article attempts, in three distinct ways, to fill this void in the discussion of partisanship by federal officials charged with enforcing federal voting laws. At the outset, I want to expand the scope of the discussion about the potential for partisanship in the administration of federal voting laws by arguing that the concerns expressed about partisanship in relation to Section 5 can easily apply to other portions of the Voting Rights Act and to other federal laws designed to secure the fundamental right to vote (Part II). If Section 5 can be used in a partisan manner, then it would seem that every other voting-related federal law can be manipulated in partisan fashion—whether it be the minority language provisions of the Voting Rights Act or the more recently enacted Help America Vote Act.

But then I will shift gears in an attempt to move the dialogue away from a discussion of the *potential* for partisanship by providing a framework that will help delineate which types of federal law enforcement decisions truly should be considered partisan and which types of decisions should not. In the first instance, creation of this framework requires a definition of what type of decision is a partisan law enforcement decision. Ultimately, I settle on the idea that a partisan law enforcement decision occurs when a federal official makes an illegitimate or largely illegitimate individual law enforcement decision

21. Posner, *supra* note 18, at 9 (“The Justice Department’s decisionmaking process is limited in its transparency, and to a great extent can seem like a black box to the outside world.”).

22. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (“[W]e must never forget that it is a constitution we are expounding.”).

23. *See Vieth v. Jubelirer*, 541 U.S. 267, 282-83 (2004) (describing the federal courts’ struggle with carving out a judicially manageable standard for partisan gerrymandering doctrine); *cf. League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2609 (2006) (describing how determining the discriminatory effects of partisan gerrymandering has “proved elusive”).

intended to directly further the ability of the decision-maker's party to win elections (Part III). In the second instance, creation of this framework requires a delineation of the type of evidence that would be used to identify a partisan law enforcement decision and on this list I place: direct evidence of partisan intent, the legal legitimacy of the decision, process flaws, consistency, and the amount of electoral gain (Part IV).

This Article, however, is by no means intended to serve as the last word on the matter of partisan law enforcement. This Article represents a beginning rather than an end, with the definitions and evidentiary framework becoming the subject of criticism and refinement. In essence, the purpose of this Article is to shift the dialogue away from accusations (or speculation) of partisanship to a more abstract, theoretical dialogue about what kinds of law enforcement decisions we should define as "partisan" and, in turn, what sort of generalized evidentiary framework we can develop to ferret out those partisan decisions. My sincere hope is that by engaging in a dialogue regarding what one might deem to be "first-order" principles of partisan law enforcement, we can come to better understand the scope of partisanship and, therefore, arrive at a better consensus regarding solutions.²⁴

II. PARTISAN LAW ENFORCEMENT DECISIONS BEYOND SECTION 5

Before defining the concept of partisan law enforcement, it is useful to demonstrate the potential scope of partisanship in the enforcement of federal voting laws. To date, the academic literature has almost exclusively focused on partisan law enforcement in the context of individual preclearance decisions rendered by DOJ under Section 5—Texas, Georgia, Mississippi. What has been left largely undeveloped by the commentators is the potential for partisan law enforcement decisions in relation to other provisions of the Voting Rights Act and in relation to other federal voting laws.

Consider the use of federal observers. The Voting Rights Act contains a provision that allows federal officials to observe activity in state and local polling places.²⁵ The very same provision allows federal officials to observe the tallying of ballots.²⁶ The decision to send these observers lies almost

24. Throughout this Article, I refer to the concept of partisan law enforcement because I generally confine my discussion to the enforcement of voting laws by DOJ. However, the concept of partisan law enforcement probably differs very little from the concept of partisan election administration by state and local election officials.

25. 42 U.S.C. § 1973f(d)(1) (2006) (allowing federal officials "to enter and attend at any place for holding an election . . . for the purpose of observing whether persons who are entitled to vote are being permitted to vote").

26. 42 U.S.C. § 1973f(d)(2) (2006) (allowing federal officials "to enter and attend at any place for tabulating the votes cast at any election . . . for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated").

completely within the discretion of the Attorney General.²⁷ What, then, stands in the way of an Attorney General who wishes to dispatch armies of federal observers to polling places in a particular locale for partisan political purposes?²⁸ For instance, an Attorney General might send federal observers to polling places in the “battleground states” during a presidential election in an attempt to influence the outcome of that election. Sound far-fetched? Well, in November 2004, the Attorney General sent hundreds of federal observers into the field and dispatched federal officials to states, such as Ohio and Iowa, where federal officials rarely observe elections.²⁹

Consider, too, the provisions of the Voting Rights Act that require certain jurisdictions to provide election-related materials and assistance in languages other than English—such as Spanish, and Asian and Native American languages.³⁰ The Attorney General has primary, if not necessarily exclusive, jurisdiction to enforce these provisions.³¹ In this context, what stands in the way of a partisan-minded Attorney General who wishes to bring litigation involving the minority language provisions of the Act in a place where such litigation is politically advantageous? To take a hypothetical example, what if a Democratic Attorney General decided to bring a minority language enforcement action in Orlando on behalf of a group of Spanish-speaking voters who are overwhelmingly Democrats in an attempt to influence the outcome of a presidential election in Florida? As a real example, allegations of politically motivated enforcement recently surfaced when the Attorney General sued the

27. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, § 3, 42 U.S.C. § 1971 (2006). A federal court may also order federal observers to monitor an election. *Id.* However, such orders are rarely issued outside of the context of litigation brought by the Attorney General.

28. In addition to sending federal observers, who are technically employed by the Office of Personnel Management, DOJ also uses its own staff to monitor elections. When I refer to “federal observers,” I am referring to persons employed by both federal agencies.

29. Press Release, U.S. Dep’t of Justice, Department of Justice Announces Federal Observers to Monitor General Election in States Across the Country (Oct. 28, 2004) available at http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm. To be clear, in all of the examples used in this Part of the Article, I am not claiming a partisan law enforcement decision has actually occurred. I am merely trying to point out that the same *potential* exists for partisan law enforcement in contexts other than Section 5.

30. The minority language provisions of the Voting Rights Act are found in Sections 4(e), 4(f)(4), and 203. 42 U.S.C. § 1973b(e) (2006); 42 U.S.C. § 1973b(f)(4) (2006); 42 U.S.C. § 1973aa-1a (2006). In addition, Section 2 of the Act has occasionally been used to require the provision of materials and election-related assistance in languages other than English. *See, e.g.,* United States v. Berks, 250 F. Supp. 2d 525 (E.D. Pa. 2003).

31. The Attorney General’s primary role in enforcing the minority language provisions of the Act is evident from its issuance of detailed guidance interpreting these provisions. *See* 28 C.F.R. §§ 55.1-55.24 (2006). Moreover, the vast majority of lawsuits filed involving Sections 4(f)(4) and 203 have been filed by the Attorney General. It should also be noted that the U. S. Supreme Court has never decided whether Section 203 allows for a private right of action.

City of Boston for violations of the minority language provisions of the Act.³²

Or consider federal law enforcement contexts outside of the Voting Rights Act. In the past two decades there have been an increasing number of federal statutes related to the conduct of elections—from the Voting Accessibility for the Elderly and Handicapped Act (VAEHA)³³ to the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA)³⁴ to the National Voter Registration Act (NVRA)³⁵ to the Help America Vote Act (HAVA).³⁶ Here again, what obstacle blocks the Attorney General from enforcing these voting-related statutes in a partisan manner? Indeed, there perhaps has already been a bit of partisan “mission creep” when it comes to the implementation of HAVA.³⁷ To take just one example, on the eve of the November 2004 presidential election, DOJ sent an intriguing letter to the State of Iowa, which just so happened to be a “battleground state,” offering unsolicited advice to state officials on how to interpret HAVA’s provisional ballot requirements.³⁸

It would seem then that partisan opportunity exists just about everywhere when it comes to the enforcement of federal voting laws; but all partisan law enforcement opportunities may not be equal. One might analyze the previously mentioned examples and assert that there is something different about the opportunity for partisan law enforcement when it comes to areas where DOJ has nearly exclusive jurisdiction (such as the administrative process of Section 5, federal observers, and, perhaps, certain portions of HAVA³⁹) and the opportunity for partisan law enforcement when it comes to areas where the federal government must affirmatively bring a lawsuit and prove its case in front of a federal judge. Basically, the argument would run something like this: when DOJ needs to establish its case in a federal court no partisanship dilemma exists because federal judges will serve as an adequate check on partisan law

32. Andrea Estes, *Suit Said to Lack 'Legal Merit,'* BOSTON GLOBE, Aug. 13, 2005, at B1 (describing how a “former senior litigator in the voting rights division of the U.S. Department of Justice has called the department’s lawsuit . . . ‘politically motivated’ and ‘largely without legal merit’”).

33. Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified at 42 U.S.C. §1973ee (2006)).

34. Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified in scattered sections of 39 U.S.C. & 18 U.S.C.).

35. Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified at 42 U.S.C. §§ 1937gg to 1937gg-10 (2007)).

36. Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified at 42 U.S.C. §§ 15301 to 15545 (2007)).

37. Tokaji, *supra* note 18, at 822 (describing the Attorney General’s HAVA enforcement efforts in Michigan and Arizona and stating that these episodes provide “further evidence that the current DOJ is willing to use its enforcement power for partisan ends”).

38. Letter from Bradley J. Schlozman, Deputy Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to the Honorable Thomas J. Miller, Att’y Gen., State of Iowa (Oct. 26, 2004), *available at* http://www.usdoj.gov/crt/voting/hava/ia_letter.pdf.

39. *Taylor v. Onorato*, 428 F. Supp. 2d 384 (W.D. Pa. 2006) (holding that the Attorney General has exclusive jurisdiction to enforce Section 301 of HAVA).

enforcement by federal officials.

Perhaps this argument is correct, but it seems there might be several potential flaws in the argument that federal judges will serve as a foolproof check against partisan law enforcement. Most obviously, it is not entirely clear that when it comes to cases involving election law, federal judges themselves will not render partisan judicial decisions.⁴⁰ Recall that the entire reason the Attorney General had the ability to engage in partisan law enforcement in the Section 5 decision involving Mississippi's congressional districts is that a panel of three Republican federal judges stood ready to impose a redistricting plan that advantaged Republicans.⁴¹ Consider, also, a recent case involving HAVA where a federal judge appointed by President George W. Bush agreed to DOJ's request to transfer control over implementation of a statewide voter registration database from Alabama's Democratic Secretary of State to its Republican Governor.⁴²

Presumably, though, federal judges will be somewhat less partisan in their decision-making than political appointees in the federal executive branch⁴³; however, there remains the problem that federal judges may not render any decisions at all. As we all well know, most litigation results in a settlement agreement that will typically get *pro forma* approval from a federal judge. What is to prevent the Attorney General from colluding with state and local political actors to engage in a settlement of election-related litigation that has partisan advantages? Indeed, the second great Justice Marshall recognized just this potential for collusion in the enforcement of federal voting laws.⁴⁴

Apart from litigation in front of federal judges, it bears noting that the Attorney General takes a lot of actions that almost never get reviewed by a federal judge. For instance, in the Section 5 context, the Attorney General's decision to approve a voting change is currently not subject to federal judicial review.⁴⁵ In addition the Attorney General sometimes enforces federal voting laws through informal agreements generally not subject to oversight by a federal judicial arbiter.⁴⁶ Moreover, litigation does not constitute the full role of

40. See Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995).

41. See *supra* notes 10-14 and accompanying text.

42. Editorial, *Strong-Arming the Vote*, N.Y. TIMES, Aug. 3, 2006, at A20.

43. Pitts, *supra* note 20, at 624-26 (positing that federal judges can serve as a check on partisan decision-making when the Attorney General decides to use Section 5 to prevent a jurisdiction from implementing a voting change for partisan reasons while "conveniently brush[ing] aside the legal realist view that federal courts will not be much less partisan in their [decision-making]").

44. *Morris v. Gressette*, 432 U.S. 491, 507 (1977) (Marshall, J., dissenting). Admittedly, Justice Marshall's discussion was confined to the Section 5 context.

45. See generally *Morris*, 432 U.S. 491.

46. See, e.g., Memorandum of Understanding Between City of Chelsea, Massachusetts and the United States, Oct. 28, 2003, available at

the Attorney General when it comes to enforcing federal voting laws. The Attorney General renders guidance and advice on the implementation of federal law through informal opinion letters,⁴⁷ formal statements of policy,⁴⁸ as well as official guidance published in the Code of Federal Regulations.⁴⁹

Suffice to say, partisan opportunity will often knock (for both major political parties) whenever the federal government has the power to involve itself in state and local electoral processes. As Spencer Overton has so aptly described the situation, politicians will use the matrix of American democratic rules to their own advantage,⁵⁰ whenever political actors retain the ability to control the enforcement of election laws, political actors retain a concomitant ability to enforce the laws to suit their own self-interested political agenda.

Of course, there is just one problem with this entire discussion. At the outset of this Article, I noted that commentators' discussion of partisanship in the administration of Section 5 has generally assumed the existence of partisan decision-making or assumed the potential for partisan decision-making. And for the last several pages, I've done exactly the same thing. The entire premise of this discussion of partisanship in the enforcement of federal voting laws in contexts outside of Section 5 has been based on risks or opportunities or potentialities. What has been presented here amounts to a lot of speculation about partisan law enforcement and very little proof of its actual occurrence.

The danger of making arguments based on potentialities rather than based on the actual existence of a problem is that if one accepts arguments of potentialities in one context, one may have trouble explaining why such arguments should be rejected in other contexts. For instance, one might accept that there is the *potential* for partisanship in the administration of Section 5—without actually proving that partisanship has occurred—and then argue for solutions to the *potential* problem. But then how would that be distinguished from one who argues that there is the *potential* for in-person voter fraud if there are lots of fake names on the voter registration rolls—without having proven

http://www.usdoj.gov/crt/voting/litigation/chelsea_mou.htm; see also DAVID BEIRNE, OFFICE OF HARRIS COUNTY CLERK, HARRIS COUNTY'S RESPONSE TO SECTION 203 AND THE VOTING RIGHTS ACT OF 1975: AN OVERVIEW OF THE CURRENT PROCEDURES AND NEEDS ASSESSMENT FOR VIETNAMESE MINORITY LANGUAGE ASSISTANCE app.B (2004), available at http://www.harrisvotes.org/docs/2002Lang_Ast_Rpt.pdf (appending the Memorandum Agreement between the United States and Harris County, Texas, to resolve issues involving Section 203 of the VRA).

47. See Voting Section, United States Department of Justice, HAVA, <http://www.usdoj.gov/crt/voting/hava/hava.html> (last visited Nov. 30, 2006) (listing numerous letters sent by DOJ regarding the enforcement of HAVA).

48. See, e.g., Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412 (Jan. 18, 2001).

49. See, e.g., Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. §§ 51.1-51.67 (2006).

50. See generally SPENCER OVERTON, STEALING DEMOCRACY (2006).

that in-person voter fraud using fake names has actually occurred—and then argues for solutions, such as government-issued photo ID, to the *potential* problem? Or, for that matter, how might one distinguish those who argue that bilingual ballots provide the *potential* for in-person voter fraud—without proof that bilingual ballots have actually been used to commit such fraud—and then advocate for the repeal of bilingual ballots to solve that *potential* problem?⁵¹

Rather than rely on potentialities or appearances, perhaps we should endeavor to make arguments based on the actual existence of a problem—even if, as with partisan law enforcement, it may prove incredibly difficult to establish the problem’s existence.⁵² Yet to establish the existence of a problem we need to do at least a couple of things. First, we need to define the problem in the abstract. How exactly should we define the concept of partisan law enforcement? What sorts of actions and activities should we consider to be “partisan”? Second, once we abstractly define partisan law enforcement, we need to construct a generalized framework suited to separating “partisan” from “nonpartisan” law enforcement decisions. The remainder of this Article undertakes these difficult tasks.

III. THE PARAMETERS OF PARTISAN LAW ENFORCEMENT

Seemingly, it should be a simple matter to define partisan law enforcement in the abstract. At its core, the concept of partisanship, at least as it relates to the enforcement of election laws, means taking some action for your own political advantage. Put slightly more concretely, in the context of the enforcement of federal voting laws, a partisan law enforcement decision could be defined as any decision intended to benefit the decisionmaker’s⁵³ political party at an election. Employing this definition, a partisan law enforcement decision could be one that is:

51. For instance, in recent testimony about the extension of the minority language provisions of the Voting Rights Act, several witnesses asserted that these provisions increase the potential for voter fraud. *See, e.g., The Bilingual Ballot Provisions of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Linda Chavez, President, One Nation Indivisible) (arguing that Section 203 “facilitates voter fraud”).

52. Rick Hasen thinks this is “impossible.” Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 982 (2005) (“It is, of course, impossible to know in most instances the extent to which a discretionary decision made by a partisan elections official can best be explained by partisan bias rather than a reasoned decision on an issue on the merits.”).

53. A decisionmaker need not be affiliated with a political party in order to render a partisan law enforcement decision. In other words, a career employee of DOJ could just as easily make a partisan law enforcement decision as a political appointee. As a practical matter, however, political appointees almost always make the ultimate decisions when it comes to federal enforcement of voting laws.

- Intended to lead to more of your political allies casting ballots (or having their ballots included in the official tabulation);⁵⁴
- Intended to lead to fewer of your political opponents casting ballots (or having their ballots included in the official tabulation);
- Intended to lead to the creation of voting structures (i.e., in the design of district lines or electoral systems) that allow more members of your political party to be elected; or
- Intended to lead to the creation of voting structures that allow fewer members of your opponent's political party to be elected.⁵⁵

If only it were this simple. Alas, it is not.

For starters, how does one define the concept of a "decision"? Partisan law enforcement can come from both a decision to act and a decision not to act. One can sometimes gain political advantage by taking action under federal election law and one can sometimes gain political advantage by not taking action under federal election law. The DOJ might bring a lawsuit because of the partisan implications (action) or it might decline to bring a lawsuit because of the partisan implications (inaction). Yet, if we define partisanship to include inaction, then we risk labeling a large number of failures to act as partisan law enforcement. This might present difficulties because limited resources exist when it comes to federal law enforcement. The simple, obvious fact is that not every case can be pursued. Indeed, when it comes to federal enforcement of voting laws, any definition of partisan law enforcement would seem to have to leave some room for prosecutorial discretion.

54. One might argue that there is nothing wrong with a politician's decision to increase the overall number of voters casting ballots or having their vote counted—that such activity represents an expansion of the franchise rather than a contraction and that any expansion of the franchise, no matter how politically motivated, is inherently beneficial for democracy. For example, we should not view as inherently malevolent a decision by Republicans to provide additional voter registration wherever hunting, fishing, or trapping licenses are sold even if the intent of the law is to disproportionately provide expanded voting opportunities for Republicans. *See, e.g.*, H.B. 125, 2006 Leg., Reg. Sess. (Fla. 2006) (signed by Governor on June 7, 2006) (requiring that voter registration forms be available wherever hunting, fishing, or trapping licenses are available); *see also* Alex Leary, *Six Bills Backed by NRA Are Law*, ST. PETERSBURG TIMES, June 8, 2006, available at http://sptimes.com/2006/06/08/news_pf/State/Six_bills_backed_by_N.shtml (noting that Florida law requires "shops that sell hunting and fishing licenses, including Wal-Mart," to offer customers voter registration applications). However, as will soon be discussed, I see no reason to differentiate (at least for the purposes of defining partisanship) illegitimate expansions of the franchise from illegitimate contractions of the franchise.

55. Obviously, this attempt to categorize—like just about any attempt to categorize—does not reflect the interrelationship amongst the categories. For example, decisions leading to more of your political allies engaging in the formal process of casting a ballot will potentially lead to the election of more members of your political party. Moreover, in an electoral system dominated by only two political parties, decisions leading to more members of one political party being elected will, *ipso facto*, lead to fewer members of the opposite political party being elected.

Even if we ignore inaction and confine the concept of a partisan “decision” to explicit action, we still have to consider the possibility that law enforcement decisions can come in various shapes and sizes. A partisan decision could emanate from a microlevel individual decision to file a particular lawsuit, but could also emanate from macro policy decisions. For instance, a Republican administration might choose to devote DOJ’s resources primarily to enforcing UOCAVA, a statute that largely benefits Republican-leaning military voters,⁵⁶ and choose not to devote resources to enforcing Section 2 of the Voting Rights Act for the purpose of challenging ex-felon disfranchisement, challenges that would largely benefit Democratic voters.⁵⁷ Conversely, a Democratic administration might make the opposite choices. And both policy decisions could be the result of a decision intended to benefit a particular political party at an election. In essence, you could have policy decisions that create systemic partisanship in the enforcement of federal voting laws.

Partisanship, particularly of the systemic variety, can also manifest itself in two forms—direct and indirect. For instance, when Republicans bring cases involving UOCAVA, the result of such cases is likely to be a direct increase in Republican voters because Republicans already safely “own” military voters. However, partisanship might manifest itself more indirectly. For instance, let us hypothesize that the Bush administration did not do well among Latino voters at the last election and desires to increase its popularity among Latinos. One of the ways the Bush administration might appeal to Latinos is by concentrating its enforcement activity on the minority language provisions of the Voting Rights Act that require certain state and local governments to provide election-related materials and assistance in Spanish. If it did so, the Bush administration would essentially be using its enforcement of federal voting laws to induce Latino support for Republicans for the purpose of winning elections; a type of activity one might describe as “indirect” partisanship.

At bottom, a lot of these problems with defining the parameters of partisan law enforcement emanate from the basic structure used to enforce federal election laws. Partisan politicians—the President, the Attorney General, and all their political underlings—have been handed the reins to control the system.

56. A few months prior to the 2004 Presidential election, the Bush administration sent a letter to every state outlining its responsibilities under UOCAVA. Voting Section, U.S. Department of Justice, Overseas Voters, http://www.usdoj.gov/crt/voting/misc/activ_uoc.htm (last visited Nov. 30, 2006) (noting that DOJ, in conjunction with the Department of Defense, sent a letter on July 21, 2004, to the States “outlining their responsibilities as related to the UOCAVA”).

57. Indeed, in recent litigation, the Bush administration DOJ filed an amicus brief arguing that Section 2 of the Voting Rights Act does not apply to New York’s felon disfranchisement law. Brief of United States as Amicus Curiae in Support of Defendants-Appellees, *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (Nos. 01-7260, 04-3886), available at <http://www.usdoj.gov/crt/briefs/muntaqim.pdf>.

The President has won an election and, at least to some extent, has earned the right to make certain decisions. For instance, there would seem to be nothing wrong with a Republican President's desire to emphasize enforcement of UOCAVA and, likewise, a Democratic President's desire to emphasize enforcement of Section 2 on behalf of disfranchised ex-felons. Winning elections has to have some impact on federal policy, even when it comes to policy decisions involving federal voting laws—otherwise why hold elections at all? If Republicans and Democrats do not make different enforcement choices, there is no reason to bother holding an election to allow voters to choose between different political parties.

Indeed, the President who wins an election *should* make decisions intended to benefit her own political supporters. Elected officials should, on some level, be responsive to the electorate. A Republican President who wants to emphasize UOCAVA and a Democratic President who wants to emphasize the elimination of ex-felon disfranchisement can be viewed as intending to increase their own Party's chances of winning an election. But they can just as easily be viewed as responding to the desires of each political party's respective base of support from the previous election—members of the military probably support expanded electoral access for military voters and African Americans probably support expanded access to the franchise for ex-felons. In essence then, both decisions represent some level of responsiveness to the electorate, which, after all, is what we want to see from politicians in a democracy.

Difficulties abound in defining partisanship, and we have not even arrived at what is perhaps the thorniest problem: what do we do with decisions that may be motivated by a desire to win an election but that are completely legitimate decisions. Decisions that everyone would agree are correct decisions. For instance, what if a Republican administration decides to file a lawsuit against the State of Georgia for a violation of UOCAVA?⁵⁸ The case itself might be a slam dunk—the State of Georgia's absentee balloting procedures might be an obvious violation of the statute. However, such a lawsuit could well be primarily motivated by the desire to advantage Republicans at an upcoming election.⁵⁹ Similarly, consider a situation where a Democratic

58. In 2004, DOJ sued the State of Georgia for violating UOCAVA. DOJ was granted preliminary relief and eventually dismissed the action after Georgia passed legislation designed to conform state law to the dictates of federal law. *United States v. Georgia*, No. 04-CV-2040-CAP (N.D. Ga. July 25, 2005) (stipulation and order of dismissal).

59. Similarly, consider that DOJ recently informed the State of Wisconsin that they would have to change their rules governing election administration to require those persons who have been issued a driver's license to provide their driver's license number in order to register and cast a ballot. *See* Letter from John Tanner, Chief, Voting Section, U.S. Dep't of Justice, to the Honorable Kevin Kennedy, Executive Dir., Wis. State Election Bd. (Jan. 13, 2006) (on file with author). In Wisconsin, which has election-day registration, such a change might operate similarly to a photo identification law that would seem to favor Republicans. However, the DOJ's interpretation of HAVA appears to be correct. *See* 42 U.S.C. § 15483

administration finds an obvious violation by the State of Georgia of African American voters' right to cast a ballot and decides to file a Section 2 lawsuit that will lead to more African Americans casting ballots. Here, such a decision could well be primarily motivated by the desire to advantage Democrats at an upcoming election. Yet, even if motivated primarily by an interest in winning a future election, should the filing of these slam dunk cases be considered partisan law enforcement decisions?

True, one could argue that as a normative matter, one should describe anything intended to benefit one's own political party—whether it be a policy decision, an exercise of prosecutorial discretion, an enforcement decision aimed at “indirectly” winning a future election, or a slam dunk lawsuit—as partisan. Indeed, such a broad definition would inexorably lead one to advocate the enforcement of federal election laws by nonpartisan officials.⁶⁰ However, because it does not seem likely that a nonpartisan federal enforcement regime will be implemented anytime in the future,⁶¹ my attempt to define partisan law enforcement reflects the reality of the current federal structure, not necessarily some aspirationally better system.

Defining a partisan law enforcement decision seems like a veritable snake-pit. Nonetheless, here is my attempt at an abstract definition of a partisan law enforcement decision in the context of the DOJ's enforcement of federal voting laws: an illegitimate or largely illegitimate individual law enforcement decision intended to directly further the ability of the decision-maker's political party to win elections. Of course, these words need more content and that is what the remainder of this Article will focus on.

The easiest part of the definition to flesh out would be the idea of an individual law enforcement decision.⁶² Essentially, this aspect of the definition

(2006).

60. Of course, the advocacy of a nonpartisan system could, itself, represent partisanship. A switch to a nonpartisan system will remove power from an incumbent political party, thus seemingly resulting in an advantage to the party out of power.

61. As Rick Hasen notes, even on the state and local level, very few governments conduct elections using nonpartisan administrators. *See* Hasen, *supra* note 52, at 973-77.

62. There is no doubt that targeting individual decisions theoretically leaves a huge loophole for partisan actors in that a partisan actor could completely shut down enforcement of a particular federal law. For example, a Democratic administration could decide never to bring a UOCAVA case or a Republican administration could decide to approve every voting change submitted under Section 5. However, these types of categorical decisions are unlikely to occur and, to the extent they do occur, would seem to be the type of big-picture political decision that can be somewhat more easily identified and remedied by voters at the ballot box.

It should also be noted that decision-makers may try to recharacterize individual law enforcement decisions as “policy” decisions. Put differently, federal decision-makers might try to cloak an individual partisan decision as the enforcement of some sort of “policy” when, in fact, no such policy actually exists. While this might occur, some of the evidentiary factors discussed *infra* Part IV—most notably the assessment of the consistency of decision-

cedes the big-picture decisions to the partisan political actors. Decisions about large-scale law enforcement priorities, such as a Republican decision to expend more resources on UOCAVA, will be left to the politicians to decide. Similarly, large-scale policy decisions, such as DOJ's much maligned "max-black" policy of the early 1990s, should not be defined as "partisan." Instead, the only types of decisions we should consider to be truly partisan are decisions regarding individual law enforcement actions—a decision to file a particular lawsuit, a decision to send federal observers to a particular election in a particular place, a decision to preclear a particular redistricting plan, a decision to send an advisory letter to a particular jurisdiction.⁶³

Harder to flesh out is the concept of a decision-maker's intent to further the ability of her political party to win elections. Basically, what this portion of the definition reaches are those individual decisions intended to directly, rather than indirectly, advance a political party's cause at the polls. The motivation for the decision must be to impact directly the turnout or result of a future election—not any motivation with a less direct nexus to voting. If Democrats want to chase the votes of members of the military by filing more UOCAVA lawsuits, so be it; and more power to Republicans if they want to attract Latino voters by filing more lawsuits under the minority language provisions. These scenarios would seem to represent democracy in action. We should not define as "partisan law enforcement" an administration's choice to intentionally try and attract the support of a group of voters at the next election. Politicians should be allowed to adopt enforcement agendas designed to attract popular support.

Under the working definition of a partisan law enforcement decision, we need to have an individual law enforcement decision intended to directly further the ability of the decision-maker's political party to win a future election; yet not all such decisions should be considered partisan—instead, only those decisions that are illegitimate or largely illegitimate should be considered partisan. Consider, for example, the following five abstract scenarios:

- First, the individual law enforcement decision is intended to improve the electoral prospects of the decision-maker's political party and there is absolutely no legitimate reason for the decision.
- Second, the individual law enforcement decision is intended to improve the electoral prospects of the decision-maker's political party and there is only an extremely marginal legitimate reason for the decision.
- Third, the individual law enforcement decision is intended to improve the electoral prospects of the decision-maker's political party and the decision represents a coin flip that could have gone either way.
- Fourth, the individual law enforcement decision is intended to improve the

making—should help to differentiate a genuine policy from a fraudulent one.

63. Decisions not to take an action—partisan inaction—do not qualify as a "decision."

electoral prospects of the decision-maker's political party and there is only an extremely marginal reason to arrive at the opposite decision.

- Fifth, the individual law enforcement decision is intended to improve the electoral prospects of the decision-maker's political party and there is absolutely no reason to arrive at the opposite decision.

Which of these situations should we define as partisan?

We should not label as partisan a legitimate, or even a defensible (i.e., the coin-flip scenario), decision even if it was motivated by a desire to improve the ability of the decision-maker's political party to win a future election. Whoever wins a federal election should be allowed some freedom to make legitimate decisions that benefit them at the polls and we should even give them the close calls on a "tie goes to the runner" theory. As long as what DOJ is doing is arguably correct why should we care about DOJ's intent? True enough, in a perfect world, no one would make any decision, even in part, because of political self-interest. But that is not the world we live in. Just as race is always a consideration in redistricting,⁶⁴ electoral prospects almost always play some role in decisions regarding the enforcement of federal voting laws. A decision with electoral benefits, if defensible, is not truly partisan. Rather, it represents legitimate governance.⁶⁵

64. *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines.").

65. Of course, there is a potential harm here in leaving the close calls and prosecutorial discretion and macro policy decisions to political actors—these political actors could use federal law enforcement to, essentially, rig elections and illegitimately retain power. They could engage in the sorts of anticompetitive practices about which New York University's Rick Pildes & Sam Issacharoff have extensively theorized. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643 (1998). In the end, though, we probably should not worry much about this. The ability to stifle competition substantially at the level of the presidency is likely to be extremely limited. In a very competitive election, partisan enforcement of federal law might make the difference between a Republican and Democratic president. But that is likely to be the odd election. There would appear to be plenty of competition (and accountability) between Republicans and Democrats on the presidential level. If we let Republicans use federal law enforcement to their slight partisan advantage for a while, Democrats will eventually take power and use federal law enforcement to their slight partisan advantage for a while. Then Republicans will return and do likewise. Indeed, this sort of back and forth between policies favored by Republicans and policies favored by Democrats occurs in the enforcement of other federal laws, *see, e.g.*, *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001) ("It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board."), and this back and forth will help achieve some level of partisan balance. In essence, there would seem to be little danger of the presidency ever turning into something resembling the uncompetitive politics of the old one-party South.

It is possible that Republicans and Democrats will use federal law to stifle competition and reduce political accountability in contests below the presidential level. Again, though, if a federal law enforcement decision could make the difference in the outcome of an election

So there it is: a partisan law enforcement decision is an illegitimate or largely illegitimate individual law enforcement decision directly intended to further the ability of the decision-maker's political party to win elections. In the final analysis, you might describe this abstract definition of a partisan law enforcement decision as one that includes elements of both intent and effect—although this may not be entirely apparent at first glance, particularly when it comes to the concept of effect. The intent portion is fairly obvious: to have a partisan law enforcement decision, the decision-maker must have an intent to improve the electoral prospects of her political party. The effect portion is a bit less obvious, for effect is not measured by the amount of partisan harm wrought by the decision.⁶⁶ Instead, the legitimacy of the decision serves as the measure for effect.

Now it is time to shift from an abstract definition of partisan law enforcement to an abstract evidentiary framework for identifying a partisan law enforcement decision.

IV. EVIDENTIARY FACTORS

Now that we have traced the definitional contours of the types of law enforcement decisions categorized as partisan (an illegitimate or largely illegitimate individual law enforcement decision intended to directly further the ability of the decision-maker's political party to win elections), it is necessary to construct an evidentiary framework for separating partisan decisions from other "nonpartisan" decisions. There are at least five elements that should be considered when determining whether an individual law enforcement decision is partisan. Those elements include: direct evidence of intent, the legal legitimacy of the decision, process flaws, consistency with past practice, and the amount of electoral gain.

Before we get started, however, a brief word is needed about how the evidentiary elements fit together with the concepts of intent and effect. As noted, this Article's definition of partisan law enforcement can be viewed as including elements of both intent and effect. However, the definition should not be considered as having two "prongs" with some of the evidentiary elements described above serving to solely prove the intent prong and some of the evidentiary elements serving solely to prove the effect prong. In other words,

and the decision is within the realm of legitimacy, then the decision should not be considered an exercise in partisan decision making. A close call that could be outcome determinative is not a problem—such a close call will have to be made and will inevitably advantage one party or another. It is only the illegitimate decisions used to stifle competition (and accountability) that should be treated as partisan.

66. For instance, one could measure effect by calculating the number of votes or seats gained. This sort of measurement, to the extent it is possible to calculate, is part of the analytic framework suggested *infra* Part IV.

each element can serve as evidence that an individual law enforcement decision is largely illegitimate and that an individual law enforcement decision is intended to further the ability of the decision-maker's political party to win elections. To take just one example, evidence of a flaw in the decision-making process may serve as an indicator of intent (because only bad actors need to subvert usual procedures) and effect (because the need to circumvent usual procedures tends to show the bottom-line decision was illegitimate). Put simply, the elements work holistically rather than categorically.

A. THE FACTORS

Direct Evidence of Intent. Obviously, one of the best pieces of evidence for determining whether a partisan law enforcement decision occurred will be an outright admission that the decision was made with the intent of improving the electoral prospects of the decision-maker's party. One might analogize this to the search for "direct" evidence of discriminatory intent in the employment context under the regime created by *Price Waterhouse v. Hopkins*.⁶⁷ To take an obvious example, if a DOJ official comes forward and says, point blank, "We decided to take action X because we intended the decision to benefit our partisan political allies," then such a statement serves as compelling evidence of the occurrence of a partisan law enforcement decision.⁶⁸ Yet direct evidence of the consideration of electoral prospects does not, *ipso facto*, demonstrate that a partisan decision has occurred because one still needs to look at the other factors discussed below.

Legitimacy of the Decision. Here is where things get tough. Coming to some conclusion about the legitimacy of a legal decision could be viewed as an utterly hopeless task. As the critical legal studies movement has pointed out, legal decisions seem inherently indeterminate. Argument leads to counterargument which leads to counterargument which leads to

67. 490 U.S. 228 (1989). Of course, I recognize that demarcating the line between direct and circumstantial evidence of intent is not as easy as it sounds. See generally Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107 (1991).

68. Direct evidence of an intent to improve a party's electoral prospects will undoubtedly be rare. When engaging in debate over electoral rules, few politicians openly admit the implications for their political party. However, sometimes those involved in politics candidly admit the political implications of decisions involving electoral rules. See, e.g., Antoine Yoskinaka & Christian R. Grose, *Partisan Politics and Electoral Design: The Enfranchisement of Felons and Ex-Felons in the United States, 1960-99*, 37 ST. & LOC. GOV'T REV. 49, 50 (2005) (quoting a Republican Party Chair's opposition to an ex-felon enfranchisement bill because "[t]here's no more anti-Republican bill than this As frank as I can be, we're opposed to it because felons don't tend to vote Republican" (citing Kim Chandler, *Felon Voting Bill Ensnares Riley*, THE BIRMINGHAM NEWS, June 22, 2003, at 15A)).

counterargument until, it seems, there are enough arguments on either side of the coin for anyone to choose her preferred outcome. There is always a reason and it is difficult to separate the legitimate reasons from the illegitimate reasons.⁶⁹ Personal perspective will also play a huge role. Republicans will think their reasons are right and good. Democrats will believe the exact opposite. The personal is the political.

It is true that, on some level, indeterminacy reigns in the law. But I am not completely prepared to throw in the towel. In my view, through the use of traditional forms of legal argument, such as statutes and precedents to name just a couple, we can arrive at some relative consensus as to where a particular law enforcement decision lies on a continuum from completely illegitimate to toss up to completely legitimate. Moreover, in addition to traditional legal arguments, there are other, additional proxies we can use to help determine the legitimacy of a decision. For example, if the decision has been marked by process flaws or direct statements of intent for partisan political gain, these will assist us in determining whether the basis for the decision was legitimate or illegitimate. In other words, the illegitimacy of a decision does not solely depend upon ping-ponging arguments regarding statutes, precedents, legislative history, etc.; looking at factors such as process flaws and consistency provide useful insights into whether a decision represents an illegitimate intent to improve the electoral prospects of the decision-maker's party.

Process Flaws. The use of a different process for decision-making, something that diverges from normal or routine practice, can serve as persuasive evidence that a partisan decision has occurred.⁷⁰ To illustrate this, let us take a hypothetical example from Section 5 of the Voting Rights Act. Let us say the normal chain of events is for career staff to conduct an independent factual investigation of a voting change and then to use those facts to make a recommendation to the political staff. However, in one particular instance, political appointees instruct career staff to forego any factual investigation at all, and, instead, immediately send a letter approving the voting change. Such a chain of events would serve as evidence of a partisan law enforcement

69. As Cincinnati's Michael Solimine has noted in the context of partisan decision making by federal judges: "[o]ne's judgment on whether to label [a particular judicial decision] as partisan decision making will depend, of course, on how convincing one finds the opinions filed by the[] judges, and whether they were applying the law and the facts in a principled fashion, irrespective of their personal views." Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, OHIO ST. L. J. (forthcoming 2007) (draft on file with author).

70. Process flaws are one method used by federal courts to determine if government officials are acting with a racially discriminatory purpose. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper [racial] purposes are playing a role.").

decision.⁷¹

Consistency. When a law enforcement decision is made, to what extent is the decision consistent with prior law enforcement decisions? If the decision is consistent with prior decisions, then that would seem to indicate the decision does not represent an illegitimate attempt to improve the electoral prospects of the decision-maker's political party. In contrast, if the decision is inconsistent with prior decisions, then that would tend to indicate the decision *does* represent an illegitimate attempt to improve the electoral prospects of the decision-maker's political party.

But there are two ways to view consistency: "exogenous consistency" and "endogenous consistency." By exogenous consistency, I mean a search for consistency across political party lines. In other words, we are looking to see whether an individual law enforcement decision made by a Democratic administration is consistent with an individual law enforcement decision made by a previous Republican administration. In contrast, endogenous consistency would look to the consistency within a single administration itself. Here we are looking at whether a law enforcement decision made by a Democratic administration is consistent with a previous decision made by the exact same Democratic administration.

While both types of consistency could be relevant to determining whether a partisan law enforcement decision has occurred, endogenous consistency is far more important than exogenous consistency. This is because, to the extent we are allowing administrations of different political persuasions to set different law enforcement priorities, a strong expectation exists that it will be impossible to stay exogenously consistent.⁷² However, a failure to consistently follow the

71. Process flaws are important, but not all process flaws are created equally. Process flaws will lie on a continuum. The above example, where a deliberative process is completely and totally short-circuited, provides what might be considered an extreme example of a process flaw. Other flaws may be more subtle. For instance, what if the career staff's recommendations are routinely followed by political staff, yet, in one instance, the recommendation is not followed?

72. Exogenous consistency is what is commonly used to respond to allegations of partisanship related to the Attorney General's administration of Section 5 during the 1990s redistricting cycle. In short, a Republican Attorney General was accused of requiring jurisdictions covered by Section 5 to maximize the number of majority-minority single-member districts for the purpose of creating more districts hospitable to the election of Republicans. These charges of partisanship, however, are often answered by asserting that the Clinton administration did not reverse course when it arrived in office. Instead, the Clinton administration continued along the exact same policy path as the previous Republican administration. See Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in RACE AND REDISTRICTING IN THE 1990'S 80, 98 n.73 (Bernard Grofman ed., 1998) (providing an example of decision making by the Clinton administration that was consistent with that of the Bush I administration); see also Tokaji, *supra* note 18, at 801 ("One of the arguments advanced by those who reject charges of partisan manipulation during the 1990s is that the

same administration's decision-making tends to show that some sort of bad faith may be involved.⁷³

Amount of Electoral Gain. The stakes involved in the decision will provide useful evidence of whether a decision was made with the intent of improving the electoral prospects of the decision-maker's party. How many more voters of the decision-maker's party might be brought to the polls? How many voters of the opposing party might be barred from the polls? How many more candidates of the decision-maker's political party might be elected because of the decision? What level of office holding might be implicated by the decision—the presidency, control of the House of Representatives, or an election involving a small town council?⁷⁴ Is the next election likely to be closely contested or a walk in the park? All of these factors will help provide evidence as to whether a partisan law enforcement decision has occurred.⁷⁵

DOJ's preclearance practices remained consistent between the Bush I administration and the Clinton administration, which took over the reins in 1993.”)

73. For example, if the Bush administration makes a written request for additional information from the State of Mississippi because of concerns over a shift in the power over a voting matter from the legislature to a state court but then several years later sends a letter to indicate that a shift in the power over a voting matter is not even a change subject to Section 5 review, this provides evidence that one (or perhaps both) of the decisions was politically motivated. *Compare* Letter from Joseph D. Rich, Chief, Voting Section, U.S. Dep't of Justice, to the Honorable Michael Moore, Att'y Gen., State of Miss. (Feb. 14, 2002) (asserting that it is a voting change when redistricting authority is shifted from the state legislature to a state court) (on file with author) *with* Letter from John Tanner, Chief, Voting Section, U.S. Dep't of Justice, to Thurbert Baker, Att'y Gen., and Dennis R. Dunn, Deputy Att'y Gen., State of Ga. (Apr. 21, 2006) (asserting that it is not a voting change when a jurisdiction shifts voter education authority from one state official to another) (on file with author). Special thanks to Mark Posner for bringing this example to light during a colloquy on the Election Law Listserv. Posting of Mark Posner, fimposner@verizon.net, to election-law@majordomo.ills.edu (Apr. 25, 2006) (on file with author).

74. This should not be misinterpreted as an argument that partisan law enforcement decisions related to presidential elections are somehow worse than partisan law enforcement decisions related to city councils. What we are considering here are factors that will lead us to determine whether a partisan law enforcement decision has occurred and I think it is safe to say that it is more likely for a partisan law enforcement decision to be made when the stakes are perceived to be higher—i.e., when we are electing a President as opposed to a dog-catcher. The partisan stakes are also higher when a federal election is involved because DOJ political appointees have more of a personal stake (i.e., job-security, political chits in Congress) in the outcomes of federal elections.

75. The factors listed here comprise what I think will be the most probative pieces of evidence in determining whether a partisan law enforcement decision has occurred. There may be other factors worth considering, too. For instance, if a presidential administration has a history (or lack thereof) of partisan law enforcement decisions, that may be worth factoring into the analysis.

B. RULES V. STANDARDS

Obviously, no magic formula exists for determining whether or not a partisan law enforcement decision has been made. There are many evidentiary factors to consider, and there will be much room for debate when it comes to concrete application of the factors. Indeed, debate about the evidentiary factors will play out on a couple of levels. There will be debate about whether or not an individual factor is present. For example, there might be great debate over whether the failure of DOJ political appointees to follow the advice of career DOJ employees constitutes a flaw in the decision-making process; after all, at the end of the day, political appointees have no obligation to follow the direction of career staff.⁷⁶ There will also be debate as to whether enough of the factors are present so that we might definitively brand a decision as partisan. For example, is direct evidence coupled with process flaws enough? Is a completely illegitimate decision coupled with no other evidence enough? Is weak evidence of the existence of all five factors enough?

No doubt, it would be wonderful if we could have a crisp, neat formula to determine whether or not a partisan law enforcement decision has been made. Unfortunately, the prospects for a formulaic answer to determine the presence of a partisan law enforcement decision seem remote. At bottom, evaluating whether or not a partisan law enforcement decision has occurred will be complex and hazardous.⁷⁷ But there is nothing wrong with that. As Justin Driver has pointed out in the context of partisan gerrymandering, partisanship would seem to be an area where standards, rather than clear rules, will have to suffice.⁷⁸ My effort here has merely been to try to provide a *standard* for determining whether a partisan law enforcement decision has been rendered, rather than a rule.

76. The failure of political appointees to follow the advice of career employees has served as one of the key pieces of evidence in the allegations of partisan decision making involving the Texas, Georgia, and Mississippi Section 5 determinations. *See, e.g.*, Mark A. Posner, *Evidence of Political Manipulation at the Justice Department: How Tom DeLay's Redistricting Plan Avoided Voting Rights Act Disapproval*, FINDLAW (Dec. 6, 2005), http://writ.news.findlaw.com/commentary/20051206_posner.html (arguing that failure to follow the recommendation of career staff serves as evidence of partisan decision making).

77. *Cf.* *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2609 (2006) (“Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous, even when the actor is an individual performing a discrete act.”).

78. Justin Driver, *Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After Vieth v. Jubelirer*, 73 GEO. WASH. L. REV. 1166, 1191-92 (2005) (“If the Court wants to give teeth to judicial review of redistricting schemes and encourage redistricting bodies to internalize criteria that will prevent egregious partisan gerrymanders, it will need to abandon the relative comfort of rules for the uncertainty, ambiguity, and indeterminacy that necessarily accompany standards.”).

V. CONCLUSION

As noted at the outset, this has been an endeavor that aims to spark a dialogue, not to finish it. There is plenty of room for respectable and principled disagreement at virtually every step along the way. One might oppose my expansion of the possibility of partisanship beyond the narrow confines of Section 5 by asserting that the only problem with partisan law enforcement in relation to federal voting laws comes when executive branch officials have exclusive authority not subject to review by a federal court. One might assert that my definition of partisan law enforcement is too narrow, and that it should encompass, for example, partisan inaction as well as action. One might assert that my evidentiary framework is hopelessly indeterminate and that no framework can ever be developed that will separate the partisan law enforcement decisions from the nonpartisan ones. Partisanship, it could be argued, is inevitably in the eye of the beholder, and perhaps we can never create a workable definition of the term.⁷⁹ All of these criticisms may well be valid.

You may have noticed, too, that this Article lacks any sort of clarion-call solution designed to eliminate partisan law enforcement.⁸⁰ Obviously, the best solution would be to put the enforcement of voting laws in the hands of nonpartisan actors—persons with nothing to gain or lose in the political process. Like others, I am deeply skeptical of the ability of humans in a democracy to design truly nonpartisan electoral structures. As the University of Pennsylvania's Nathaniel Persily observes: "[I]t is almost impossible to design institutions to be authentically nonpartisan and politically disinterested."⁸¹ Even the august Federal Reserve stands accused of partisanship from time to time.⁸² And particularly when it comes to the context of voting and elections, entities that seem nonpartisan at the start often do not seem quite so nonpartisan in the end—witness the resolution of the Hayes-Tilden⁸³ or Bush-Gore presidential

79. See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 676 (2002) (allowing that "nonpartisanship or political disinterestedness is difficult to define").

80. Perhaps one recommendation (it's not really a solution) that could be made would be to require greater transparency in DOJ decision making so that outsiders (such as academics) have a better ability to assess whether or not a partisan law enforcement decision has occurred.

81. See Persily, *supra* note 79, at 674.

82. See, e.g., Daniel Gross, *The Maestro Is a Hack*, SLATE, Nov. 21, 2002, <http://www.slate.com/id/2074429/> (describing Alan Greenspan as a "partisan hack" for Republicans).

83. During the Hayes-Tilden contest of 1876, a commission of seven Democrats and seven Republicans was created, with the tie-breaking vote given to Justice Bradley who "most contemporary observers viewed . . . as fair-minded and nonpartisan." John Copeland Nagle, *How Not To Count Votes*, 104 COLUM. L. REV. 1732, 1746 (2004). Yet Justice Bradley seemed quite a bit less nonpartisan after he delivered the election to Hayes. *Id.* at

elections.

Even putting this skepticism aside, it might assist the cause of those who seek to move the enforcement of federal voting laws (or even the enforcement of state voting laws) to nonpartisan entities to develop some kind of neutral framework—one that applies equally to both major political parties—to pinpoint exactly which decisions made by political officials are partisan. It would seem that one of the problems with trying to convince the public of the problem of partisanship in the enforcement of federal voting laws (or the administration and enforcement of state voting laws) is that accusations of partisanship seem amorphous, unprincipled, and untethered. Republicans accuse Democrats of engaging in partisan decision making and vice versa without having any neutral filter to sift the wheat from the chaff. In short, advocates of the move to nonpartisan enforcement of voting laws might benefit by first undertaking the difficult task of defining partisanship and creating a framework to separate the partisan from the not so partisan.