

**Remarks by Wendy Weiser
For The Federalist Society Election Law Conference
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I would like to thank the Federalist Society for inviting me and for hosting this conference on a topic central to the functioning of our democracy. Even if we disagree on some policy positions, it's important that people of good will, with different views, sit down together and discuss solutions to what we all acknowledge is an electoral system in need of modernization and reform.

My remarks will focus on a category of voting problems that we're seeing with increasing frequency in this election cycle (and last one too). And that is: the rise of new technical barriers to voting. I'll argue that these kinds of technical barriers have no place in the administration of fair elections. I'll also discuss voter registration barriers more broadly, and a solution that I believe addresses these concerns—and, I hope, some concerns of my co-panelists.

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I'll start with technical barriers. Last week, the Ohio Supreme Court reversed a decision by the Secretary of State to reject thousands of absentee ballot applications from registered voters whose eligibility was not in serious doubt. I'll describe the dispute in some detail because it illustrates the kinds of problems we're seeing nationwide.

The rejected voters used an absentee ballot request form created by the McCain campaign, but did not check an unnecessary box on the form. The box in question, which looks like a bullet point, appears at the top of the form next to a bold-face statement that reads: "I am a qualified elector and would like to receive an Absentee Ballot for the November 4, 2008 General Election." Most readers would interpret this as meaning that if they filled out and signed the form, they would be affirming that statement. And that's how thousands of Ohio voters, mostly elderly, interpreted it.

But not the Secretary of State. According to her, if an applicant didn't check the box, then he didn't affirm that he is qualified and his application had to be rejected. Putting aside the fact that the voters who filled out the form clearly intended to indicate that they are qualified, such a statement is plainly unnecessary for election officials to make eligibility determinations. For one

thing, the applicants included their voter registration information on the form. For another, election officials can look up each applicant on the state's voter registration database, which includes all qualified voters who are registered in the state. This was nothing more than a game of gotcha!

Fortunately, the Ohio Supreme Court stepped in and ordered these applications processed. But courts aren't always there to overturn every technical hurdle put up before voters.

This is not an anomaly.

Florida and several other states currently have similar rules in place for processing voter registration forms. They reject forms if the applicants don't check boxes at the top indicating that they are citizens over 18—even though later in the form, the applicants provide their birthdates (which should give election officials enough information to determine if they are over 18), and they sign a sworn statement that they're eligible citizens (which should suffice to affirm their citizenship). Since 2004, thousands of citizens in Florida alone didn't make it on the rolls on time, and lost their ability to vote, because of this technical rule.

As another example, four states currently require election officials to reject voter registrations if they can't electronically match the voters' information with drivers' license or Social Security databases. And there are currently lawsuits trying to impose similar requirements in three other states. The problem is that there are lots of errors in these state databases, and the match process states use is widely recognized—including by the National Academies of Science—as error prone, to say the least. To give a sense of the magnitude of the errors, Florida recently started reviewing more than 20,000 failed matches, and it has already found that more than $\frac{3}{4}$ were the result of typos. They're still investigating the others, though they are not likely to get through them all on time. And in Wisconsin, matching failed for 22% of people on the voter rolls, including four of the six members of their election board. Working with information technology efforts, we have studied match failure problems and found that they affect minorities, married women, and people with foreign-sounding names at much higher rates.

These examples highlight a vulnerability in our election administration system. If states and election officials can use technical requirements as a barrier to voting or voter registration, then we have a system that can be

gamed to keep out disfavored voters, and that in fact does keep out eligible voters, typically through no fault of their own.

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This isn't new to electoral politics. Back in the Jim Crow days, technical barriers to voter registration and voting were common—and typically ill-intentioned. Regardless of intentions, these kinds of barriers are still unfair and, frankly, un-American. In the 60's, Congress tried to put an end to these shenanigans, prohibiting officials from denying the right to vote based on any immaterial “error or omission” on voting-related paperwork or records.

This is under-enforced. We need a renewed commitment to this principle.

But getting rid of paperwork obstacles is not enough. We still have a system in which 30% of Americans are not registered to vote, according to the 2006 Census, and application rejections account for only a fraction of the problem.

Bad list maintenance practices is another problem. We recently released a study showing that millions of voters are purged from the rolls each year without any notice, using *ad hoc* and non-transparent procedures that are similarly prone to error and manipulation. (For example, this year, a local Mississippi election official discovered that one of his colleagues erroneously purged 10,000 voters using her home computer.)

We have *access* problems as well. The Department of Veterans' Affairs, for example, has refused to allow election officials or civic groups to provide voter registration services to the 5.2 million veterans who are residents and patients of its facilities. Nor has the agency made voter registration available itself, except to a few hundred of its patients. (It's true that the agency recently agreed to consider requests by election officials and civic groups, but only a small number of requests were granted.)

All this points to the need to modernize our voter registration system—a system that's remained fundamentally unchanged since it was put in place in the late nineteenth century. We all agree on the ultimate goal—a system that includes every eligible voter once, and only eligible voters, and a system that is not vulnerable to manipulation for partisan or other purposes.

And I am hopeful that we can all agree on a way forward—moving toward a system of universal voter registration in which election officials are responsible for building a list of all eligible—and only eligible—voters. That can be done by automatically registering citizens included on other government lists that are more complete, like state tax, social service, and drivers' license lists, and by regularly checking for and removing duplicates and people who move or die. Registration would be permanent within states, automatically updating based on changes of residence, as is currently done in 8 states. And there would be fail-safe procedures, like Election Day registration or traditional voter registration, for the 5% or so of voters who would be missed or mistakenly purged. This kind of system—which is used in most other advanced democracies—is within reach now that we have new technological tools like statewide voter databases.

And it has a number of advantages:

- It would include far more eligible voters than the current system.
- It would dramatically reduce opportunities for imposing technical barriers on voters or manipulating the list of who gets to vote.
- It would reduce the need for a huge administrative infrastructure to provide and process voter registration applications.
- It would streamline and rationalize the system, taking out the middlemen and ensuring that election officials don't have to process hundreds of thousands of registrations in the weeks before an election.
- And it would eliminate opportunities for voter registration fraud, which at least some of my co-panelists believe create the risk of voter fraud.
- And it is wildly supported by Americans.

Whether or not we pursue universal voter registration, we need reforms that eliminate the ability to game the system. An electoral system in which each side tries to knock out the others' voters is one in which voters lose. Voters win, and democracy wins, when each side focuses exclusively on winning them over.