

*Supplemental Statement of*  
**Deborah Goldberg, Democracy Program Director**  
*on behalf of the*  
**Brennan Center for Justice at NYU School of Law<sup>1</sup>**

*in Response to the*  
**Charter Revision Commission Staff Report, Dated August 13, 2003,**  
**on the Impact of Nonpartisan Elections on Democracy in New York City**

*August 22, 2003*

On Monday, August 18, the Brennan Center for Justice at NYU School of Law received a copy of the Staff Report prepared for the New York City Charter Revision Commission, dated August 13, 2003 (“Staff Report” or “Report”). Virtually the entire Report focused on our prior Statement on nonpartisan elections, which we had transmitted to the Commission on July 23 (“Statement”). We now submit this Supplemental Statement to correct the Report’s serious misrepresentations of both the Center’s position and the underlying literature that on the issue.

We have prepared this Supplemental Statement notwithstanding the Commission Chair’s announcement, during the “public hearing” conducted on August 19, that a majority of the Commission already firmly supports a proposal to eliminate party primaries. We submit this supplemental statement to give those who have not yet made up their minds about the wisdom of abandoning the current system of partisan elections an opportunity to conduct a comprehensive and rigorous review of the competing analyses offered by the Center and the Commission Staff. We confine our attention to the most serious errors in the Staff Report.

**I.**

Our first point is the main point of our original Statement: In the Brennan Center’s view, it is irresponsible to make fundamental change in the City’s electoral processes, including a move to nonpartisan elections (as was originally proposed) or a move to Louisiana-style elections, without first undertaking serious, methodologically defensible, empirical analysis of its probable impact (Statement at 2). The Commission had the time and resources to conduct such a study but refused to do so. In the absence of new and reliable research, the Center had no alternative but to review pre-existing studies on the systems under consideration.

When our initial Statement was drafted, the Commission was considering a move to nonpartisan elections, so our study began with the scholarship on that system. Our Statement

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<sup>1</sup> Frederick A. O. Schwarz, Jr., Interim President of the Brennan Center and Chair of the New York City Campaign Finance Board, took no part in the formation of the Center’s position on this issue. The views expressed here and in the Center’s initial statement are those of the Brennan Center, for which Ms. Goldberg serves as spokesperson on this issue.

plainly disclosed that there were serious gaps, weaknesses, and inconsistencies in those studies – indeed, we made a point of noting the small samples, failure to control for potentially confounding factors, and other scientific deficiencies in the data and analyses upon which we were forced to rely (Statement at 2) – and our tentative conclusions were expressly qualified by reference to those concerns. Making the best of a bad situation, we undertook a literature review and reported our findings.<sup>2</sup>

According to the Staff Report, the Center’s discussion of the literature failed to mention a national survey that is supposed to have concluded that “ballot type is not related to the election of women and minorities” and that “Hispanics [fare] a little better in nonpartisan elections,” citing McManus [sic] and Bullock, 1993 (Report at 9 & n.27). The Center has searched in vain for the source of these quotations. We did not find this language in the MacManus and Bullock article that the Staff listed as a reference (which was actually published in 1991). Nor did the only article by those authors published in 1993 contain the quoted conclusions. Neither of the articles even supported the propositions that the Staff attributed to the authors. We searched a more comprehensive abstract service to confirm that we were not missing any 1993 articles, we examined a 1990 article whose title referred to structural features of Hispanic representation, we did a search in several full-text journal services (ProQuest, Ingenta, JSTOR, and Westlaw), and we did an Internet search for the authors’ names – all to no avail. Finally, we did an Internet search for the quotations, but the only hit we got was the Staff Report. We are certain that the Staff did not make up these quotations from whole cloth, but we remain puzzled that we could find no trace of them after such an extensive search.

The Staff also accuses the Center of making “an unsubstantiated assertion” that nonpartisan elections may increase voter roll-off (Report at 5). Perhaps the Staff did not read the *Teams Without Uniforms* article, which explicitly discusses roll-off in Nebraska.<sup>3</sup> The Michigan data cited in our Statement (Statement at 3 & n.4) also goes to that point.<sup>4</sup>

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<sup>2</sup> In its Report, the Commission Staff suggests that our reference to this literature somehow discredits our analysis, although that scholarship is plainly all that is available. The Report also accuses the Center of “burying” in footnotes articles supporting nonpartisan elections (Report at 5, 10). The Staff is correct that those articles appear in footnotes. All of our sources appear in footnotes. We made a concerted effort to portray fairly in text what the empirical studies generally concluded, while fully disclosing minority views (if any) in footnotes.

<sup>3</sup> Brian F. Schaffner, Matthew Streb, and Gerald Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 *Political Research Quarterly* 1:7 (March 2001). Reading an article does not guarantee that the Staff will characterize it fairly. The Staff quotes the Collins article to support a claim that race, generally, does not affect turnout (Report at 8). But racial salience, as used in his article, is a matter of how the race of *candidates*, specifically, affects voter turnout. In that narrow sense, Collins found that race did not appear to operate as a salient factor in nonpartisan elections. But Collins fully supports the generally accepted view that the decrease in voter participation that comes with nonpartisan elections is concentrated among less educated and less affluent communities, see William P. Collins, *Race as a Salient Factor in Nonpartisan Elections*, 33 *Western Political Quarterly* 3:330 (1980), which are disproportionately communities of color (Statement at 4 & n.6).

<sup>4</sup> The Staff misrepresents our account of the Michigan elections (Report at 5). The Center did not state that press attention was higher in partisan than nonpartisan races. The Center pointed out that a nonpartisan race for the Michigan Supreme Court attracted fewer votes than a partisan race for a university governing board, even though the nonpartisan race was presumably of higher salience than the nonpartisan race (Statement at 3 & n.4). The

The Staff, on the other hand, does make important claims for which it has never produced any evidence. The Report asserts that the Department of Justice has granted preclearance under the Voting Rights Act of changes from partisan to nonpartisan elections nearly 100% of the time (Report at 1). Where are the documents that support that claim? They do not appear in the list of references, and they have never been shared with the public. We have no way of knowing how many instances of that change we are talking about, what the demographics of the jurisdictions under consideration were, what offices were involved, or a host of other factors that should be controlled for before any conclusion can be drawn about their implications for a change to nonpartisan elections in New York City.

Clearly the Commission Staff was aware that scientific method requires control for variables other than the change directly under consideration when seeking to explain that change's impact. The Staff expressly cites the lack of control as grounds for criticizing other studies (Report at 5). It is thus difficult to explain why the Staff, in seeking to defend nonpartisan elections, repeatedly cites anecdotal evidence without making any attempt to factor out potentially confounding factors.<sup>5</sup> Why is it that the Staff repeatedly lists a handful of nonpartisan cities with higher turnout rates (Report at 1, 6, Appendix B) as if some causal conclusion could be drawn from one to the other?<sup>6</sup>

Other examples of methodological neglect abound.<sup>7</sup> It is easy to pick out individual races in which losing candidates of color *might* have done better under nonpartisan elections (Report at 2, 9). Even assuming (without evidence) that those candidates *would* have been more competitive, it is quite another matter to demonstrate that nonpartisan elections *systematically* improve opportunities for communities of color to elect representatives of their choice. The evidence suggests that nonpartisan elections may reduce those opportunities (Statement at 4-5), and the Commission's refusal to produce Prof. Lichtman's prior studies of mayoral races only heightens concerns about retrogression. Those concerns cannot be allayed, as the Staff suggests, by "imagining" what might have happened under nonpartisan elections in isolated races (Appendix A).<sup>8</sup> Promoting genuine and lasting diversity at all governmental levels requires a

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associated footnote noted that the discrepancy was far greater when the nonpartisan race was compared with high-salience partisan elections.

<sup>5</sup> The Staff finds persuasive the fact that nonpartisan elections produced Atlanta's first Black mayor (Report at 8). But the Staff neglects to mention that 61% of Atlanta's residents are African American. Under any electoral system that does not widely disfranchise Blacks, one would expect Atlanta frequently to elect African-American mayors.

<sup>6</sup> Even if the Staff's methodology were defensible, the data in the Report show that six nonpartisan cities had higher turnout in their second round of elections than New York City did in its general election, while 19 had lower rates of participation.

<sup>7</sup> Contrary to the Staff's suggestion (Report at 6), no conclusion can be drawn from the very small sample of Council and Assembly special elections, especially without also having information about regular elections.

<sup>8</sup> The speculations about improved representation for Latinos (Report at 9, Appendix A) are particularly suspect because Latino voters are a higher percentage of Democrats than they are of the overall population.

transparent and replicable analysis of partisan and nonpartisan elections that fully controls for competing explanations of success among minority candidates.<sup>9</sup>

## II.

The Staff Report claims that much of the Center's criticism is "moot," because the Commission is no longer supporting nonpartisan elections (Report at 4). The policy change that was at least ostensibly up for consideration when we prepared our initial Statement was a move to elections in which party labels do not appear on the ballot. All of the studies cited both by the Center and by the Commission address nonpartisan elections, as so defined. None of the cited studies addresses what appears now to be the Commission's proposal: a two-stage election in which all candidates appear on a single first-round ballot, with their party registration should they so choose, and the top two vote-getters proceed to a run-off election.

We applaud the Commission's response to the Center's serious concerns about the loss of political party cues on the ballot, but the new proposal has been the subject to even *less* study than nonpartisan elections, and there is far less experience with it available for analysis. As far as we know, there are two cities (Jacksonville and Minneapolis) and one state (Louisiana) that use such a system. The Commission Staff reports that "[n]o studies exist on the impact of nonpartisan elections that allow candidates to identify their party membership on the ballot" (Report at 4). Even if this claim were true, and it is not, the lack of reliable research should be regarded as reason for caution (if not alarm), not as a green light for speculation about what might happen if the City rushes headlong into uncharted territory.<sup>10</sup>

Moreover, adopting the Louisiana system does not eliminate the Center's concerns about loss of political party cues on the New York City ballot. The information that is conveyed by party registration is very different, and less helpful, than the information reflected in a party endorsement. Candidates can change their party enrollment if they choose, even if they do not

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<sup>9</sup> The failure to apply accepted social science methodology is exacerbated by the Staff's mischaracterizations of the research. Contrary to the Staff's suggestion (Report at 4), the *Teams Without Uniforms* article did find that participation dropped when Asheville, NC switched to nonpartisan elections, albeit only slightly. The Staff also claims that *The Municipal Voter* article "took as a given that turnout in municipal nonpartisan elections was low, as compared with presidential elections" (*Id.*), but Hamilton in fact supplies data supporting the claim that turnout is lower in nonpartisan municipal elections than in partisan municipal elections. Howard D. Hamilton, *The Municipal Voter: Voting and Nonvoting in City Elections*, 65 *Amer. Poli. Sci. Rev.* 4: 1139-40 (Dec. 1971). The Staff is correct that his data is old, but the correct response to that problem is to commission a more up-to-date, methodologically defensible study, not to use the age of the data as an excuse to ignore scientific standards.

<sup>10</sup> A preliminary search turned up three studies of the Louisiana system: Charles D. Hadley, *The Impact of the Louisiana Open Elections System Reform*, 58 *State Government* 152 (1986); Thomas A. Kazee, *The Impact of Electoral Reform: "Open Elections" and the Louisiana Party System*, *Publius* 131 (Winter 1983); Stella Z. Theodoulou, *The Impact of the Open Elections System and Runoff Primary: A Casestudy of Louisiana Electoral Politics, 1975-1984*, 17 *The Urban Lawyer* 457 (1985). The Center did not previously cite these studies because the Louisiana system was not before us when we prepared our initial Statement. Our recent review of them suggests that they are not only outdated but also of questionable methodological soundness. Nevertheless, the Staff's failure even to locate them, much less to examine them, speaks volumes about the Staff's interest in intellectual rigor.

genuinely embrace the party's political platform, but a nomination reveals that a majority of a party's voters believes that the candidate best represents its principles.

Information is also lost because the Louisiana system undermines New York's "fusion" ballot system, in which political parties may cross-endorse a single candidate. Fusion allows political parties to more fully inform voters about the candidate's political views – a right-wing Republican may secure the endorsement of the Conservative Party; a left-wing Democrat may be endorsed by the Working Families Party. Fusion also allows voters to express allegiance to minor-party views, without forcing the party to run what may be a "spoiler" candidate. Because major-party candidates want votes from minor-party supporters, fusion helps to keep Democrats and Republicans true to politically distinct ideologies. Under truly nonpartisan elections, the benefits of fusion are lost, but all parties lose equally – none is identified on the ballot.<sup>11</sup> The Louisiana model allows minor parties on the ballot only if candidates are party members – and potential spoilers – negating the benefits of fusion and entrenching major-party control over the political agenda.

Adopting the Louisiana system also heightens concerns about potential fringe candidates. The Staff cannot have it both ways – it cannot both claim to have eliminated the risks of genuinely nonpartisan elections by putting political party affiliations back on the ballot, and at the same time insist that Louisiana's experience with the likes of David Duke is irrelevant to politics in New York City.<sup>12</sup> "Conventional wisdom" and bald assertions that "[i]t is likely that [nonpartisan elections] would have a moderating effect on campaigns" (Report at 12) are a poor substitute for a methodologically reliable defense of the Louisiana model.

### III.

The Commission has offered no substantive response to the concern raised both by the Center and by the Campaign Finance Board that abolition of party primaries carries the potential for unleashing a flood of party spending. Clearly, the Board cannot be required to treat every expenditure that directly or indirectly benefits that candidate as an in-kind contribution to the campaign, as was apparently considered. By forcibly breaking the connection between the party organization and the candidate, as is done in either nonpartisan elections or under the Louisiana model, those election systems eliminate the basis for the reasonable imputation that could otherwise be made when a party has nominated the candidate in a partisan primary. Such attribution rules would therefore almost certainly be unconstitutional. The responsible approach would be for the Commission to work closely with the Board to determine whether there is a

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<sup>11</sup> The Staff states: "Goldberg affirmatively notes that nonpartisan elections would succeed in weakening political parties and then she argues that this would not be a good thing because parties are useful organizations" (Report at 11). What the Brennan Center actually said was: "In some cases, nonpartisan elections do succeed in weakening political parties" and we argued that: "Transferring power from parties to wealthy candidates and celebrities is . . . by no means an unmitigated blessing" (Statement at 6-7). We also stated: "Even if the shift were a desirable goal, however, it is not clear that truly nonpartisan elections can be achieved in New York City (*Id.*). The Commission has evidently abandoned any effort to institute truly nonpartisan elections.

<sup>12</sup> The Staff is correct that an African American advanced to the run-off in the Louisiana gubernatorial race, but he lost to an extreme right-wing opponent, who is widely viewed as a racist and the heir to David Duke's mantle.

practicable solution to this problem and, if so, how the regulatory amendments should be framed. Instead, in its haste to place a question on the ballot, the Commission appears to be foisting the entire responsibility onto the shoulders of the Board.

#### IV.

As this Supplemental Statement was nearing completion, the Brennan Center received third-hand an electronic copy of a new report prepared for the Commission by its Staff, dated August 21, on Jacksonville's electoral system. This research is definitely a move in the right direction; additional analysis of Minneapolis and cities in Louisiana would also be helpful. But if the Commission proceeds to its final vote on August 25, as is evidently planned, even this limited research comes much too late. The Staff has not shared the report with the Center; nor has the report been posted (as of this writing) on the Charter Revision Commission's website. Even assuming that an official copy is released on August 22, public interest organizations and scholars interested in improving democracy in New York City, including the Brennan Center, cannot possibly evaluate the research in a meaningful way over the weekend before the Commission concludes its work. If the new report is to represent anything more than show, and the Commission's decision is to be based on anything more than speculation, that decision should be postponed until independent and thorough assessments of its proposal are complete and have been subject to public scrutiny.