THE ELECTIONS CLAUSE: CONSTITUTIONAL INTERPRETATION AND CONGRESSIONAL EXERCISE

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

JULY 12, 2021

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THE ELECTIONS CLAUSE: CONSTITUTIONAL INTERPRETATION AND CONGRESSIONAL EXERCISE

MONDAY, JULY 12, 2021

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to call, at 1:02 p.m., via Webex, Hon. Zoe Lofgren [Chairperson of the Committee] presiding.

Present: Representatives Lofgren, Raskin, Butterfield, Aguilar, Scanlon, Leger Fernandez, Davis, Loudermilk, and Steil.

Staff Present: Jamie Fleet, Majority Staff Director; Khalil Abboud, Deputy Democratic Staff Director; Brandon Jacobs, Legislative Clerk; Dan Taylor, Senior Counsel; Sean Wright, Senior Elections Counsel; Sarah Nasta, Elections Counsel; David Tucker, Parliamentarian; Natalie Young, Press Secretary; Kulani Julata, Elections Counsel; Peter Whippy, Communications Director; Caleb Hays, Republican General Counsel and Deputy Staff Director; Gineen Bresso, Republican Special Counsel; Rachel Collins, Republican Counsel; and Mike Cunnington, Republican Policy Advisor.

The CHAIRPERSON. The Committee on House Administration will come to order.

We have several Members present, and we will be joined by several others as this hearing proceeds.

As we begin, I want to note we are holding this hearing in compliance with the regulations for remote committee proceedings pursuant to House Resolution 8.

We ask Committee Members and witnesses to keep their microphones muted when they are not speaking to limit background noise, and members will need to unmute themselves when seeking recognition or when recognized for their five minutes. Witnesses will also need to unmute themselves when recognized for their five minutes or when answering a question.

Members and witnesses, please keep your cameras on at all times, even if you need to step away for a moment. Please don't leave the meeting or turn your camera off.

I would also like to remind Members that the regulations governing remote proceedings require that we cannot participate in more than one committee proceeding at the same time.

At this time, the chair is authorized to declare a recess of the Committee at any point, and all Members will have five legislative days in which to revise and extend their remarks and have any written statements be made part of the record.

And without objection, that is ordered.

Our hearing today will examine the broad constitutional authority provided to Congress to regulate Federal elections under Article I, Section 4, Clause 1 of the U.S. Constitution, known as the Elections Clause.

The clause reads as follows, quote: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

The text is clear. It prescribes a duty to States to make regulations for the time, place, and manner of congressional elections—but, critically, also provides Congress with the superseding power to make or alter such regulations at any time.

During the Constitutional Convention and State ratification debates, the Framers fought for the inclusion of the Election Clause and the broad powers that it confers to Congress. For its supporters, the clause was necessary for self-preservation of the Federal Government in the face of potential State obstructions to congressional elections.

In defense of the Elections Clause, Alexander Hamilton wrote in Federalist 59 that, quote: "Its propriety rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation."

The Framers raised other concerns as well to defend the inclusion of the Elections Clause in the Constitution and the Federal oversight over congressional elections that it would authorize. They warned about the potential for State lawmakers to abuse their powers and pass election regulations that would lead to unequal representation, such as partisan gerrymandering. They also warned about other forms of voter suppression in Federal elections that would go unchecked unless Congress was empowered with the remedy of the Elections Clause to act.

The Framers' warning rings true today. Since the Supreme Court's 2013 *Shelby County v. Holder* decision, State legislatures around the country have passed a wave of voter suppression efforts, including strict voter ID laws, improper voter purges, and increasingly limited opportunities to access the ballot.

And this pattern has only further escalated since the 2020 general election. Partisan gerrymandering by incumbent political parties—both parties—remains an ongoing obstacle to equal voting rights across various States.

In our hearing today, we will hear more about what the Framers intended when they drafted and included the Elections Clause in our Constitution.

Likewise, the Supreme Court has been consistent in construing the Elections Clause as providing, quote, "paramount," unquote, powers to Congress to enact Federal election regulations that preempt State regulations and has interpreted such powers be broad and expansive.

For example, in *Smiley v. Holm*, in 1932, the Supreme Court said, "These comprehensive words embrace authority to provide a complete code in congressional elections," which was not limited to just times and places, but to the "numerous requirements as to pro-

cedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."

In another case, *Arizona v. Inter Tribal Council of Arizona*, in 2013, Justice Scalia, a renowned conservative Justice, wrote for the court that the National Voter Registration Act requirement that voters affirm their citizenship preempted Arizona's proof of citizenship requirement, relying on *Smiley v. Holm* and the understanding that the Elections Clause empowers Congress to preempt State regulations governing the times, places, and manner of holding congressional elections and that times, places, and manner are comprehensive words.

The NVRA is only one example of Congress exercising its Elections Clause powers. Congress has long exercised its Elections Clause powers to enact legislation covering various types of Federal election regulations, from the Apportionment Act of 1842, which eliminated the general ticket system in favor of the congressional district, to modern examples, including the Federal Election Campaign Act of 1971 and the Uniformed and Overseas Citizens Absentee Voting Act of 1986, as well as the Help America Vote Act in 2002.

Reliance on the Elections Clause as a source of congressional authority has long been supported on a bipartisan basis. Since the House began requiring bill sponsors to identify the constitutional authority for their proposed legislation in recent years, Members have cited the Elections Clause as the authority for their legislation more than 230 times. That includes scores of measures introduced by Republican Members, many of which would have required States to take certain steps in how they conduct their elections or prohibited certain activities.

In the last Congress, my colleague, Ranking Member Davis, introduced legislation to deny Federal election grants to States that permit third-party individuals or groups to return voters' completed ballots to election officials. In doing so, he cited, as the sole constitutional authority to his legislation, the Elections Clause of the Constitution.

But this authority can be used to empower States and citizens to make voting easier, safer, and more secure while ensuring that suppressive tactics and plans may not be used to limit or deny access to the ballot box.

For example, Congress has endeavored to enact new democracy reforms, including H.R. 1, the For the People Act, under its Elections Clause powers, as well as other constitutional provisions. H.R. 1 would help remedy ongoing voter suppression efforts across States, just as the Framers intended.

Far from the Federal takeover of elections, as claimed by some critics, H.R. 1 typifies an appropriate exercise of congressional authority.

This hearing provides a rare opportunity to explore the contours of the Elections Clause and the sweeping constitutional powers it provides Congress to enact transformational democracy legislation, like H.R. 1.

I look forward to hearing from our witnesses today.

I understand Mr. Davis is on assignment today, may be joining us later, but I believe Mr. Steil will be offering his opening statement.

So, Mr. Steil, you are now recognized for five minutes.

[The statement of The Chairperson follows:]

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MINORITY STAFF DIRECTOR

Chairperson Zoe Lofgren
The Elections Clause: Constitutional Interpretation and Congressional Exercise
July 12, 2021
Opening Statement

Our hearing today will examine the broad constitutional authority provided to Congress to regulate federal elections under Article I, Section 4, Clause 1 of the U.S. Constitution, known as the Elections Clause. The Clause reads as follows:

"The Times. Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

The text is clear. It prescribes a duty to states to make regulations for the time, place, and manner of congressional elections but critically also provides Congress with a superseding power to make or alter such regulations "at any time." During the Constitutional Convention and state ratification debates, the Framers fought for the inclusion of the Elections Clause and the broad powers that it confers to Congress. For its supporters, the clause was necessary for self-preservation of the federal government in the face of potential state obstructions to congressional elections. In defense of the Elections Clause, Alexander Hamilton wrote in Federalist No. 59 that, "Its propriety rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation."

The Framers raised other concerns as well to defend the inclusion of the Elections Clause in the Constitution and the federal oversight over congressional elections that it would authorize. They warned about the potential for state lawmakers to abuse their powers and pass election regulations that would lead to unequal representation, such as partisan gerrymandering. They also warned about other forms of voter suppression in federal elections going unchecked unless Congress was empowered with the "remedy" of the Elections Clause to act.

The Framers' warnings still ring true today. Since the Supreme Court's 2013 Shelby County v. Holder decision, state legislatures around the country have passed a wave of voter suppression efforts, including strict voter ID laws, improper voter purges, and increasingly limited opportunities to access the ballot. And this pattern has only escalated since the 2020 general election. Further, partisan gerrymandering by incumbent political parties remains an ongoing obstacle to equal voting rights across various states.

In our hearing today, we will hear more about what the Framers intended when they drafted and included the Elections Clause in our Constitution. Likewise, the Supreme Court has been consistent in construing the Elections Clause as providing "paramount" powers to Congress to enact federal election regulations that preempt state regulations and has interpreted such powers to be broad and expansive. Foe example, in Smiley v. Holm (1932), the Supreme Court observed that: "These comprehensive words embrace authority to provide a complete code for congressional elections," which was not limited to just "times and places," but to "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."

In another case, Arizona v. Inter Tribal Council of Arizona (2013), Justice Antonin Scalia, a renowned conservative justice, wrote for the Court that the National Voter Registration Act's requirement that voters affirm their citizenship preempted Arizona's proof-of-citizenship requirement, relying on Smiley v. Holm and the understanding that the Elections Clause "empowers Congress to pre-empt state regulations governing the "Times, Places, and Manner of holding congressional elections" and that "Times, Places, and Manner,.....are comprehensive words.

The NVRA is only one example of Congress exercising its Elections Clause powers. Congress has long exercised its Elections Clause powers to enact legislation covering various types of federal election regulations. From the Apportionment Act of 1842, which eliminated the general-ticket system in favor of the congressional district, to modern examples, including the Federal Election Campaign Act (1971), the Uniformed and Overseas Citizens Absentee Voting Act (1986), and the Help America Vote Act (2002).

Reliance on the Elections Clause as the source of Congressional authority has long been supported on a bipartisan basis. Since the House began requiring bill sponsors to identify the constitutional authority for their proposed legislation in recent years, Members have cited the Elections Clause as the authority for their legislation more than 230 times. That includes scores of measures introduced by Republican Members, many of which would have required states to take certain steps in how they conduct their elections or prohibited certain activities.

In the last Congress, my colleague, Ranking Member Davis, introduced legislation to deny federal election grants to states that permit third party individuals or groups to return voters' completed ballots to elections officials. In doing so, he cited as the sole constitutional authority for his legislation the Elections Clause of the Constitution.

But this authority can be used to empower states and citizens to make voting easier, safer, and more secure---while ensuring that suppressive tactics and schemes may not be used to limit or deny access to the ballot box. For example, Congress has endeavored to enact new democracy reforms, including H.R. 1, the For the People Act, under its Elections Clause powers, as well as other constitutional provisions. H.R. 1 will help remedy ongoing rampant voter suppression efforts across states, just as the Framers intended. Far from a "federal takeover of elections," as claimed by its critics, H.R. 1 typifies an appropriate exercise of Congressional authority.

This hearing provides a rare opportunity to explore the contours of the Elections Clause and the sweeping constitutional powers it provides Congress to enact transformational democracy legislation, like H.R. 1. I look forward to hearing from our witnesses today.

Mr. STEIL. Thank you very much, Madam Chairperson.

Today's hearing is titled "The Elections Clause: Constitutional Interpretation and Congressional Exercise." This is really a hearing that our Committee should have had before we had hearings on elections administration, before the drafting and introduction and passage of H.R. 1, and before the drafting and introduction of H.R. 4 last Congress.

Article I, Section 4 of the Constitution clearly gives States the primary role in establishing—and I quote—"The Times, Places, and Manner of holding Elections for Senators and Representatives." Under the Constitution, Congress has a purely secondary role in this space.

This is evident from the way it is written—the States are listed first, and Congress is listed second. Under H.R. 1 and H.R. 4, Congress is clearly outside these constitutional bounds.

These bills prevent any State from establishing the time, place, and manner in which elections are held by establishing a nationalized election system run by bureaucrats in Washington, D.C.

And while we are on the subject of H.R. 4, the Supreme Court ruled this month that States have the power to protect the integrity of their elections through thoughtful, considered legislation, making it easy to vote and hard to cheat.

In the case against Arizona, the Court upheld the State's power to ban the use of third-party ballot harvesting. Justice Alito's opinion stated, quote, "One strong and entirely legitimate State interest is the prevention of fraud. Fraud can affect the outcome in a close election, and fraudulent votes dilute the rights of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome," end quote.

Public confidence in our elections is something I, as Ranking Member on the Subcommittee on Elections, am focused on. Ranking Member of the Committee Rodney Davis is leading the way with his Faith in Elections Project.

We have seen this issue in North Carolina. The results of a congressional race were tossed because of fraud resulting from ballot harvesting. California has had issues as well. We have seen it in Madison, Wisconsin.

Despite the well-documented fraud cases with ballot harvesting, H.R. 1 legalizes this practice nationwide. And according to Democrats, prohibition of ballot harvesting by a State is by definition discrimination.

Fortunately, the Supreme Court ruled this is not the case. Instead, the Court ruled that intent and the totality of a State's voting system matters.

Justice Alito noted that merely implementing voting structures intended to bolster voter confidence, such as rules to increase ballot integrity, does not equal discrimination, which is what my Democratic colleagues continue to claim.

Not only does the recent Supreme Court ruling invalidate my Democratic colleagues' claim, but this Committee's record has demonstrated this as well.

During multiple hearings, my Democratic colleagues have claimed that voter ID is used to suppress votes. However, the data

clearly disputes this. Contrary to the Democrats' claim that voter ID requirements lower voter turnout, States with voter ID laws saw record turnout in the 2020 election.

I thought I would take this opportunity during a remote hearing to take everyone on the Committee to rural America.

While I haven't found a Kinko's, the Vice President of the United States may be very interested to learn that I can confirm folks in rural Wisconsin and rural communities across the United States have running water, have electricity.

I found this new invention that I don't think was there when then-Vice President Biden first ran for Senate, but is available now here in rural America, and it is called a camera phone. It is amazing. And it is a camera and a phone, and it can take a photo of an ID and can be submitted electronically. Shocking, I know.

Now, it may not have come to San Francisco, so Vice President Kamala Harris may not be as familiar, but I would encourage everyone to check out these new camera phones that can be used to provide enhanced integrity in our elections for people voting by mail remotely in rural America.

Additionally, the data used by Democratic witnesses is flawed.

During a hearing earlier this year, Democratic witness Dr. Nazita Lajevardi stated that minority participation in the 2016 election was less than the 2012 election and claimed this was due to voter suppression.

However, she admitted that her analysis relied on self-reported voter information from online surveys to reach her conclusion, not a scientific poll, and essentially reverse engineered her desired result.

And further, during that Committee hearing I pointed out that her study did not control for the difference in candidacy between Barack Obama and the historically terrible candidacy of Hillary Clinton.

While my Democratic colleagues invited many college professors to participate in these hearings on H.R. 1 or voter suppression, they invited no election officials who had administered elections.

Republicans, on the other hand, have invited multiple election administrators, including our witness today, the Kentucky Secretary of State, Michael Adams—and I am appreciative of you joining us here—and together these individuals have decades of experience in election administration, and each one of them have or will testify about how bad H.R. 1 is for States.

They have repeatedly stressed that mandates throughout H.R. 1 will not work in their jurisdictions, they would be incredibly costly to implement, and they could even make elections less secure.

In contrast, the only two election officials the majority invited had never administered elections prior to testifying.

It is my hope that after a thorough review of the Committee's record and the recent Supreme Court decisions, Democrats will abandon their efforts to circumvent the Constitution and nationalize our elections.

It is clear our election system works best when those closest to the people are setting the rules for administering the elections, not unelected bureaucrats in Washington—just as our Founding Fathers wrote in Article I, Section 4 of the Constitution.

Madam Chairperson, I yield back. Thank you.
[The statement of Mr. Steil follows:]

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The Supreme Court ruled this month that States have the power to protect the integrity of their elections through thoughtful, considered legislation, making it easy to vote and hard to cheat. In the case against Arizona, the Court upheld the State's power to ban the use of third-party ballot harvesting. Justice Alito's opinion stated "One strong and entirely legitimate State interest is the prevention of fraud. Fraud can affect the outcome in a close election, and fraudulent votes dilute the rights of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome."

Public confidence in our elections is something I as Ranking Member of the Subcommittee on Elections, am focused on and Ranking Member of the full Committee Rodney Davis is leading the way with his Faith in Elections project. We have seen this issue in North Carolina. The results of a congressional race were tossed because of fraud resulting from ballot harvesting. California has had issues

as well and we have seen it in Madison, Wisconsin. Despite the well-documented fraud cases with ballot harvesting, H.R. 1 legalizes this practice nationwide. And according to Democrats, prohibition of ballot harvesting by a State is by definition discrimination. The Supreme Court has fortunately ruled this is not the case and instead has ruled that intent and the totality of a State's voting system matters.

Justice Alito noted that merely implementing voting structures to bolster voter confidence, such as rules to increase ballot integrity does not equal discrimination, which my Democratic colleagues continue to claim. The recent Supreme Court ruling invalidates my Democratic colleagues' claim but this Committee's record has demonstrated this as well. During multiple hearings, my Democratic colleagues have claimed that voter ID is used to suppress votes. The data clearly disputes this and contrary to the Democrats' claim, States with voter ID laws saw record turnout in the 2020 election. I thought I would take this opportunity during a remote hearing to take everyone on the Committee to rural America.

During a hearing earlier this year, Democratic witness Dr. Nazita Lajevardi stated that minority participation in the 2016 election was less than the 2012 election and claimed this was due to voter suppression. However, she admitted that her analysis relied on self-reported voter information from online surveys to reach her conclusion, not a scientific poll, and essentially reverse engineered her desired result. Further, during that committee hearing I pointed out that her study did not control for the difference in candidacy between Barack Obama and the historically terrible candidacy of Hillary Clinton. My Democratic colleagues invited no election officials who had actually administered elections while they invited many college professors to participate in hearings on H.R. 1 or voter suppression.

Republicans, on the other hand, have invited multiple election administrators, including our witness today, the Kentucky Secretary of State, Michael Adams. These officials have repeatedly stressed that mandates throughout H.R. 1 will not work in their jurisdictions, they would be incredibly costly to implement, and they could even make elections less secure.

It is my hope that after a thorough review of the Committee's record and the recent Supreme Court decisions, Democrats will abandon their efforts to circumvent the Constitution and nationalize our elections.

It is clear our election system works best when those closest to the people are setting the rules for administering the elections, not unelected bureaucrats in Washington, D.C. just as our Founding Fathers wrote in Article I, Section 4 of the Constitution.

The CHAIRPERSON. The gentleman yields back.

And all other Members are invited to submit opening statements for the record.

We have a very distinguished panel to hear from today, and I would like to welcome each of them and thank them for participating.

First, we have Professor Jack Rakove, who is the William Robertson Coe Professor of history and American studies and Professor of political science and law at Stanford University, where he has taught since 1980.

He is a constitutional historian whose principal areas of research include the origins of the American Revolution and the Constitution, the political practice and theory of James Madison, and the role of historical knowledge in constitutional litigation.

He is the author of six books, including "Original Meanings: Politics and Ideas in the Making of the Constitution," which won the Pulitzer Prize in history.

He is a member of the American Academy of Arts and Sciences, the American Philosophical Society, and a past president of the Society for the History of the Early American Republic.

He obtained his Ph.D. in history from Harvard University and his bachelor's in history from Haverford College.

Next we have Vice Dean Franita Tolson, who is Vice Dean for faculty at the USC Gould School of Law and is a nationally recognized expert in election law.

Her scholarship and teaching focus on the areas of election law, constitutional law, legal history and employment litigation, political parties, the Elections Clause, the Voting Rights Act of 1965, and the 14th and 15th Amendments.

Dean Tolson received her J.D. from the University of Chicago Law School and clerked for the Honorable Ann Claire Williams of the United States Court of Appeals for the Seventh Circuit and the Honorable Ruben Castillo of the United States District Court for the Northern District of Illinois.

In 2019, her journal article titled "The Elections Clause and the Underenforcement of Federal Law" appeared in the Yale Law Journal forum, and which examined the broad powers conferred under the Elections Clause and the underutilization of such powers by Congress and the constitutionality of H.R. 1.

This year, Dean Tolson's forthcoming book, "In Congress We Trust?: Enforcing Voting Rights from the Founding to the Jim Crow Era," will be published by the Cambridge University Press.

Dean Daniel Tokaji is the Dean of the University of Wisconsin Law School and is a leading authority in the field of election law. His scholarship addresses questions of voting rights, free speech, and democratic inclusion.

He has published over fifty law review articles, book chapters, and papers on a broad scope of topics. Dean Tokaji is the author of "Election Law in a Nutshell," second edition, and coauthor of "Election Law: Cases and Materials," as well as "The New Soft Money."

Previously, the Dean served as Associate Dean for faculty and was a professor of constitutional law at Ohio State's Moritz College of Law, and the dean received his J.D. from Yale Law School and

clerked for the Honorable Stephen Reinhardt of the Ninth Circuit Court of Appeals.

He is a former civil rights attorney and has worked on various free speech, racial justice, and voting rights cases.

Last, but certainly not least, is Secretary of State Michael Adams. Secretary Adams is Kentucky's 86th Secretary of State, sworn into his term on January 6, 2020.

Secretary Adams established a private practice in election law in 2007. He served as General Counsel to the Republican Governors Association and later expanded his practice, representing national political committees, national political figures, and statewide campaign efforts.

In 2016, he was appointed to the Kentucky Board of Elections. Previously, he worked on Senator Mitch McConnell's 2002 reelection, was Deputy General Counsel for Governor Ernie Fletcher, and was appointed counsel to the U.S. Deputy Attorney General in the Bush administration.

Secretary Adams received his J.D. from Harvard Law School and clerked for Chief U.S. District Judge John Heyburn.

Welcome to all of you.

We will hear your verbal testimony for about five minutes. There is a clock on the screen which will help you keep track of the time. When your time is up, we do ask that you please summarize. Your entire statements will be made part of the written record.

So let me turn first to Professor Rakove.

It is great to see you, and we would certainly welcome your testimony.

STATEMENTS OF JACK RAKOVE, COE PROFESSOR OF HISTORY AND AMERICAN STUDIES, AMERICAN UNIVERSITY; THE HONORABLE MICHAEL G. ADAMS, SECRETARY OF STATE, COMMONWEALTH OF KENTUCKY; DANIEL P. TOKAJI, FRED W. AND VI MILLER DEAN AND PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN LAW SCHOOL; FRANITA TOLSON, PROFESSOR OF LAW AND VICE DEAN FOR FACULTY AND ACADEMIC AFFAIRS, UNIVERSITY OF CALIFORNIA GOULD SCHOOL OF LAW

STATEMENT OF JACK RAKOVE

Mr. RAKOVE. Thank you very much.

First off, I would like to thank Chairperson Lofgren, Ranking Member Davis, and the other Members of this Committee for this opportunity to discuss the origins of the Times, Places and Manner Clause.

It is also a special pleasure for me to appear before my former student, Congresswoman Scanlon, whose law school recommendation I wrote more years ago than she and I would like to remember.

The principal concern of my written statement lies with the original intentions of the Framers of the Constitution in drafting the Times, Places and Manner Clause. There are four main conclusions that I wish to present.

First, a reconstruction of the drafting of this clause indicates that we should indeed read it expansively. Not only does it give Con-

gress broad authority to correct identifiable defects in the conduct of congressional elections within the States, it also empowers Congress to use its legislative power creatively, to draw upon lessons of experience to design an optimal manner of conducting Federal elections.

In its original form, the clause first appeared at the midpoint of the Federal Convention where the Committee of Detail proposed it as a response to the problem of asking: What should happen should one or more States default on their obligation to provide for the election of Members of Congress?

That could occur, for example, if the two houses of a State legislature simply failed to agree on an election law. But it could also occur when a State willfully tried to sabotage the national government.

Knowing the prior history of the Articles of Confederation, when the States had often fallen short of fulfilling their Federal duties, the Framers of the Constitution had legitimate reasons to worry about allowing Federal elections to become wholly dependent on the voluntary compliance of the State legislatures.

Second, this reading gains additional authority when we examine the most detailed speech on the clause, which James Madison gave on August 9, 1787, the one day the clause was actively debated.

That debate occurred when two South Carolina delegates argued that there was no need for any congressional review or alteration of State regulation of Federal elections.

Madison gave the principal refutation of this motion. Precisely because times, places, and manners were, Madison said, words of great latitude, he argued they would be subject to, quote, "all the abuses that might be made of this discretionary power."

State legislatures, which had their own favorite measure to carry, could well mold the regulations to favor the candidates they wished to succeed. And if there were inequalities in the allocation of seats within the State legislatures, these may also be replicated in the design of congressional districts.

All these potential sources of abuse, therefore, justified congressional oversight and revision. The other Framers evidently agreed, because the South Carolina motion was rejected without even a roll call.

But in the third place, Madison's speech also identified the real problems that the Framers faced in designing a system of national political representation.

Here is Madison's list of problems: whether the electors should vote by ballot or viva voce; should assemble at this place or that place; should be divided into districts or all meet at one place; should all vote for all the Representatives or all in a district vote for a number allotted to the district; these and many other points would depend on the legislatures and might materially affect the appointments.

I believe it is important for members of this Committee to know that there was no precedent in Anglo-American history for the kind of representative system the Framers were designing. The American Colonies' and States' representative seats were routinely assigned to townships and counties when they were legally organized.

That principle of community representation would never work in the extensive and expanding American Republic. Congressional districts, as the Framers conceived them, would be wholly arbitrary political entities. The State legislatures would have to be created de novo and would likely alter with every decennial census.

As Madison makes clear, the manner of holding elections embraced everything from the actual method of voting to deciding exactly what kind of constituency was to be represented.

Given the novelties of that concept, the clause effectively empowers Congress to examine how the system of political representation is working or not working in the clause's own language at any time.

Fourth and finally, when Americans in the Revolutionary era thought about political representation, there was, however, one maxim that consistently guided their thinking. It was the idea first stated by John Adams in 1776, repeated by others afterwards, including at the Constitutional Convention, that a legislative assembly should be a mirror miniature portrait or transcript of the larger society.

As Adams put it, it should be an equal representation, or, in other words, equal interest among the people should have equal interest in it.

Of course, the Founders' conception of who constituted political society was hardly identifiable with ours but in their times, this was still a remarkably democratic vision of what a popular government should look like.

Their idea of equal interest is not very different from the one-person, one-vote principle that has guided modern American thinking about representation since the 1960s. It implies that the true goal of democratic politics is equitable inclusion, not overt distortion or exclusion.

The Times, Places and Manner Clause invites Congress to think boldly about how to attain that end, which is, in fact, part of the process of forming a more perfect Union.

Thank you very much.

[The statement of Mr. Rakove follows:]

Statement on the Historical Origins and Implications of the Times, Places and Manner Clause (U.S. Constitution, Article I, Section 4, Clause 1)

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Introduction

In its origins and substance, the Times, Places and Manner Clause (hereafter TPM) rested on two presumptions about the nature of the system of national popular representation that the Constitution created. First, the initial responsibility for determining how members of the House of Representatives would be selected would devolve to the state legislatures. This presumption reflected the underlying structure of a federal system in which the individual states remained autonomous units of government, entitled to decide how their electorates would be constituted and empowered to choose their representatives. Second, their decisions about the election of members of Congress would be subject to federal oversight and congressional alteration. That authority rested in part on the belief that determining how to best represent the people was itself an experimental problem in constitutional design that should be subject to review in the light of further political experience. But the adoption of the TPM Clause also reflected the serious

misgivings about the state legislatures that many framers of the Constitution shared. That skepticism about the state legislatures was a conspicuous element in the Federalist movement that favored the adoption of the Constitution. Anyone concerned with the original meaning of the TPM Clause, as it was understood in the late 1780s, needs to take this attitude into account. Translated to the political discourse of our own moment in American history, this historical reading justifies an expansive interpretation of the potential uses of the TPM Clause (as contemplated, for example, in HR1, the For the People Act). Indeed, in certain respects the concerns of the 1780s still seem pertinent two-and-a-third centuries later.

Origins of the TPM Clause

At the Federal Convention, the TPM Clause originated in the work of the five-member Committee of Detail, which met over ten days before presenting its report on August 6, 1787. The Committee's essential task was to convert the general resolutions the Convention had adopted during its first eight weeks of debate into a working text of a constitution. Beyond stipulating "That the Members of the first Branch of the Legislature" would be elected by the people and arranging for a decennial census to be conducted to adjust the size of the lower house, the Convention had previously said nothing about the mode of election. The Committee of Detail filled this omission. In the initial sketch of the TPM provisions drafted by Edmund Randolph, with "emendations" from John Rutledge, elections to the House "shall be *biennially* held on the same day through the *same* state: except in case of accidents, and where an adjournment to the succeeding day may be necessary." The place of election "shall be fixed by the legislatures from

time to time, or on their default by the national legislature."[1] The reference to state legislatures *defaulting* their electoral obligations indicates, at the very least, a fear that recalcitrant states might discourage or prevent their constituents from being able to elect their representatives. The provision then underwent further refinement. A fresh draft in the pen of James Wilson provided that "The Times and Places and the Manner of holding the Elections *of* the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered and superseded by the Legislature of the United States." Here again the draft language seems to contemplate obstructive action by the state legislatures. The phrase "at any Time, be altered and superseded" implies that Congress might need to intervene quickly to prevent a derelict state legislature from impeding the election of the people's representatives.[2] Nothing in this wording implies that these alterations need be a matter of negotiation between Congress and the affected state or states; or that there should be a waiting period delaying congressional action or constructive state action. Nor, however, were such processes precluded.

Further tinkering with the draft version of the TPM Clause made its language less threatening. Another draft in Wilson's hand eliminated "superseded," which would have been redundant of "altered" in any case. As reported to the Convention on August 6, the times, places, and manner of electing both houses would be "prescribed" by each state's legislature, "but their provisions concerning them may, at any time, be altered by the Legislature of the United States."[3] The Convention debated the clause three days later. After James Madison and Gouverneur Morris failed in a motion to exclude the Senate from the clause, the delegates turned

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[1] Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven, 1911, 1937), II, 137n., 139. From these quotations I have removed words deleted from Randolph's draft but retained italicized words and letters indicating additions he made.
[2] Ibid., 155.
[3] Ibid., 165, 179.

their attention to the second half of the clause, with its congressional oversight provision. Two South Carolina framers, Charles Pinckney and John Rutledge (a member of the Committee of Detail), moved to strike this whole provision, on the grounds (as Madison recorded the point) that the states "could & must be relied on in such cases" to do their duty. Five delegates then discussed the motion. Their remarks offer the best evidence of how the framers understood the scope and significance of the clause.[4]

Nathaniel Gorham of Massachusetts, a past president of the Continental Congress, opened the remarks by noting that "It would be as improper [to] take this power from the Natl. Legislature" as it would be for the British Parliament to leave "the circumstances of elections . . . to the Counties themselves." Madison then gave a lengthy speech detailing a slew of concerns and objections justifying his opposition to the South Carolina motion. He began by noting that one could not uncritically assume that the state legislatures would always prefer "the common interest at the expense of their local conveniency or prejudices." Because the "mode" chosen for the appointment of representatives could affect the results, the state legislatures "ought not to have the uncontrouled right of regulating the times places & manner of holding elections. These were words of great latitude," Madison continued, and would therefore be subject to "all the abuses that might be made of the discretionary power."

Madison then detailed the range of decisions that states would have to make to determine how their representatives would be elected:

> Whether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place; shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many

[4] Ibid., 239-42. All the quotations cited in the next four paragraphs are covered by this note.

other points would depend on the Legislatures, and might materially affect the appointments.

As this single sentences demonstrates, Madison's account of the scope of the TPM Clause covered everything from how individuals would vote to the definition of which constituencies would be represented. These matters were substantive in nature, and precisely because that was the case, the qualms he expressed about how the states would answer these questions justified federal oversight. "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." Moreover, wherever there was an "inequality" in the distribution of seats within the state legislatures, one could expect a corresponding bias to "produce a like inequality in their representation in the Natl. Legislature." Given these dual concerns with substantive questions about representation and the prospect for partisan distortions in the election of representatives, granting Congress the power to alter state regulations seemed entirely sensible.

Following Madison, three other delegates addressed the Pinckney-Rutledge motion. Rufus King noted that no one had suggested how this power might be abused. Gouverneur Morris "observed that the States might make false returns and then make no provisions for new elections." Roger Sherman indicated that he thought the clause should be retained, "though he had himself sufficient confidence in the State Legislatures." The South Carolina amendment was then rejected without a roll call. The second half of the TPM Clause was then revised at the suggestion of George Read. Instead of using the word "prescribed" to refer to the decisions of the state legislatures, Read proposed inserting the phrase "regulations, in each of the foregoing cases may at any time, be made or altered by the Legislature of the U.S." The point of this revision, Read explained, was "to give the Natl. Legislature a power not only to alter the

provisions of the States, but to make regulations in case the States should fail or refuse altogether." The entire clause was then approved *nemine contradicente*—with no one voting against it.

In his notes of debates, Madison gave himself the principal credit for defending the TPM Clause. His arguments will shortly be examined in greater detail; they offer important insights not only into his criticisms of the "vices" of the state legislatures but also into the substantive problem the TPM Clause necessarily had to address. But even without giving special attention to Madison's speech, the thrust of this debate indicates that the framers were generally united on the importance of giving Congress significant authority over the conduct of its own elections. One element of that consensus was the perception that individual state legislatures might well misuse, abuse, or even obstruct the entire process, thereby jeopardizing the right of their constituents to be adequately and fairly represented in the national legislature. But Madison's defense of the TPM Clause also implicates questions and problems that the whole American polity had to consider, namely, beyond agreeing that one branch of the national legislature had to represent (or re-present) the people themselves, what other norms and criteria should the House of Representatives also fulfill?

James Madison's Concerns

Whether or not we identify Madison as "the father of the Constitution," or simply regard him as a major shaper of the agenda of the Federal Convention of 1787, his political concerns and writings still dominate our understanding of the origin of the Constitution. In the period preceding the assembling of the Convention at Philadelphia in May 1787, no one did more than Madison to shape its agenda. His papers reveal more about the concerns and the tactics that

drove the emerging Federalist movement than those of any other framer. And in the end, although Alexander Hamilton was the original author of and most prolific contributor to the eighty-five essays of *The Federalist*, Madison's papers—starting with his first essay, the much-analyzed *Federalist 10*—define the outlines of what modern commentators often call our "Madisonian constitution."

The dominant themes Madison expressed in his August 9 speech on the TPM Clause were fully consistent with his pre-Convention arguments about what he described as the "Vices of the Political System of the United States." The twelve-point memorandum on that subject that Madison drafted mostly in April 1787, roughly a month before the Convention was scheduled to assemble, repeatedly emphasized the failings of the state legislatures, not only to fulfill their duties to the national government under the Articles of Confederation, but also to vindicate the principles of majority rule that constituted the foundational premise of republican government. The most obvious failings dealt with the failure of the states to provide their "requisitions" to fund national purposes and their failure to comply with the terms of national treaties—most importantly, the Treaty of Paris ending the war for independence. Others concerned the unfair measures states pursued against the citizens of other states and the "want of concert in matters where common interest requires it." Madison traced the weakness of the Continental Congress to its lack of authority to "sanction" or "coerce" the states into performing their acknowledged duties. The omission of this essential authority owed something to the patriotic enthusiasms of 1776-77, when the Articles of Confederation were drafted. But they also reflected conditions that, he now concluded, would impair any federal system in which the central government had to rely on the voluntary compliance of the states to implement its measures. The basic facts, Madison reasoned, were that the interests of the were too diverse interests to produce common

agreement; that each contained "courtiers of popularity" who would happily mobilize opposition to federal measures; and that even where common agreement on federal policy did exist, doubts about whether other states would comply would impair the collective performance of all.[5]

To this litany of vices about the failure of the states to support federal policy, however, Madison added a fresh set of charges criticizing the internal vices of the state legislatures. Here he complained about the "multiplicity," "mutability," and finally the "injustice" of state legislation, the last of which "betrays a defect still more alarming, more alarming not merely because it is a greater evil in itself, but because it brings into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights." Madison then posed a serious question which was not merely rhetorical in nature: "To what causes is this evil to be ascribed?" The answers he gave to this question in the remainder of the memorandum in turn provided the first statement of the arguments we know best from *Federalist* 10. The famous conclusion that Madison drew was that the greater the extent of a republican society, the more difficult it would become for the wrong kinds of factions to form, the kind, that is, that would not respect the common good and private rights. *Contra* the conventional wisdom which held that republics should be geographically small and socially homogeneous, Madison concluded that a society possessing "a greater variety of interests, of pursuits, of passions, which check each other" would prove more resistant to the vices of faction. The extended national republic of the United States

[5] James Madison, Vices of the Political System of the United States, [April 1787], in Jack N. Rakove, ed., *James Madison: Writings* (New York: Library of America, 1999), 69-73. Here I draw on my prior writings, especially Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York, 1996), 35-36; idem., *A Politician Thinking: The Creative Mind of James Madison* (Norman, OK, 2017), 21-53.

would prove less vulnerable to the evils of factious republicanism than any or all of the individual states.[6]

Madison drew one critical programmatic conclusion from this analysis, and it had a profound impact on his agenda for the Federal Convention. Beyond the "positive" legislative powers that Madison wished to vest in the national government, he also believed that the national legislature should exercise "a negative *in all cases whatsoever* on the legislative acts of the States, as heretofore exercised by the Kingly prerogative" over the American colonies. This veto power struck Madison as being "absolutely necessary, and . . . the least possible encroachment on the State jurisdictions." It would have two great uses. First, it would enable the national government to protect itself against the efforts that Madison still expected the states to make "to invade the national jurisdiction, to violate treaties & the law of nations & to harass each other with rival and spiteful measures dictated by mistaken views of interest." Second, such a negative would act as a "controul [sic] on the internal vicissitudes of State policy; and the aggressions of interested majorities on the rights of minorities and of individuals." It would, that is, allow the national government to intervene within the states individually, preempting the enactment of laws that were subversive of national policies or that would disadvantage minorities.[7]

The negative on state laws did not, of course, become part of the Constitution. Its rejection was a bitter disappointment to Madison, and one reason why, when the Convention adjourned, he still doubted that the Constitution would do enough to "prevent the local *mischiefs* which every where excite *disgusts* agst the *state governments.*"[8] In late October 1787 Madison wrote a lengthy letter to Thomas Jefferson that provided an extended defense of this proposal,

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[6] *Madison: Writings*, 74-80.
[7] Letter of Madison to George Washington, April 16, 1787, ibid., 81-82.
[8] Letter of Madison to Thomas Jefferson, September 6, 1787, ibid., 136.

which he knew Jefferson was unlikely to favor. The idea that the national legislature should be able to quell or override state legislation remained a remedy that Madison still privately supported. His "disgust" with the state legislatures may have run deeper than the feelings of other framers of the Constitution, but then again, it was based on his reflections about his three-and-a-half years of uninterrupted service in the Continental Congress (1780-83) and another three years spent as the dominant member of the Virginia House of Delegates (1784-86). In fact, the debate of August 9, 1787 indicates that other framers shared Madison's general concerns with the potential delinquency of the states.[9]

In its own way, the TPM Clause implemented the logic of Madison's pet scheme for a negative on state laws. To say that Congress "may at any time by Law make or alter such Regulations" as the states had enacted governing the election of members of both houses was to allow the legislative authority of the states to be superseded or overruled. The TPM Clause would thus operate much as the negative on state laws would have done, except that it could be applied either against individual delinquent states (literally negatively) or used positively if there was a national agreement on the optimal mode for choosing members of the House. (In the case of the Senate, the sole question that mattered was whether senators would be elected in a joint session of both houses or bicamerally, with each house consenting on a final selection.)

The critical question thus involved the election of the House of Representatives. Here the disparaging comments that Madison directed against the state legislatures were secondary to the genuinely substantive problems that this issue raised. On what basis, or in conformity to which

[9] Letter of Madison to Thomas Jefferson, October 24, 1787, ibid., 146-52. The arguments in this letter anticipate the famous theory of *Federalist* 10, which was published four weeks later. The most significant difference between the texts is that there was no need for Madison to offer a public defense of a provision the Convention had rejected.

principles, should the people of a state be represented? Should an entire state be regarded as a single constituency, with individual voters casting as many ballots as the state's whole delegation? Should voters cast a single vote for one member of their geographically defined district? Should voters in each district vote for members coming from all the districts into which a state could be divided?

Prior to 1787, the Anglo-American model of representation—as applied to the House of Commons and the colonial and (post-1776) state legislatures—had rested on simple principles. In the English (post-1707 British) House of Commons, each shire or county sent two members to Parliament, and legally chartered bodies (such as urban boroughs or other corporations) could be granted the same right of representation. The idea, however, that the right to representation should be equally proportioned across the population, or that towns should be given the power to send members to the House of Commons as they grew more populous, was not a norm that was generally accepted. From the late seventeenth century down to the passage of the two great parliamentary Reform Acts of 1832 and 1868, complaints about the inequities of political representation were a recurring theme in British politics. After the Hanoverian dynasty acceded to the British throne in 1714, the ministries that held power thereafter used the existence of "rotten" and "pocket" boroughs—respectively, constituencies with few voters or where a government or aristocratic interest dominated—to develop the parliamentary majorities needed to sustain their administration. Coupled with the use of offices and pensions to make members of the House susceptible to Crown influence, these practices supported the common criticism that Britain's "vaunted" or "boasted" constitution rested on a corrupt foundation.[10]

[10] See the general discussion in Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, 1967, 1992, 2017), 55-93.

The American colonists and revolutionaries were well versed in these criticisms of this corrupted constitution. More than that, beginning with the Stamp Act crisis of 1765-66, the differences between the practices of representation in Georgian Britain and in its American provinces formed a fault line that worked to mobilize colonial opposition to British imperial policy. The standard American response to the Stamp Act held that taxes were the "free gift" of the people, to be granted only with the consent of one's own legislature. Because Americans sent no members to the House of Commons, Parliament had no authority to tax them. Defenders of the British government replied that the colonists were "virtually" represented in Parliament, because members of the House of Commons had the responsibility of considering the good of the entire polity, and not the mere interests of their immediate constituents.[11]

Americans found these claims wholly unpersuasive. In the colonies the right of political representation was routinely extended to communities—either townships or counties—as they were legally organized. There was no selective process of granting the right of representation to some communities while denying it to others. When spokesmen for the British government wrote argued that the colonies had no greater right to representation than, for example, the emerging industrial cities of the English midlands, American writers scoffed at their arguments. The most famous response came from the Massachusetts lawyer, James Otis. "To what purpose is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham, and Sheffield, who return no members? If those now so considerable places are not represented, they should be."[12] So much for the claim that the colonists could be virtually represented by members of the House of Commons whom they would never see! In the face of these objections, the British response

[11] Ibid., 161-75.
[12] Ibid., 169 for the famous Otis quotation.

moved in a different direction. Instead of insisting that the colonists were somehow represented in Parliament, the government argued that Parliament (acting with the king's consent) was the ultimate sovereign within the British empire, and that when Parliament acted, the colonists simply had to obey its decisions. The idea that the consent of the people was essential to their duty to obey the laws here gave way to the idea that law was nothing more nor less than the command of the sovereign, here conveyed by the idea that ultimate sovereignty within the British empire resided in the king-in-Parliament.[13]

The expectation that representation was a *right* that should be routinely extended to all communities, rather than a *privilege* that government could offer, withhold, or even retract through *in quo warranto* proceedings, was part of the common understanding that shaped the new state constitutions that Americans began writing in 1776. That idea worked well at the state level of politics, where there was a finite number of communities to be represented. One impact of the political enthusiasm that accompanied the American movement toward independence in the mid-1770s was to encourage more communities to make sure that their representatives would physically attend the legislative assemblies. But the framers of the Federal Convention faced a more complicated question. Believing that effective debate within a legislative chamber would require some upper limit on the number of its members, they could not imagine allowing the size of the House to expand indefinitely. The individual communities to which American practice had routinely assigned legislative seats would have to be combined one way or another. Perhaps the state itself was the appropriate unit of representation—as it remained for some small states until 1842, when Congress deployed the TPM Clause to require that all members of the House would

[13] Ibid., 198-229.

be elected in single-member districts. The latter was the model of representation that most other states adopted quickly.

Yet the general resort to this practice still begged an important question. Unlike towns, townships, and counties, which exercise multiple functions of governance and hence encourage some sense of civic identity, congressional districts exist for one purpose only: to elect members of the House of Representatives. They are in that sense arbitrary and artificial in their creation; they expect nothing of their constituents beyond exercising their suffrage (if individuals choose to vote). If one lives in a populous state, it is unlikely that one knows the number of one's district, much less its boundaries. A district is simply an arbitrary entity imposed on a map, an artifact of political arithmetic and geography that has only one purpose. It is that arbitrary character that makes congressional districting so vulnerable to political manipulation, as state legislatures, armed with ever more refined information about their constituents, redesign districts for partisan ends. As commentators like to say, in the United States, voters do not choose their representatives; the representatives (or their party's mercenary agents) choose their voters.

When Madison defended the TPM Clause on August 9, 1787, he thus had two concerns in mind. One was the danger of overt manipulation (or obstruction) conducted for improper purposes by partisan state legislatures, producing results that might prove subversive of the collective national good. It was the absence of any formula prescribing what a district should be that left the whole problem of designing the "manner" of choosing representatives open to the wrong impulses. That was why a congressional remedy had to be kept available, one that could be legally invoked whenever Congress (and the assenting president, since it had to act by law) deemed it necessary. Yet the larger substantive problem also had to be confronted. The TPM Clause could be applied constructively, as Americans learned more about how their system of

political representation was actually working. It was thus an invitation to creative constitutional thinking, which would allow those to come "to form a more perfect union" through the lessons of experience.

The Mirror of Representation

There was, however, one other presumption about the nature of political representation that Americans repeatedly stated during the Founding era that is also relevant to our concerns. Although this presumption did not address the TPM Clause directly, it stated and defined an ideal of representation—or even re-presentation—that illuminated the underlying democratic values of this era of constitutional formation. Although these democratic values are not identical with ours, they nevertheless constituted an important first step in the process that has led the American electorate to expand from one generation to the next.

When Americans began writing new state constitutions in the spring of 1776, they expressed a republican enthusiasm that reflected their awareness of the historical novelty of their enterprise. As John Adams observed at the conclusion of his influential pamphlet, *Thoughts on Government*, which appeared in April 1776, he and his colleagues had "been sent into life at a time when the greatest lawgivers of antiquity would have wished to live." Earlier in his pamphlet, Adams expressed the American ideal of a representative assembly:

> The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other

> words equal interest among the people should have equal interest in it. Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections.[14]

Two years later, when the new commonwealth of Massachusetts was still struggling to write its constitution, Theophilus Parsons reworked Adams's language in a tract commonly known as *The Essex Result*. "The rights of representation should be so equally and impartially distributed," Parsons wrote, "that the representatives should have the same views, and interests with the people at large. They should think, feel, and act like them, and in fine, should be an exact miniature of their constituents."[15]

The same opinion was also expressed at the Federal Convention. "The Legislature ought to be the most exact transcript of the whole Society," James Wilson declared on June 6, 1787. George Mason echoed the point a few minutes later. "The requisites in actual representation [the phrase that Americans used to distinguish their practices from the British notion of virtual representation] are that the Representatives should sympathize with their constituents, should think as they think, & feel as they feel, so much so, that even the diseases of the people should be represented—if not, how are they to be cured?"[16]

Of course, these comments hardly exhausted the concerns that the framers of the Constitution, their Federalist supporters, and their Anti-Federalist opponents expressed about the nature of political representation. This was a large subject, and arguably the most important problem of all, and a broader range of goals, fears, concerns, and opinions remained to be stated.

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[14] John Adams, *Thoughts on Government* (Philadelphia, 1776), reprinted in Philip B. and Ralph Lerner, eds., *The Founders' Constitution* (Chicago and London, 1987), I, 107-110.
[15] [Theophilus Parsons], *Result of the Convention Holden at Ipswich in the County of Essex . . .* (Newburyport, 1778), reprinted in Oscar Handlin and Mary F. Handlin, eds., *The Popular Sources of Political Authority* (Cambridge, 1966), 341.
[16] Farrand, ed., *Records*, I, 132-34, 142,

But the idea that the regulatory authority over elections exercised by either the state legislatures or Congress (under the TPM Clause) should be used to cloud the mirror, distort the miniature, and mutilate the transcript was never part of their discussion—except insofar as Federalists and Anti-Federalists argued that corrupt motives would tempt the other side to violate this fundamental norm.

Viewed in this light, the For the People Act and the authority it derives from the Times, Places and Manner Clause remain consistent with the deepest political ambitions of the Founding era and, one could argue, with the original meaning and intention of the Constitution. A latter-day Madisonian, like the author of this statement, would not find it difficult to write an analysis of state legislative politics, *circa* 2020-2021, that would be consistent with the animus of his April 1787 memorandum on the Vices of the Political System of the United States. To a strike though dispiriting degree, many of his criticisms still hold.

The CHAIRPERSON. Thank you very much, Professor.

Now I would like to call on Dean Tolson for her testimony.

STATEMENT OF FRANITA TOLSON

Ms. TOLSON. Thank you very much.

To Chairperson Lofgren, Ranking Member Davis, and distinguished Members of the committee, I appreciate the opportunity to appear and speak about the scope of congressional power under the Elections Clause of Article I, Section 4, which is a vast source of power, but has, nonetheless, been significantly underutilized.

Now, under the clause, States, as we know, can set procedural regulations for Federal elections; but, importantly, Congress can implement, quote, "a complete code for Federal elections," end quote. And this code can supplement or, alternatively, displace the State regulatory regime, particularly if States have jeopardized the health and vitality of Federal elections in some way.

Under the clause, Congress can make or alter State law. Congress can also commandeer State law, State officials, and State offices to implement Federal law. In certain circumstances, Congress can regulate voter qualification standards.

By invoking a number of constitutional provisions that empower Congress to regulate the times, places, and manner of Federal elections, as well as regulate voter qualification standards, H.R. 1 stands on firm constitutional footing because, first, provisions similar to those in H.R. 1 have already been validated by Supreme Court case law and by prior congressional classes.

And, second, Congress' authority to enact Federal voting rights legislation is substantially broader when it acts pursuant to the Elections Clause, as well as the 14th and 15th Amendments, than when proceeding under the latter two amendments alone.

Despite the Elections Clause's untapped potential, it has not been a source of much Federal legislation, which contributes to this perception that H.R. 1 is unprecedented and, therefore, unconstitutional. It is not.

For example, a 1932 Supreme Court decision held that voter registration for Federal elections is a manner regulation under the Elections Clause, a holding that the Court reaffirmed as recently as 2013. So H.R. 1's voter changes are not constitutionally problematic.

In addition, Congress can commandeer State offices and State officials to implement Elections Clause legislation, as it has in statutes like the National Voter Registration Act, which creates voter registration agencies out of all offices in the State that provide either public assistance or State-funded programs. Courts have found these provisions to be constitutional, illustrating that those portions of H.R. 1 that impose additional obligations on State officials with respect to voter registration are also constitutionally sound.

Moreover, the Supreme Court in a 2015 decision has upheld the use of independent commissions to draw congressional districts, thereby validating H.R. 1's use of these commissions for Federal elections.

Given these precedents, these provisions of H.R. 1 are arguably constitutional. There will, nonetheless, be inevitable constitutional objections to provisions of H.R. 1 that touch on voter qualifications,

which are usually within the State's domain, and in particular the fact that H.R. 1 reenfranchises those with felony convictions for purposes of voting in Federal elections.

However, these concerns are also unfounded. Under the Elections Clause, there are limited circumstances in which Congress can reach voter qualifications, particularly in instances where State regulations discourage or unduly impact voter turnout in Federal elections.

For example, the Uniformed and Overseas Citizens Absentee Voting Act, or UOCAVA, enacted solely pursuant to the Elections Clause, created a uniform Federal ballot specifically for use by military personnel and incorporated State voter qualification standards to determine which personnel were entitled to vote.

Congress enacted UOCAVA to address an exigency that threatened the health and legitimacy of Federal elections; namely, the disenfranchisement of a category of military voters overlooked and insufficiently protected by State law.

But when the Elections Clause is coupled with Congress' power under the 14th and 15th Amendments, both of which are also invoked as explicit authority for H.R. 1, then Congress' authority to reach voter qualifications is even more indisputable.

H.R. 1 will prohibit States from barring individuals no longer in custody from exercising their fundamental right to vote in Federal elections as protected by the 14th and 15th Amendments. As it stands, millions of people—a category that is, unsurprisingly, disproportionately minority, given the racist status of these laws generally—are disenfranchised for hundreds of different felonies and misdemeanor offenses.

As the Supreme Court has recognized, Congress has the power under the Elections Clause to, quote, "protect the elections in which its existence depends," and, quote, "to protect the citizen and the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself," end quote. H.R. 1's felon disenfranchisement provisions serve this exact purpose.

As these judicial and statutory precedents establish, most of H.R. 1's provisions do not approach the outer limit of Congress' power under the Elections Clause which empowers that body to, again, make or alter State law, to commandeer State law, State officials, and State offices, and, especially when coupled with Congress' power under the 14th and 15th Amendments, to regulate voter qualification standards.

Thank you so much for the opportunity to discuss my research. I welcome any questions that you have.

[The statement of Ms. Tolson follows:]

U.S. House Committee on House Administration
Hearing on
"The Elections Clause: Constitutional Interpretation and Congressional Exercise."
July 12, 2021

Statement of Franita Tolson
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Chairman Lofgren, Ranking Member Davis, and Members of the Committee on House Administration:

Thank you for the opportunity to appear and speak about the scope of congressional power under the Elections Clause of Article I, Section 4 of the U.S. Constitution.[1] This issue has been at the core of my research since I entered the legal academy over a decade ago. I have published numerous articles in leading law reviews, and I have a forthcoming book project on the scope of congressional power over elections.[2]

The Elections Clause is a vast source of federal power that has been significantly under-utilized in the two centuries long battle over the regulation of federal elections. Under the Clause, states can set procedural regulations, but Congress can also enact its own laws and, more importantly, veto state regulations at will. Despite this unique structure, both the U.S. Supreme Court and legal scholars tend view exercises of federal authority under the Clause as a somewhat unwelcome intrusion on the states' authority to legislate with respect to federal elections.

Contrary to this view, Congress can disregard state sovereignty in enacting and enforcing legislation passed pursuant to the Elections Clause. While traditional federalism doctrine prioritizes experimentation in governance dispersed among the fifty states—variation that emerges, in part,

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[1] The Elections Clause, in its entirety, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1.
[2] *See, e.g.,* FRANITA TOLSON, IN CONGRESS WE TRUST?: THE EVOLUTION OF FEDERAL VOTING RIGHTS ENFORCEMENT FROM THE FOUNDING TO THE DAWN OF THE JIM CROW ERA (forthcoming 2022).

from limiting the reach of the federal government,[3] the Elections Clause places a premium on congressional, rather than state, sovereignty. Its structure permits Congress to implement a "complete code for federal elections" that can supplement or, alternatively, displace the state regulatory regime,[4] particularly if states have jeopardized the health and vitality of federal elections in some way. Because states do not have identical authority to displace federal law under the Clause, Congress' power is broader than the authority that the Clause confers upon the states.

Consequently, congressional power under the substantive provisions of the Elections Clause (governing the "Times, Places, and Manner" of federal elections) is not constrained by the same federalism concerns that have hobbled Congress' ability to enforce the Fourteenth and Fifteenth Amendments. In *Shelby County v. Holder*, the U.S. Supreme Court criticized the preclearance provisions of section 4(b) and 5 of the Voting Rights Act of 1965 ("VRA") for, among other things, forcing a subset of states to solicit permission from the federal government to enact election laws that they would otherwise have the authority to implement.[5] This intrusion imposed a significant and, in the Court's view, unwarranted federalism cost that could not be justified by the Fourteenth and Fifteenth Amendments.[6] However, the Court ignored that the Elections Clause stands as an additional source of authority, unconstrained by these federalism concerns, that can justify federal anti-discrimination and voting rights legislation.

Both the unique nature of the Elections Clause as well as the missteps of the *Shelby County* decision highlight the importance of viewing Congress' authority comprehensively to account for the myriad provisions that empower Congress to regulate federal elections. To explain the scope of this authority, the remainder of this written testimony is organized as follows. Part I clarifies the scope of congressional power under the Elections Clause by relying on history, text, statutes, and judicial precedents. This part illustrates that Congress' authority to "make or alter" state regulations not only empowers that body to impose uniformity on the states, but Congress can commandeer state officials to implement Elections Clause legislation and, in some limited circumstances, regulate voter qualification standards. Part II assesses some of the more controversial provisions of H.R. 1 in light of this history, text, and precedent. This part shows that H.R. 1 is relatively uncontroversial when compared to Election Clause legislation that Congress has enacted historically. More importantly, Congress' reliance on multiple sources of authority to justify H.R. 1, including the Elections Clause and the Reconstruction Amendments, provides sufficient constitutional grounding for all of the provisions of H.R. 1.

I) The Elections Clause as a Broad Source of Congressional Authority

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[3] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457-58 (1991) (reviewing the "system of dual sovereignty between the States and the Federal Government").

[4] *See* Smiley v. Holm, 285 U.S. 355, 366 (1932).

[5] *See* Shelby County v. Holder, 570 U.S. 529 (2013).

[6] *See* U.S. CONST. AMEND. XIV (providing, in relevant part, "No State shall make or enforce any law which shall… deny to any person within its jurisdiction the equal protection of the laws"); *id.* AMEND. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). Congress can enforce both of these provisions through "appropriate legislation." *Id.* AMEND. XIV, SEC. 5.; *Id.* AMEND. XV, SEC. 2.

The Election Clause's overarching purpose is to ensure the continued existence and legitimacy of federal elections,[7] making this provision an important supplement to the Reconstruction Amendments as a source of authority to combat voter suppression, improve the administration of federal elections, and combat racial discrimination in voting. As the next sections show, the Clause serves these purposes by empowering Congress to legislate broadly, even if this sometimes displaces the underlying state regime; necessitates the commandeering of state officials to implement Elections Clause legislation; or requires that Congress regulate the voter qualification standards that are within the states' regulatory authority.

A) *Congress' Authority to Protect the Health and Legitimacy of Federal Elections*

The Elections Clause assumes that well-functioning states will exercise significant authority over federal elections to preserve their role in the formation of the federal government,[8] but Congress has, on occasion, intervened in the electoral process to protect the health and legitimacy of federal elections. Congress' enactment of the Help America Vote Act ("HAVA") as a response to several issues that occurred during the 2000 Presidential election is instructive of this point.[9] Voters cast approximately one hundred million ballots in Florida, but the election was a statistical tie in the state between George Bush and Al Gore. The fact that the two contestants were separated by very few ballots unsurprisingly generated significant concerns about the voting process in several counties in Florida, leading to litigation and public protest.[10]

After the election ended, Congress expressed major reservations about the use of varying technologies throughout the state, the questionable experience of poll workers, and the fact that local governments bore the costs of elections and voter registration—all of which played a pivotal role in the controversy surrounding the 2000 election.[11] Given this, Congress could have easily justified imposing a uniform rule that addressed these issues, but HAVA does not nationalize presidential elections. Instead, it addresses these administrative problems by moving the election process "from an environment of local control with loose state and federal oversight to an environment of strong state control and loose federal oversight."[12] Congress assumed that most states were well-functioning such that they could continue to manage presidential elections; for those with problems, the answer was not federal uniformity, but more oversight of local election boards by state officials. Congress, nonetheless, mandated this oversight, a decision usually reserved to the states themselves.

Through HAVA, Congress adhered to its traditional position of leaving much of the preexisting state regime in place to promote finality and ease of administration, even when Congress was incentivized to impose uniformity as much as possible because of the disastrous 2000 election. These values matter as much as creating a well-functioning national democracy in which uniform

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[7] *See* Franita Tolson, *The Spectrum of Congressional Authority over Elections,* 99 B. U. LAW REV. 317 (2019); Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework,* 59 WM. & MARY L. REV. 2211 (2018); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act,* 65 VAND. L. REV. 1195 (2012).

[8] *See* Tolson, *Reinventing Sovereignty, supra* note 7, at 1207, 1258 (arguing that this is one of the purposes behind the Clause's adoption).

[9] *See* Leonard M. Shambon, *Implementing the Help America Vote Act,* 3 ELECTION L.J. 424, 426-28 (2004).

[10] *See* Bush v. Gore, 531 U.S. 98, 103 (2000) (per curiam) (holding that the recount of presidential ballots without uniform standards violated the Equal Protection Clause of the Fourteenth Amendment).

[11] *See* Shambon, *supra* note 9, at 424-25.

[12] *Id.* at 431.

federal authority might better address dysfunction in a swing state but could potentially cause chaos in the forty or so other states that properly conduct their elections. The baseline assumption in the Clause is that states should be sufficiently autonomous to properly structure federal elections, but in those instances in which federal oversight could result in more democratic outcomes or better election administration, Congress has been willing to enact this legislation under the Elections Clause.

For example, HAVA's provisional balloting requirements illustrate that the federal government can impose new, substantive requirements on the states that are not necessarily traceable to state law. Section 303(b) of HAVA, for example, requires a voter who registered by mail to present photo identification or documentary proof of identification when voting in-person for the first time.[13] Without such identification, states must treat a prospective voter's ballot as provisional until he or she produces the proper documentation.[14] Prior to HAVA, many states required voters to produce identification at other points during the voting process; allowed individuals to vote using more or less onerous forms of identification; or utilized procedures, including for provisional ballots, that varied considerably. Section 303(b) sought to streamline this process to increase predictability and ensure little variation in the treatment of first time voters, who may be less informed about the process than their more seasoned counterparts.

In *Sandusky County Democratic Party v. Blackwell*, the district court concluded that voters have a right to cast a provisional ballot under HAVA in their designated precinct and a private right of action to enforce the provisional voting requirement. Another case, *White v. Blackwell*, read HAVA to require states to allow voters who requested (but did not cast) an absentee ballot to vote provisionally.[15] At the time of the election, Ohio did not have a law that was preempted by this requirement. Both cases implicitly recognize that Congress has independent authority to legislate and the courts use HAVA—rather than state law—as the baseline for resolving the thorny issues in these cases.[16] For purposes of legitimacy and ease of administration, states remain relevant and important for the regulation of federal elections—just not sovereign over them.

B) Congress' Power to Commandeer State Officials under the Elections Clause

In addition to its authority to "make or alter" state regulations, the sharpest and most prominent iteration of congressional sovereignty under the Elections Clause is its power to commandeer state offices, state law, and state officials—authority that stands in stark contrast to traditional views about the primacy of state sovereignty under federalism doctrine.[17] Despite the reinvigoration of the Supreme Court's federalism jurisprudence, a trend that has continued with the Roberts Court, Congress' authority to commandeer state officials pursuant to the Elections Clause remains unchanged. As Samuel Issacharoff has observed,

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[13] Help America Vote Act, 52 U.S.C. § 21083(b)(1)-(2).

[14] *Id.* § 21083(b)(2)(B).

[15] *See* White v. Blackwell, No. 3:04 CV 7689, 2001 U.S. Dist. LEXIS 26043, at *6-7 (N.D. Ohio Dec. 12, 2001).

[16] *See, e.g.*, Arizona v. Inter Tribal Council of Ariz., Inc. (*"Arizona Inter Tribal"*), 570 U.S. 1, 39 (2013) (Alito, J., dissenting).

[17] *See* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 101 (2016) (noting that the Supreme Court has not resolved this issue, but determining that "anti-commandeering challenges ... are unlikely to succeed"); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752 (2016). Other scholars have also argued that Congress can commandeer state officials when acting pursuant to the Elections Clause. *See, e.g.*, Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 237-38 (1997).

> [Congress'] power to enforce its "general supervisory power[]."... has remained intact [under the Elections Clause], even with the Court's developing Eleventh Amendment jurisprudence, which carves out a protected zone for core state functions.... Similarly, direct federal regulation [of elections] is unaffected by the concern for impermissible federal commandeering of state functions presented by congressional attempts to compel state undertakings for federal programs directly.[18]

The text of the Clause similarly suggests that Congress, in the course of exercising its authority, can commandeer the offices, law, and officials of the state in accordance with this "general supervisory power."[19] The Clause's provision that, "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed* in each State by the Legislature thereof" is very different from the language that establishes that Congress "*may at any time* by Law make or alter such Regulations."[20] The use of the mandatory language "shall be prescribed" to describe state authority and "may ... make or alter" to describe congressional authority illustrates that Congress can act if it chooses, but states must act, even if at the behest of Congress.

Arguably, neither the language of the Elections Clause nor its structure justify reading "shall" as anything other than a direct command to the states to enact the laws governing federal elections and to permit Congress to commandeer the state regulatory regime if the states have failed to carry out their duty. The Elections Clause uses both "shall" and "may" in its language, so interpreting "shall" to mean "may" so as to limit Congress' ability to commandeer the states would result in the perverse outcome that neither government is obligated to issue the laws that govern federal elections. The lack of a clear directive to either sovereign stands at odds with the purpose of the Clause, in which ensuring that states make provisions for federal elections is integral to preserving our democracy's overall legitimacy.

This view is consistent with how the Supreme Court has generally interpreted "shall," the mandatory nature of which signals that Congress can draft state officials into implementing a federal regulatory regime. Indeed, those times where the Court has interpreted "shall" to mean "may" have been to avoid the constitutional issues created by Congress' commandeering of state officials under an entirely different provision—the Commerce Clause which, unlike the Elections Clause, does not have a textual command that gives Congress express commandeering power.[21]

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[18] Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 109 (2013).

[19] *See id.*

[20] U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

[21] *See, e.g.*, New York v. United States, 505 U.S. 144, 151-54 (1992) (holding that Congress could not commandeer states into enacting a federal regulatory program by forcing them to take title to their waste). In *New York*, the Court applied the constitutional avoidance canon to section 2032c(a)(1)(A) of the Act, declining to read its language that "[e]ach State *shall* be responsible for providing ... for the disposal of ... low-level radioactive waste generated within the State" as a direct command from Congress, "despite the statute's use of the word 'shall,'" because "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems." *Id.* at 151, 170 (emphasis added). *See also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 649 (2012) (Ginsburg, J.,, concurring in part and dissenting in part) (arguing that the individual mandate was a penalty rather than a tax because "[it] commands that every 'applicable individual *shall* ... ensure that the individual ... is covered under minimum essential coverage.'").

Avoiding potentially unconstitutional interpretations is not the only reason that the Court has interpreted "shall" to be permissive. The Court also has done so to bring coherence to an otherwise ambiguous statutory scheme.[22] However, the Elections Clause's Congress-centric focus, which allows states to be pushed into the service of the federal government, is not inherently ambiguous such that reading the term "shall" as mandatory instead of permissive would create structural issues between Congress and the states, as has occurred in other contexts.

Ultimately, the text of the Elections Clause reflects that Congress' ability to commandeer the states is unlike any power that the states possess and often occurs in the absence of state action.[23] Over the past two centuries, Congress has stepped in to facilitate election administration when the states have been unable or unwilling to do so, commandeering state officials, state facilities, and state law to ensure the continued health of federal elections. During the Reconstruction era, for example, Congress sought to force state election officials to comply with state law by making noncompliance with state law a federal crime.[24] The Enforcement Act of 1870 incorporated by reference substantive state law that governed the mechanics of federal elections,[25] exposing state officials to dual liability that blurred the lines of accountability.[26] In the companion cases of *Ex parte Siebold* and *Ex parte Clarke*, the Supreme Court rejected the argument that this use of state law and state officials was impermissible, noting in *Siebold* that

> it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties.[27]

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[22] *See, e.g.*, Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 436-37 (1995). In *Lamagno*, the Court declined to read "shall" as mandatory in interpreting the Westfall Act, which empowers the Attorney General to certify that a federal employee was acting within the scope of his employment if that employee is sued for a wrongful or negligent act. The Act provides that, "Upon certification by the Attorney General ..., any civil action or proceeding ... *shall* be deemed an action against the United States ..., and the United States *shall* be substituted as the party defendant." *Id.* at 419. Reading "shall" to be mandatory instead of permissive would make the Attorney General's certification conclusive, and in the process, run afoul of the "traditional understandings and basic principles[] that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up to render." *Id.* at 434.

[23] *Arizona Inter Tribal*, 570 U.S. 1, 14 (2013).

[24] *See* The Enforcement Act of 1870, § 22, ch. 114, 16 Stat. 140, 145 (1870). For example, Section 22 of the Act provided:

> That any officer of any election at which any representative or delegate in the Congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States or by or under any State, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election ... shall be deemed guilty of a crime and shall be liable to prosecution and punishment therefor.

Id.

[25] *Id.* § 2.

[26] *See Ex parte* Clarke, 100 U.S. 399, 408 (1879) (Field, J., dissenting). Accountability is one of the core considerations at the heart the Court's anti-commandeering jurisprudence under the Commerce Clause. *See* New York v. United States, 505 U.S. 144, 151-54 (1992).

[27] *Ex parte* Siebold, 100 U.S. 371, 387 (1879).

The Court further argued that, while "Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State[,]" Congress can punish them for violating federal law.[28]

More recently, Congress has commandeered both state officials and state offices by imposing affirmative obligations on the states to implement the NVRA. Under section 10 of the NVRA, each state must designate a state officer as the chief state election official responsible for coordinating the requirements of the Act.[29] The NVRA also requires each state to designate all offices in the state that provide either public assistance or state-funded programs primarily engaged in providing services to persons with disabilities as voter registration agencies.[30] In *Voting Rights Coalition v. Wilson,* California argued that these provisions violated the Tenth Amendment by commandeering state agencies to administer a federal election scheme.[31] The Ninth Circuit rejected this argument, holding that "Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators. The exercise of that power by Congress is by its terms intended to be borne by the states without compensation."[32] Courts in both Pennsylvania and South Carolina declined to impose an anti-commandeering rule to the NVRA for similar reasons, recognizing that Congress can directly regulate the state's manner and means of voter registration.[33]

C) Congress' Authority to Regulate Voter Qualification Standards under the Elections Clause

The Supreme Court has recognized that the Elections Clause "gives Congress 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'"[34] Protecting the fundamental right to vote has been a key goal of much Elections Clause legislation that seeks to reduce administrative burdens and increase access to avoid widespread disenfranchisement, but sometimes this legislation can intrude on the authority that states retain over voter qualifications under Article I, Section 2 of the Constitution.[35] As this section shows, Congress can, in some circumstances, reach voter qualifications under the Elections Clause.

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[28] *Id.*; *see also id.* at 388. ("It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed.").

[29] 52 U.S.C. § 20509 (Supp. III 2016).

[30] § 20506(2)(A)-(B); *see* Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen, 152 F.3d 283, 285 (4th Cir. 1998) (holding that NVRA applies to public colleges); Nat'l Coal. for Students with Disabilities v. Taft, No. 2100-CV-1300, 2002 WL 31409443, at *2 (S.D. Ohio Aug. 2, 2002) (same). *See also* United States v. New York, 700 F. Supp. 2d 186, 203-04 (N.D.N.Y. 2010) (holding that NVRA applies to public colleges and community colleges).

[31] Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995).

[32] *Id.*

[33] *See* Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Ridge, 1995 WL 136913, at *6-7 (E.D. Pa. 1995); Condon v. Reno, 913 F. Supp. 946, 963 (D.S.C. 1995).

[34] Foster v. Love, 522 U.S. 67, 71 n. 1 (1997) (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)); *see also id.* (stating that this authority encompasses both congressional elections and "any 'primary election which involves a necessary step in the choice of candidates for election as representatives in Congress'" (quoting United States v. Classic, 313 U.S. 299, 320 (1941)).

[35] Article I, Section 2 of the Constitution provides that the qualifications for federal electors should be the same as the electors for the most numerous branch of the state legislature. *See* U.S. Const. art. I, § 2.

1) Manner Regulations vs. Voter Qualification Standards: Statutory Precedents

For example, the National Voter Registration Act of 1993 ("NVRA") substantially expanded voter registration opportunities by requiring states to allow voters to register by mail and at certain state and local offices.[36] The statute clarifies when states can conduct voter registration;[37] how voters can be removed from the voter rolls;[38] and the process by which states must allow voters to register.[39] These regulations impose costs and minimize the flexibility that states would otherwise have in structuring this aspect of their electoral system.[40] The NVRA is Elections Clause legislation that imposes uniformity on the states and displaces elements of the state electoral apparatus, but the statute has also been central for according additional protections to the fundamental right to vote.

While Congress' power to regulate voter registration is beyond dispute,[41] the Supreme Court has sustained the NVRA even when faced with a non-frivolous argument that the statute conflicted with a state's authority to enforce its voter qualifications.[42] In *Arizona v. Inter Tribal Council of Arizona*, the plaintiffs challenged an Arizona law that required individuals to present documentary proof of citizenship to register to vote in state and federal elections, a requirement that would disenfranchise thousands of voters (many of whom are racial minorities).[43] The plaintiffs argued that the Arizona proof-of-citizenship requirement conflicted with the NVRA's uniform federal form used to register voters for federal elections that only required affirmation of citizenship status, not documentary proof.[44] The Court held that the NVRA required states to "accept and use" the federal form as a "complete and sufficient registration application," and therefore preempted the Arizona law that would require additional documentation.[45] Notably, the dissenters in the case took the position that the NVRA interfered with the State's power to enforce its proof-of-citizenship requirement which,

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[36] The NVRA, 42 U.S.C. § 1973gg (2012) (current version at 52 U.S.C. §§ 20501-20511), governs voter registration for federal elections, making it easier for individuals to register at certain state offices including DMVs (which is why the statute is referred to as the "motor-voter" law).

[37] Section 6 requires each state to designate as voter registration agencies all offices in the state that provide public assistance and administer state-funded programs primarily engaged in providing services to persons with disabilities. 52 U.S.C. § 20506 (Supp. III 2016).

[38] Each State must also provide that a registrant may not be removed from the official list of eligible voters except by registrant request, by reason of criminal conviction or mental incapacity, or by a general program that removes voters ineligible due to death or a change in residence. § 20507(a)(3)-(4) . States must complete any program to systematically remove ineligible voters from the official lists of eligible voters no later than ninety days prior to the date Federal election. § 20507(c)(2)(A).

[39] Under section 5, a voter registration application form must be part of each state's motor vehicle registration. § 20504(a)(1). Section 6 requires each State to accept and use the voter registration application form prescribed by the Federal Election Commission to register voters by mail. § 20505(a).

[40] *See, e.g.*, Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1416 (9th Cir. 1995) (holding that the federal government does not have to cover the costs of state implementation of the NVRA).

[41] Smiley v. Holm, 285 U.S. 355, 366 (1932) (noting that Congress can implement "a complete code for congressional elections," that govern "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns").

[42] *Ariz. Inter Tribal*, 570 U.S. at 6.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 9, 14 ("We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate . . . .").

in their view, is a voter qualification standard that falls squarely within the province of the states.[46] These justices argue that any federal interference with the state's power over voter qualifications is unconstitutional, even in a context in which federal authority is plenary (such as voter registration for federal elections).

The dissenters' critique misses the point, however. Congress can reach these regulations because it is difficult, if not impossible, to completely insulate voter qualification standards from federal authority under the Elections Clause.[47] The fact that the Clause empowers Congress to enact legislation that is necessary "to enforce the fundamental right involved,"[48] as the Court has recognized, renders the line between manner regulations and voter qualification standards unclear where both are implicated.

This has been the case, historically. In a comprehensive review of founding era sources discussing the "manner" of elections, Professor Robert Natelson observed that:

> English, Scottish, and Irish sources used the phrase 'manner of election' to encompass the times, places, and mechanics of voting; legislative districting; provisions for registration lists; *the qualifications of electors and elected*; strictures against election-day misconduct; and the rules of decision (majority, plurality, or lot).[49]

In his summary of this evidence, Professor Natelson noted that American, English, Irish, and Scottish lawmakers defined "manner of election" in largely the same way, encompassing factors such as elector and candidate qualifications, time of elections, terms of office, place of elections, rules for elections, mechanics of voting, election dispute procedures and regulation of election day misconduct.[50] While it is clear that the Framers of the Constitution did not intend to give Congress

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[46] *Id.* at 23 (Thomas, J., dissenting); *Id.* at 2262, 2264 ("[B]oth the plain text and the history of the Voter Qualifications Clause, U.S. Const., art. I, § 2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied. To avoid substantial constitutional problems created by interpreting § 1973gg-4(a)(1) to permit Congress to effectively countermand this authority, I would construe the law as only requiring Arizona to accept and use the form as part of its voter registration process, leaving the State free to request whatever additional information it determines is necessary to ensure that voters meet the qualifications it has the constitutional authority to establish. Under this interpretation, Arizona did 'accept and use' the federal form.").

[47] *Compare* Oregon v. Mitchell, 400 U.S. 112, 122 (1970) (arguing that congressional power under the Elections Clause is broad enough to reach voter qualifications because "[s]urely no voter *qualification* was more important to the Framers than the *geographical qualification* embodied in the concept of congressional districts" and "[t]here can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal elections").

[48] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[49] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (2010) (emphasis added). *Id.* at 17-18.

[50] *Id.* at 13-14 (discussing the 1721 South Carolina election code that "described 'the Manner and Form of electing Members' to the lower house of the colonial assembly as including the qualifications of office-holders and the freedom of voters from civil process on election days,'" and the 1780 Massachusetts Constitution which "described the 'manner' by mandating the time of the election . . . property and age qualifications of electors, a notice of election, and who would serve as election judges"); *see also id.* at 16 ("State election laws adopted after Independence employed 'manner of election' and its variants in the same general way. The 'mode of holding elections' in a 1777 New York statute provided for public notice at least ten days before election in each county for elections for governor, lieutenant-governor, and senate. It

plenary control over voter qualifications under the Clause,[51] these sources highlight the significant overlap between manner regulations and voter qualification standards at the country's founding such that the boundary between the two was not readily apparent.

For this reason, congressional power under the Elections Clause arguably extends to setting voter qualifications if a state either fails to do so, or alternatively, has set voter qualifications in a way that undermines the health or legitimacy of federal elections.[52] This is consistent with how the Supreme Court has approached Congress' authority in other contexts, most notably with respect to its enforcement authority under the Reconstruction Amendments. In *City of Rome v. United States*, for example, the Court rejected the argument that Congress' enforcement power under the Fifteenth Amendment was limited to remedying only purposeful discrimination, noting that "even if § 2 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect."[53] The Court further observed that Congress may pass legislation under Section 2 of the Fifteenth Amendment in order to prohibit acts that do not violate section 1 of the Act, "so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch v. Maryland*."[54] Similarly, a narrow interpretation of the "manner" of federal elections could render Congress unable to effectively address state regulations that significantly undermine federal elections.

Most importantly, Congress has exercised its authority under the Clause this broadly in the past, affecting voter qualification standards in the process of regulating the manner of federal elections. For example, the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"),[55] enacted pursuant to the Elections Clause, created a uniform federal ballot specifically for use by a category of voters overlooked by state law—military personnel—and the law incorporated state voter qualification standards to determine which personnel were entitled to vote.[56]

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specified the places for election, the supervising officers and election judges, times of notice, returns of poll lists, declaration of winner, and some voter qualifications.").

[51] *See id.* at 20 (explaining that "[t]he constitutional language governing congressional elections differed from usual eighteenth-century 'manner of election' provisions" because the Constitutions lists "qualifications, times, and places separately from 'Manner'" and describes "the residuum as 'the Manner of *holding* Elections").

[52] *See, generally,* Tolson, *supra* note 7.

[53] 446 U.S. 156, 173 (1980).

[54] *Id.*

[55] 52 U.S.C. §§ 20301-20311 (2018). In the House report, representatives argued that they could impose this uniform requirement on the states because of their authority under the Elections Clause. *See Uniformed and Overseas Citizens Absentee Voting: Hearing on H.R. 4393 Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 99th Cong. 66 (1986) (statement of Rep. William Thomas) [hereinafter *UOCAVA Hearings*] ("But my concern is that one possible solution is viewed as having the Federal Government impose a degree of uniformity on the States, which then makes it easier to explain what the State procedure is because they're all the same. My concern is that if the States want to structure their election procedure differently, I think they have every right to. In fact, I don't think, beyond certain requirements, that we ought to get into the 'who' aspect of the voting. But time, place, and manner, to a very great degree, we have that ability under the Constitution.").

[56] 52 U.S.C. § 20310 (defining eligible voters as those who, notwithstanding their absence, would otherwise be qualified to vote in last place in which they resided).

The earliest attempts to protect military voters revealed that the source of authority pursuant to which Congress could enfranchise these individuals would be a point of contention.[57] The Supreme Court had not decided *Harper v. Virginia State Board of Elections*,[58] so voting was not yet a fundamental right under the Equal Protection Clause;[59] there was no record of racial discrimination in voting such that the Fifteenth Amendment was implicated;[60] nor had the Court decided that state laws prohibiting military personnel from voting were unconstitutional.[61] In 1952, President Harry Truman wrote a letter to Congress, which recognized the difficulties of enacting a uniform federal regime for overseas voting, but noted that Congress had the authority to act since the states had shirked their duty:

> I agree with the committee that, in spite of the obvious difficulties in the use of the Federal ballot, the Congress should not shrink from accepting its responsibility and exercising its constitutional powers to give soldiers the right to vote where the States fail to do so. Of course, if prompt action is taken by the States, as it should be, it may be possible to avoid the use of a Federal ballot altogether. . . . Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954.[62]

Over thirty years after Truman's letter, some states still did not provide for absentee voting in the manner UOCAVA later required.[63] As applied to those states, UOCAVA incorporated state voter qualification standards, allowing only those members of the military qualified to vote under their respective state laws to utilize the federal absentee ballot.[64] For those states that had mechanisms in

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[57] In 1942, Congress used its war powers to adopt the Soldier Voting Act of 1942, which required states to allow active military personnel to vote in federal elections regardless of the voter qualification standards of their home states. *See* KEVIN J. COLEMAN, CONG. RESEARCH SERV., RS20764, THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES 1-2 (2015). In 1944, reluctant to rely on its war power as the conflict was nearing its end, Congress amended the 1942 Act to recommend, but not require, that military voters be allowed to participate in federal elections. *Id.* at 2. In 1955, Congress adopted the Federal Voting Assistance Act, but this law similarly recommended, but did not require, states to allow military personnel to register and vote absentee. *See* Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584.

[58] 383 U.S. 663 (1966).

[59] *See* Franita Tolson, *Offering a New Vision for Equal Protection: The Story of* Harper v. Virginia State Board of Elections, *in* ELECTION LAW STORIES 63, 64 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

[60] *See* Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 53-54 (1959) (holding that literacy test requirement for voting was not racially discriminatory).

[61] *Compare* Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (finding Tennessee's durational residence laws unconstitutional), *with* Tullier v. Giordano, 265 F.2d 1, 4 (5th Cir. 1959) (dismissing voter's lawsuit against parish for failing to register him to vote because the denial "[did] not constitute such 'purposeful discrimination between persons or classes of persons' as would amount to a denial of the equal protection of the laws").

[62] *UOCAVA Hearings*, *supra* note 55, at 56 (letter from President Truman to House Committee on Elections, March 22, 1952).

[63] *See id.* at 71 (letter from Col. Charles C. Partridge to Rep. Al Swift) (noting that "most counties in most states fall short of the 35-day standard which the Department of Defense has recommended as representing the *minimum* time necessary for an absentee ballot to go from a local election official to an overseas voter and back"); *id.* at 60 (article by Jody Powell, *Fight Waged to Guarantee the Right to Vote*, DALL. TIMES HERALD, Nov. 12, 1983) ("State election laws in most of the 50 states can, and do, deprive many Americans who are serving their country of the right to help select its government. The culprit is the way absentee ballots are handled. Most states send them out so late and require them to be returned so early that voting is a practical impossibility for Americans stationed overseas . . . .").

[64] 52 U.S.C. § 20302(a)(2) (2018) (requiring states to accept absentee ballots from "otherwise valid" military voters).

place for absentee military voting, the statute did not displace these regimes.[65] The practical effect of UOCAVA, through its incorporation of state voter qualification standards for a category of voters overlooked or insufficiently protected by state law, was to create a new category of voters for purposes of federal elections.[66] As a result, UOCAVA "made" law in some states and "altered" it in others, but more importantly, UOCAVA created a voter qualification standard for federal elections, illustrating that the states' authority under Article I, Section 2 cannot be completely segregated from federal power. As the debate over UOCAVA shows, states often used their authority to circumscribe the electorate, sometimes deliberately and, other times, through oversight. Where states fail to set voter qualifications for federal elections, or alternatively, seek to purposely circumscribe the electorate, Congress can address these actions through the Elections Clause.

2) Manner Regulations vs. Voter Qualification Standards: Judicial Precedents

The Supreme Court's caselaw has recognized that there is not a clear line between voter qualification standards and manner regulations that can neatly cabin federal power to regulating the latter, but not the former. In *Minor v. Happersett*, for example, the Court held that the right to vote was not a privilege or immunity of citizenship protected by the Fourteenth Amendment, but denied that its interpretation of the Fourteenth Amendment affected, or even implicated, congressional authority under the Elections Clause.[67] Although the case is obviously problematic for historical reasons, the Court notably resisted the urge to unrealistically place voter qualifications beyond the reach of the Clause. As the Court observed:

> It is not necessary to inquire whether this power of supervision thus given to Congress [under the Elections Clause] is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.[68]

"[U]ntil Congress acts" suggests that the Court reserved judgment on this issue, but by 1884, the Court definitively resolved whether Congress can protect the right to vote through its authority

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[65] *Id.* § 20303(g) ("A State is not required to permit the use of the Federal write-in absentee ballot, if, on and after August 28th, 1986, the State has in effect a law providing that – (1) a State absentee ballot is required to be available to any voter . . . at least 90 days before the . . . election . . . involved; and (2) a State absentee ballot is required to be available to any voter . . . as soon as the official list of candidates . . . is complete."); *see also UOCAVA Hearings*, *supra* note 55, at 90 (testimony of John Pearson, Office of the Secretary of State, Washington) ("As I mentioned earlier in my testimony, we enthusiastically support any efforts that you can make to ensure that service to one's country does not result in an inability to participate in the decisionmaking process. We would ask, however, that Congress keep in mind that some States, such as ours, have already taken steps in this area and that these State efforts should not be superseded by Federal law that might be more restrictive in nature."); *id.* at 80 (testimony of Julia Tashjian, Secretary of State, Connecticut) ("[W]e question the necessity for the imposition of a Federal write-in ballot in States which, like Connecticut, make write-in absentee ballots available to their overseas electors well before the availability of regular absentee ballots. The imposition of an additional early write-in ballot in Connecticut will invite confusion and add to the complexity of administering the absentee voting process.").

[66] *Cf.* Minor v. Happersett, 88 U.S. 162, 170 (1874) (holding that there are no voters of federal creation).

[67] *See id* at 171 (stating that Congress may make or alter regulations of time, place, or manner of elections notwithstanding holding); *see also* McPherson v. Blacker, 146 U.S. 1, 39 (1892) (holding that the Reconstruction Amendments did not alter the balance of power between states and federal government such that states who allowed their citizens to vote for electors at the time of the ratification of these Amendments had surrendered their power under Article II to appoint electors permanently).

[68] *Minor*, 88 U.S. at 171.

under the Elections Clause. In *Ex parte Yarbrough*, the Court sustained an indictment under the 1870 Enforcement Act against individual defendants who conspired against an African-American citizen "in the exercise of his right to vote for a member of the Congress of the United States . . . on account of his race, color, and previous condition of servitude . . . ."[69] The Court held that the Fifteenth Amendment "gives no affirmative right to the colored man to vote," suggesting that this provision standing alone is insufficient support for the Act, but ultimately concluded that "it is easy to see that under some circumstances it may operate as the immediate source of a right to vote."[70] Those circumstances are present where Congress is exercising its authority under the Elections Clause, as it was in *Yarbrough*, to regulate national elections.[71]

In addition to recognizing that Congress could, in some instances, protect the right to vote from private interference through the Elections Clause, *Yarbrough* and another case, *In re Coy*,[72] also held that Congress' authority under the Clause is not diminished simply because a federal regulation may affect state and local elections.[73] Federal law made it a crime for any election official to "violate or refuse to comply with his duty" at "any election for representative or delegate in Congress," but the defendant election inspectors argued they could not be indicted because they were tampering with the returns to taint state and local elections, not the House election.[74] The Court found this argument "manifestly contrary to common sense" because "[t]he manifest purpose of both systems of legislation is to remove the ballot-box as well as the certifications of the votes cast from all possible opportunity of falsification, forgery, or destruction."[75]

As illustrated by the 1870 Enforcement Act and also UOCAVA a century later, Congress arguably has reserve power to set voter qualifications to guard against the possibility that states will refuse to regulate or actively undermine federal elections. Both Congress and the Supreme Court have understood the necessity of reading federal power this broadly in other contexts as well. In *Oregon v. Mitchell*,[76] for example, the Court upheld the 1970 amendments to the Voting Rights Act that lowered the voting age in national elections from twenty-one to eighteen.[77] Age is arguably a voter qualification standard, but the justices engaged in a broad reading of federal power to sustain the

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[69] *Ex parte* Yarbrough, 110 U.S. 651, 657 (1884). *See also* Richard M. Valelly, *Partisan Entrepreneurship and Policy Windows*, *in* Formative Acts 126, 133 (Steven Skowronek ed., 2007) (noting that the *Yarbrough* Court, in holding that Congress has ample authority to protect federal elections under Elections Clause, "*strengthened* Fifteenth Amendment enforcement by fusing it to the congressional regulatory power contained in Article I").

[70] *Yarbrough*, 110 U.S. at 665.

[71] *Id.* at 662 (upholding sections 5508 and 5520 of the 1870 Enforcement Act as a lawful exercise of Congress' power under the Elections Clause, the Fifteenth Amendment, and the Necessary and Proper Clause because Congress "must have the power to protect the elections on which its existence depends from violence and corruption"); *see also* Valelly, *supra* note **Error! Bookmark not defined.**, at 135 ("[A] *unanimous* Court ruled that in order to protect the electoral processes that made it a national representative assembly, Congress could protect the right to vote of any citizen, Black or white.").

[72] 127 U.S. 731 (1888).

[73] *See id.* at 752 (stating that federal government may regulate Congressional elections, regardless of state and local elections taking place); *Yarbrough*, 110 U.S. at 662 (stating that no federal powers are "annulled because an election for state officers is held at the same time and place").

[74] *Coy*, 127 U.S. at 749-50, 753.

[75] *Id.* at 755; *see also* Valelly, *supra* note 69, at 135-36 (arguing that the Court rejected the claim because "during the elections the state and local elections officials had, for all intents and purposes, become officers of the United States and were subject to the jurisdiction of the United States").

[76] 400 U.S. 112 (1970).

[77] *Id.* at 120.

provision. For example, Justice Black, writing for himself on this point, argued that "the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed it advisable to do so."[78] Four other Justices argued that the Equal Protection Clause would sustain the extension of the franchise to eighteen-year-olds even though the record was devoid of any evidence of racial discrimination in voting or impermissible motivation on the part of the states.[79] While the precedential value of *Mitchell* is uncertain,[80] it remains true that there is ambiguity about how far congressional authority extends when states not only fail to set voter qualifications, but more commonly, "under-legislate" in determining who can participate.[81]

Treating voter qualification standards as manner regulations in some limited instances can mitigate this problem, and this approach has an analytical parallel in the Supreme Court's long history with the all-white primary. The use of procedural regulations to increase the effectiveness of discriminatory voter qualification standards was common in the pre-VRA South,[82] but the extent to which the Elections Clause played a role in dismantling these systems has been overlooked in the legal literature. Part of this oversight is because the all-white primary, invalidated under the Fourteenth and Fifteenth Amendments, was the primary mechanism through which states used under-legislation as a tactic to facilitate racial discrimination in voting. While determining who can participate in the primary falls firmly within the voter qualification camp, there was an interconnectedness between the use of election procedure and voter qualification standards to disenfranchise African-Americans during this time period.[83]

In a series of cases collectively known as the "White Primary Cases," the Supreme Court invalidated a succession of Texas laws that prohibited African-American voters from participating in the

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[78] *Id.* at 119 (arguing that Elections Clause and Necessary and Proper Clause gave Congress authority to set voter qualifications for federal elections).

[79] *See, e.g., id.* at 143 (Douglas, J., concurring in part and dissenting in part) (noting "election inequalities created by state laws and based on factors other than race may violate the Equal Protection Clause . . . .").

[80] *See Arizona Inter Tribal*, 570 U.S. 1, n.8 (2013) ("In *Mitchell*, the judgment of the Court was that Congress could compel the States to permit 18-year-olds to vote in federal elections. Of the five Justices who concurred in that outcome, only Justice Black was of the view that congressional power to prescribe this age qualification derived from the Elections Clause, while four Justices relied on the Fourteenth Amendment. That result, which lacked a majority rationale, is of minimal precedential value here." (citations omitted)).

[81] This Section focuses on the "White Primary Cases" as the paradigmatic example of under-legislation, but under-legislation generally includes any circumstance in which the state legislature either fails to define a key term with respect to voter qualifications, or delegates the responsibility for defining the term to a third party. After Reconstruction, for example, states would delegate significant authority to election registrars in order to facilitate private discrimination through under-legislation. *See* Tolson, *The Spectrum of Congressional Authority, supra* note 7, at 464-65. A famous modern day example would be the Florida Supreme Court's failure to define the "intent of the voter" standard that governed the recount during the 2000 presidential election. *See* Gore v. Harris, 772 So. 2d 1243, 1254-55 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

[82] United States v. Louisiana, 225 F. Supp. 353, 381-82 (E.D. La. 1963) ("The decision to enforce the interpretation test more than thirty years after its adoption was accompanied, in almost every parish where the test has been used, by a wholesale purge of Negro voters or by periodic registration so that Negro voters were required to re-register *after* the test came into use. Citizen Council members challenged the registration of large numbers of Negro voters on the ground that they had not satisfied all of the requirements of the Louisiana voter qualification laws at the time they registered.").

[83] *See id.* at 377 ("The white primary not only effectively kept Negroes from voting in the only election that had any significance in the Louisiana electoral process but it also correspondingly depressed Negro registration to insignificantly low numbers.").

Democratic Party's primary. The 1923 version of the law stated, "[i]n no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas."[84] The Court, in *Nixon v. Herndon*,[85] struck down the law as a facially discriminatory effort by the state to disenfranchise African-Americans on the basis of race in violation of the Fourteenth Amendment.[86] *Herndon*'s promise of rigorous judicial enforcement proved to be illusory, however.

In *Newberry v. United States*,[87] the Court reversed the convictions of defendants who had violated the Federal Corrupt Practices Act on the ground that Congress' authority under the Elections Clause did not extend to enacting legislation that applied to party primaries.[88] Similarly, in *Grovey v. Townsend*,[89] the Supreme Court upheld a Texas Democratic Party resolution that limited membership to whites on the grounds that there was no direct state action that ran afoul of the Fourteenth and Fifteenth Amendments.[90] The Court refused to intervene even though it was clear that the resolution was an instance of under-legislation, or where the state left a gap in its regulatory regime in order to delegate to the political party the responsibility of furthering discrimination.

In the years following *Grovey* and *Newberry*, the Court recognized that its caselaw ignored the practical reality that African-Americans were being disenfranchised indirectly through the party primary process and that the State was complicit in this disenfranchisement. In an about face, the Court, in *United States v. Classic*,[91] sustained the indictment of election commissioners who altered election returns in a primary election. In doing so, the Court sustained the constitutionality of federal criminal laws enacted pursuant to Congress' authority under the Elections Clause and the Necessary and Proper Clause that prohibited anyone acting under color of state law from depriving an individual of any "rights, privileges, and immunities secured and protected by the Constitution and laws of the United States."[92] The Court found that the commissioners interfered with the right to vote "at the only stage of the election procedure when their choice is of significance . . . ."[93] This case also corroborated that Congress' authority to regulate party primaries under Article I and the Elections Clause is not only broader than it is under the Fourteenth and Fifteenth Amendments, but also that there is no state action requirement:

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[84] 1923 Tex. Gen. Laws 74.

[85] 273 U.S. 536 (1927).

[86] *Id.* at 540-41 ("We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth."); *see also* Nixon v. Condon, 286 U.S. 73, 89 (1932) ("The Fourteenth Amendment, adopted as it was with special solitude for the equal protection of the members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.").

[87] 256 U.S. 232 (1921).

[88] *Id.* at 258. The FCPA provided, in pertinent part that, "No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides . . . ." Federal Corrupt Practices Act, 2 U.S.C. §§ 241-248, *repealed by* Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101-30126 (2018); *Newberry*, 256 U.S. at 243. The FCPA tracked the Enforcement Act of 1870 by incorporating state law by reference.

[89] 295 U.S. 45 (1935).

[90] *Id.* at 55 ("We find no ground for the holding that the respondent has in obedience to the mandate of the law of Texas discriminated against the petitioner or denied him any right guaranteed by the Fourteenth and Fifteenth Amendments.").

[91] 313 U.S. 299 (1941).

[92] *Id.* at 309-10.

[93] *Id.* at 314.

> While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."
>
> Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.[94]

In the Court's view, the Elections Clause, combined with the Necessary and Proper Clause, extended federal authority to party primaries and ensured that voters qualified under state law could cast their ballot.[95] Thus, states still have the primary role of choosing voter qualifications, but the Court is clear that, with respect to policing the procedure of elections, state control over voter qualifications exists only to the extent that Congress has not exercised its powers pursuant to the Elections and Necessary and Proper Clauses.[96] *Classic*, and its holding that the primary is an integral part of the election for selecting congressman, opened the door for a successful challenge to the all-white primary under the Reconstruction Amendments, but did so with significant help from the Elections Clause.

Two of the later White Primary Cases highlight, in rather dramatic fashion, that federal power in this area should be viewed comprehensively. *Smith v. Allwright*,[97] which held that the Democratic Party's practice of excluding African-Americans from their primary violated the Fifteenth Amendment,[98] and *Terry v. Adams*,[99] which extended *Smith*'s broad reading of federal power to primaries conducted by a county political organization,[100] illustrate the difficulty of creating a firm boundary between manner regulations and voter qualification standards: the problem of circumvention. Under-legislation by the State with respect to voter qualifications is often intended to circumvent the restrictions of the Fourteenth and Fifteenth Amendments and use private organizations to promote racial discrimination.[101] But key to federal power being able to reach these discriminatory regulations was a judicial recognition that Congress could regulate party primaries under the Elections Clause.

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[94] *Id.* at 315 (citations omitted).

[95] *Id.* at 325. Notably, the Court introduced the idea that the right to vote has independent federal significance separate from its regulation by the states. For more on this point, see generally TOLSON, *supra* note 2.

[96] *Classic*, 313 U.S. at 315.

[97] 321 U.S. 649 (1944).

[98] *Id.* at 766 ("Here we are applying . . . the well established principle of the Fifteenth Amendment, forbidding the abridgment by a state of a citizen's right to vote.").

[99] 345 U.S. 461 (1953).

[100] *Id.* at 462.

[101] Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 429 (2014) ("The Court found that the anti-circumvention norm justified abrogating the First Amendment rights of a private association because the state was using the Democratic Party to circumvent the protections of the Fourteenth and Fifteenth Amendments.").

II) Congress' Authority to Enact H.R. 1

Proposed pursuant to the Elections Clause, the Guarantee Clause of Article 4, Section 4, as well as the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, H.R. 1 is Congress' most ambitious attempt to restructure our system of federal elections in a generation.[102] H.R. 1 addresses campaign spending, expands voter registration, proposes independent redistricting commissions for congressional redistricting, prohibits felon disenfranchisement, and bolsters election security, among other things.[103] By invoking a number of constitutional provisions that empower Congress to regulate voter qualification standards as well as the time, places, and manner of federal elections, H.R. 1 stands on firm constitutional footing because: 1) the proposed statute is less intrusive of state sovereignty than some federal voting legislation previously enacted under the Elections Clause; and 2) Congress' authority to enact federal voting rights legislation is substantially broader when it acts pursuant to more than one source of constitutional authority.

A. H.R. 1's Standing Relative to other Elections Clause legislation

Despite the Elections Clause's untapped potential, it has not been a source of much federal legislation, which contributes to the perception that H.R. 1 is unprecedented and therefore unconstitutional. In reality, H.R. 1 is less far reaching than some of Congress' past Elections Clause statutes, illustrating that the statute is not at the outer limit of congressional authority under the Clause.[104] For example, the aforementioned Enforcement Act of 1870, typically categorized as Fifteenth Amendment legislation but also enacted pursuant to the Elections Clause, criminalized violations of state law that governed federal elections.[105] This statute exposed state officials to dual liability and provided voters with federal protection. Comparatively, the 1870 Act was a much more aggressive statement of federal power than more recent statutes, such as the NVRA's requirement that states offer voter registration at all state offices that provide public assistance or, alternatively, H.R. 1's proposed requirement that states offer online and automatic voter registration.

Likewise, the Enforcement Act of 1871 went further than its counterpart enacted a year earlier, instituting a system of federal oversight for congressional elections. This regime was designed to ferret out voter fraud and other illicit behavior prohibited by the 1870 Enforcement Act that

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[102] Even the preclearance regime of the Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301 (2012)) (hereinafter "VRA" or "the Act"), which imposed federal oversight for certain state political systems, is not a perfect analogy because the Elections Clause, by giving Congress comprehensive power to regulate federal elections, does not require any continuing evidence of racial discrimination for federal oversight to remain valid. *See generally* Tolson, *Reinventing Sovereignty, supra* note 7. Under the Act, nine states—mostly in the deep South, along with a few jurisdictions scattered throughout several other states—were covered by section 5. *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last updated Aug. 6, 2015). Specifically, section 5 prohibits those changes that have a "retrogressive" effect on minority communities—i.e., minorities are worse off under the new law than its predecessor. *See* Beer v. United States, 425 U.S. 130, 141–42 (1976).

[103] H.R. 1, 116th Cong. (2019). In March 2019, the House passed H.R. 1 in a vote of 234 to 193, but Majority Leader Mitch McConnell did not bring the bill to the Senate floor. *See* Ella Nilsen, *House Democrats Just Passed a Slate of Significant Reforms to Get Money Out of Politics*, VOX (Mar. 8, 2019, 11:25 AM), https://www.vox.com/2019/3/8/18253609/hr-1-pelosi-house-democrats-anti-corruption-mcconnell [https://perma.cc/CJV8-NKMG] (describing H.R. 1 as "dead on arrival in the Senate"). The bill was reintroduced in the 117th Congress as H.R. 1, the "For the People Act of 2021." https://www.congress.gov/bill/117th-congress/house-bill/1/text?loclr=cga-bill.

[104] *See* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171 (2019)

[105] Enforcement Act of 1870, ch. 114, § 2, 16 Stat. 140, 140; *id.* § 22, 16 Stat. at 145-46.

prevented individuals from voting.[106] Unlike the preclearance provisions of Sections 4(b) and 5 of the VRA, which applied to mostly southern jurisdictions, the 1871 Act applied to congressional districts nationwide. In contrast, the only oversight that would be created by H.R. 1 is a committee to oversee presidential inaugurations, a far cry from the system of oversight created by the 1871 Act.

Effectively, both Enforcement Acts implicated state elections and voter qualifications even though, by their terms, their oversight applied only to federal elections. These provisions were extremely controversial, with opponents questioning the statutes' use of criminal penalties, their implications for voting access, and their interference with state election systems.[107] Nonetheless, the Supreme Court upheld criminal prosecutions under the 1870 and 1871 Acts, reading broadly congressional power under the Elections Clause to enact this legislation.[108]

Similarly, much of H.R. 1 falls firmly within the scope of congressional authority over elections because it is less far-reaching than much of Congress' nineteenth century voting rights legislation, falling squarely within the Court's precedents. For example, the Court has long held that voter registration falls within the scope of federal authority over elections, so H.R. 1's voter registration changes are not constitutionally problematic.[109] Since Congress can commandeer state offices and state officials to implement Elections Clause legislation, those provisions that impose additional obligations on state officials with respect to voter registration are also constitutionally sound.[110] Moreover, the Supreme Court has upheld the use of independent commission to draw congressional districts, thereby validating H.R. 1's use of these commissions for federal elections.[111]

While this written testimony does not touch on every aspect of H.R. 1, much of which is arguably constitutional, it nonetheless focuses on the inevitable constitutional objections that are likely to arise from H.R. 1's provisions that touch on the authority over voter qualifications that the Constitution imparts to the states. As the next section shows, these concerns are unfounded when Congress legislates pursuant to multiple constitutional provisions that, along with the Elections Clause, permit Congress to regulate voter qualification standards.

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[106] Enforcement Act of 1871, ch. 99, 16 Stat. 433, 433 (incorporating Section 20 of the 1870 Enforcement Act); *see also id.* § 2, 16 Stat. at 433-34 ("[W]henever in any city or town having upward of twenty thousand inhabitants, there shall be two citizens . . . of different political parties . . . who shall be designated as supervisors of election."); *id.* § 5, 16 Stat. at 434-35 ("That it shall be the duty of the said supervisors of election, and they, and each of them, are hereby authorized and required . . . to challenge any vote offered by any person whose legal qualifications the supervisors . . . shall doubt"); *id.* § 8, 16 Stat. at 436 (designating marshalls to protect the election supervisors and to arrest individuals who violate the Act).

[107] CONG. GLOBE, 41st Cong., 2d Sess. app. at 355 (1870) (statement of Sen. William Hamilton) (disputing that Congress can impose criminal penalties under the Fifteenth Amendment because "the denial of the exercise of a certain power by the Constitution to a State does not thereby confer upon Congress power over the subject-matter of such denial"); *id.* at 473-74 (comments of Casserly) ("It is needless to pursue further the argument as to the powers of Congress under the fifteenth amendment, and as to what is 'appropriate legislation to enforce its provisions.' I leave this part of the subject with a single observation. That observation is as to the difference between legislation by Congress to execute an express power exclusive in itself, and legislation to enforce a limitation of a general power exclusive in the States. In the former case Congress may claim a liberal construction in the aid of its express exclusive power. In the latter case the State has a right to restrict Congress to the very terms of the prohibition. This is especially true when the prohibition affects the power of the State over a subject such as the suffrage.").

[108] *Ex parte* Clark, 100 U.S. 399 (1879); *Ex parte* Siebold, 100 U.S. 371 (1879).

[109] *Arizona Inter Tribal*, 570 U.S. 1, 14 (2013); Smiley v. Holm, 285 U.S. 355, 366 (1932)

[110] *See* Part I (B), supra.

[111] Ariz. State Legislature v. Ariz. Indep. Redisticting Comm'n, 576 U.S. 787 (2015).

B. H.R. 1 and the Spectrum of Congressional Authority over Elections

As Part I(C) shows, there are limited circumstances in which Congress can reach voter qualifications under the Elections Clause, particularly instances in which state regulations discourage voter turnout in federal elections.[112] But, when coupled with Congress' power under the Reconstruction Acts, Congress' authority to reach voter qualifications is indisputable. As the prior section shows, the Supreme Court has upheld some of Reconstruction's most far reaching provisions, including the Enforcement Acts of 1870 and 1871, because these provisions were enacted pursuant to multiple sources of authority.

Even if one were to assume (erroneously, I might add) that Congress' power to "make or alter" regulations that govern federal elections should have minimal or no impact on either state elections or the voter qualifications that states have primary authority to set under Article I, Section 2,[113] H.R. 1 is still constitutional. Congress can use its authority under the Elections Clause, coupled with its authority under the Fourteenth and Fifteenth Amendments, to address a state's attempt to purposely circumscribe its electorate through its authority over voter qualifications.

For example, H.R. 1 prohibits the disenfranchisement of felons in federal elections after they have been released from custody, probably one of the most controversial parts of the bill. Felony status has long been considered a voter qualification that states can use to exclude otherwise eligible voters, and historically, has disproportionately disenfranchised minority voters relative to white voters. Many states prohibit felons from voting long after they have been released from custody or, alternatively, require them to petition the state for the restoration of their voting rights after a term of years.[114] The Court has nonetheless interpreted Section 2 of the Fourteenth Amendment to sanction felon disenfranchisement because it exempts felony status from the penalty of reduced representation imposed on any state that abridges or denies the right to vote.[115]

However, the Court has not resolved whether Congress can regulate felon disenfranchisement under the Elections Clause if states have abused their power in a way that affects turnout and participation in federal elections. Many states are guilty of such abuse. For example, Florida voters approved a state constitutional amendment that would have restored the voting rights of those previously incarcerated, but the state legislature passed, and the Federal Court of Appeals for the Eleventh Circuit upheld, a law undermined the amendment by requiring all fines and fees to be paid prior to the restoration of voting rights.[116] H.R. 1 would prohibit states from barring individuals who are no

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[112] Tolson, *The Spectrum of Congressional Authority, supra* note 7. This is not an argument that Congress has plenary power over voter qualifications under the Elections Clause; rather, Congress can reach voter qualifications under the Clause when states' control over voter qualifications threatens the health of federal elections. My scholarship identifies two circumstances in which this is likely: when states under-legislate with respect to voter qualifications in order to facilitate discrimination, and when states try to use this power to deter turnout and participation in federal elections. *Id.*

[113] *See, e.g.*, *Arizona Inter Tribal*, 570 U.S. 1 (2013) (Alito, J., dissenting); Id. (Thomas, J., dissenting).

[114] *Felony Disenfranchisement Laws in the United States*, SENTENCING PROJECT (Apr. 28, 2014), www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states [https://perma.cc/9PY7-MDLV].

[115] Richardson v. Ramirez, 418 U.S. 24 (1973).

[116] *See* Voting Rights Restoration Efforts in Florida, BRENNAN CTR. FOR JUST. (May 31, 2019), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida [https://perma.cc/RQ72-T3ZD]. Recently, a federal district court granted a preliminary injunction

longer in custody from voting, thereby deterring broad felon-disenfranchisement laws intended to indefinitely disenfranchise a significant percentage of the electorate. As the Court has recognized, Congress has the power under the Elections Clause to "protect the elections on which its existence depends"[117] and "to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself."[118]

Regulations like Florida's statute requiring the payment of fines and fees regardless of ability to pay, as well as instances in which states disenfranchise based on an overly broad category of offenses,[119] have significant implications for turnout and participation in federal elections, such that these efforts fall within the limited instances in which Congress can reach voter qualifications under the Clause, or alternatively, when Congress exercises its authority under provisions in addition to the Elections Clause. H.R. 1 implicates the Fifteenth Amendment's prohibition against racial discrimination in voting; the Fourteenth Amendment's protections for the fundamental right to vote; and congressional power over the times, places and manner of federal elections under the Elections Clause (in addition to a number of other constitutional provisions beyond the scope of this immediate testimony). The fact that multiple constitutional provisions are at play necessitates more deference to the legislative record than if Congress were acting pursuant to one provision. While other provisions such as the Fourteenth and Fifteenth Amendments require that Congress show proof of intentional discrimination on the parts of the states to justify federal intervention, the Elections Clause has no such requirement.

In fact, Supreme Court caselaw has suggested that the scope of congressional authority to enforce and protect constitutional rights is broader—or alternatively, increased deference to the legislative record is warranted—when Congress enacts legislation pursuant to multiple sources of constitutional authority.[120] Authorization based on multiple constitutional provisions has, in some cases, proven to be the difference between invalidation and constitutionality for some federal statutes.[121] The paradigmatic example is the Affordable Care Act, which survived a constitutional challenge in 2012 because the Court found that the Act, though an unlawful exercise of the commerce power, was a valid use of the taxing power.[122]

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blocking the Florida law requiring payment of all fines and fees before individuals with felony convictions could be reenfranchised. *See* Jones v. DeSantis

[117] *Ex parte* Yarbrough, 110 U.S. 651, 658 (1884).

[118] *Id.* at 666.

[119] *See* Franita Tolson, *'In Whom is the Right of Suffrage?': The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PENN. LAW REV. (forthcoming 2021).

[120] *See* Michael Coenen, *Combining Constitutional Clauses*, 164 U. Pa. L. Rev. 1067, 1086-88 (2016) (discussing McCulloch v. Maryland, 17 U.S. 316 (1819), and The Legal Tender Cases, 79 U.S. 457 (1870), as decisions that rest "on the combined effect of multiple enumerated powers" but noting that "[n]ot much has happened since then in the world of power/power combination analysis" because most decisions focus on one source of authority "as independently sufficient to sustain the federal enactment under review").

[121] For example, Congress enacted Title VII of the Civil Rights Act of 1964 pursuant to its authority under the Commerce Clause, but in 1972, extended the reach of the statute to authorize money damages against state governments under the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976) (explaining that Congress relied on Fourteenth Amendment to amend Title VII of Civil Rights Act of 1964). After the Court's decision in *Seminole Tribe*, if Congress had relied on the Commerce Clause alone, the 1972 amendments would have been invalidated. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74 (1996) (holding that Congress cannot abrogate state sovereign immunity under Commerce Clause).

[122] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563-66 (2012).

The Court also has not been shy about sustaining legislation where Congress has failed to specify the source of authority pursuant to which it is acting. In *Fullilove v. Klutznick*,[123] for example, the Court upheld an affirmative action program requiring that ten percent of federal funds granted for local public works be allocated to minority owned firms.[124] The Court found that the program was a constitutional exercise of federal power under the Spending Clause and the Commerce Clause, even though Congress did not rely on either provision in enacting the law.[125] Similarly, in *Woods v. Cloyd W. Miller Co.*,[126] the Court upheld the Housing and Rent Act as a lawful exercise of the war power, inferring from "the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause."[127] Even though hostilities had ceased, the Court observed that, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."[128]

The Court has also sustained legislation where there is uncertainty about which constitutional provision Congress relied on in enacting the statute. In *Jones v. Alfred H. Mayer*,[129] the Court upheld 42 U.S.C. § 1982, which guaranteed to all citizens the right to convey real and personal property, as a valid exercise of the Thirteenth Amendment.[130] Section 1982 was originally part of section 1 of the Civil Rights Act of 1866, and many then in Congress believed that the Act exceeded the scope of congressional authority under the Thirteenth Amendment.[131] While the Act was reauthorized after the passage of the Fourteenth Amendment, which provided sufficient justification for its provisions, there has never been any suggestion that *Jones* was wrongly decided because the Court focused on the Thirteenth Amendment instead of the Fourteenth.

Jones and the unusual historical circumstances surrounding § 1982 might also suggest that far-reaching and potentially controversial legislation can gain substantial legitimacy from the fact that Congress can draw on multiple sources of power. A prominent example of this is section 4(e) of the VRA, which prohibits literacy tests as a precondition for voting as applied to individuals from Puerto Rico who have completed at least the sixth grade. In *Katzenback v. Morgan*,[132] the Court upheld section 4(e) as an appropriate exercise of Congress' authority to enforce the Fourteenth Amendment.[133] The Court sustained Congress' ban on literacy tests, even though an earlier court decision found these tests to be constitutional as a general matter, and Congress made no evidentiary

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[123] 448 U.S. 448 (1980).
[124] *Id.* at 490.
[125] *See id.* at 473-76.
[126] 333 U.S. 138 (1948).
[127] *Id.* at 144.
[128] *Id.*; *see also* Wilson-Jones v. Caviness, 99 F.3d 203, 208 (6th Cir. 1996) ("A source of power has been held to justify an act of Congress even if Congress did not state that it rested the act on the particular source of power.").
[129] 392 U.S. 409 (1968).
[130] *Id.* at 413.
[131] *Id.* at 455 (Harlan, J., dissenting) (presenting a comprehensive review of the legislative history suggesting that many in the Thirty-Ninth Congress believed that 1866 Civil Rights Act was unconstitutional).
[132] 384 U.S. 641 (1966).
[133] *Id.* at 655-58 (concluding that New York's english literacy requirement for voters could discriminate against New York's large Puerto Rican community, but not requiring congressional findings that prove this proposition).

findings that literacy tests were being used in a racially discriminatory manner.[134] As a practical matter, the Court might have been willing to defer to Congress because of the myriad provisions that the Court identified as potential sources of authority for section 4(e)—ranging from the treaty power to the Territorial Clause of Article III—even though Congress did not explicitly rely on any of these provisions in enacting the legislation.[135] At the very least, *Morgan* illustrates that the presence of multiple sources of constitutional support is relevant to the inquiry into the scope of congressional power,[136] a position that received the Court's full-throated endorsement in the *Legal Tender Cases*[137] and *McCulloch v. Maryland*.[138]

As this caselaw illustrates, the Court's review of the legislative record of H.R. 1 must account for the unique circumstances of each provision upon which Congress has relied to justify its legislation which warrants greater judicial deference to the underlying legislative record than if Congress is proceeding based on the Fourteenth or Fifteenth Amendments alone.[139] In particular, the use of the Elections Clause, which does not require that Congress establish a pattern of intentionally discriminatory behavior by the states,[140] necessitates that the Court take a more nuanced approach in reviewing the constitutionality of federal voting rights legislation that is based on multiple sources of authority.

Conclusion

In short, H.R. 1 is a constitutional use of Congress' authority under the Elections Clause. Most of its provisions does not approach the outer limits of Congress' power under the Elections Clause, which empowers that body to make or alter state law; commandeer state law, state officials, and state offices; and, in certain circumstances, regulate voter qualifications standards. For those portions of H.R. 1 that go beyond regulating the time, place and manner of federal elections, such as its regulation of felon disenfranchisement, those provisions are also constitutional. When combined with the Fourteenth and Fifteenth Amendments, Congress' authority to enact H.R. 1 pursuant to the

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[134] Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 53-54 (1959) (holding that literacy tests are constitutional absent discriminatory intent).

[135] *Katzenbach*, 384 U.S. at 646 n.5 (stating that Court need not consider whether section 4(e) could be sustained under Territorial Clause).

[136] Even Justice Scalia, an enduring critic of expansive federal authority, suggested that federal power is broader when Congress can point to an additional source of authority to support its legislation. *See* Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) ("[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone."). At the very least, the presence of an additional source of power arguably expands the universe of means that Congress can employ in furthering the ends of the statute. *Cf. Gonzales*, 545 U.S. at 38 (Scalia, J., concurring) ("As the Court said in the *Shreveport Rate Cases*, the Necessary and Proper Clause does not give 'Congress . . . the authority to regulate the internal commerce of a State, as such,' but it does allow Congress 'to take all measures necessary or appropriate to' the effective regulation of the interstate market, 'although intrastate transactions . . . may thereby be controlled.'" (citations omitted)).

[137] 79 U.S. 457, 534 (1870) (holding it is "allowable to group together any number of [enumerated powers] and infer from them all that the power claimed has been conferred").

[138] 17 U.S. 316, 407-12 (1819) (finding that Congress' power to charter a bank stems from its "great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies" as supplemented by the Necessary and Proper Clause).

[139] Tolson, *The Spectrum of Congressional Power*, *supra* note 7.

[140] *Id.*, *Reinventing Sovereignty*, *supra* note 7.

Elections Clause is only strengthened, given that the Clause is not subject to the same federalism constraints as the Fourteenth and Fifteenth Amendments.

The CHAIRPERSON. Thank you very much, Dean.

Now we will turn to the other dean, Dean Tokaji for your five minutes.

STATEMENT OF DANIEL P. TOKAJI

Mr. TOKAJI. Thank you, Madam Chairperson, and thank you, Ranking Member Davis, Representative Steil from my State, the great State of Wisconsin, and the other honorable members of this Committee.

My name is Dan Tokaji, and I am the Dean at the University of Wisconsin Law School. My primary research is in the area of election law, and I have written on Congress' power under the Elections Clause before.

In a word, one that the U.S. Supreme Court has used repeatedly for around 142 years, Congress' power over congressional elections under this clause is paramount. Under the unambiguous text of the Elections Clause and a long line of Supreme Court precedent, Congress has broad plenary authority over the time, place, and manner of conducting congressional elections.

The most recent explication of this principle was Justice Scalia's opinion for seven Justices in *Arizona v. Inter Tribal Council of Arizona*, back in 2013, where he referred to the broad and comprehensive scope of Congress' Elections Clause power.

In the remainder of my testimony, I will provide some background on what the Elections Clause means and how it has been construed by the Supreme Court.

So, the Elections Clause, the text of which Madam Chairwoman read earlier, allows States to prescribe rules for the conduct of congressional elections, but only insofar as Congress declines to preempt State legislative choices, as the Court said in *Foster v. Love*.

As Justice Scalia explained in *Arizona v. ITCA*, this grant of congressional power to Congress was insurance against the possibility that States would try to undermine the Union by either failing to have procedures for congressional elections or for having ones that were inadequate.

As he put it, quoting the Federalist Papers, the State legislatures otherwise could at any moment annihilate it—that is, the Federal Government—by neglecting to provide for a choice of a person to administer its affairs.

Congress has exercised its broad power to regulate Federal elections repeatedly, through the 1842 Apportionment Act, the post-Civil War Enforcement Acts of 1870 and 1871, and, more recently, through the National Voter Registration Act and the Help America Vote Act.

I won't go through all the precedent that supports these and other laws in which Congress has previously exercised its Elections Clause power, but I will hit a few highlights.

The first big case was *Ex parte Siebold*, in 1879, a case involving the Reconstruction-era Enforcement Acts, and in that case the Court said that Congress may exercise its power as it sees fit and that, quote, "When exercised, the action of Congress so far as it extends and conflicts with the regulations of the State necessarily supersedes them."

In *Smiley v. Holm*, in 1932, the Court went on to say that Congress may provide a complete code for congressional elections if it wishes, which includes registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publishing of election returns.

Now, there was a time in the early 20th century where the Court said that the Elections Clause didn't reach primary elections, but that was reversed in the *United States v. Classic* case in 1941 where the Court clarified that indeed the Elections Clause does allow Congress to reach primaries as well as general elections.

That power under the Elections Clause, of course, like any power, isn't unlimited. The Court in the U.S. Term Limits case says that the power doesn't include the power to dictate election outcomes, to favor or disfavor a class of candidates, or to evade important——

Mr. TOKAJI. Thank you.

But Congress does, as the Court clarified in *Arizona v. ITCA*, have very broad power, and as Justice Scalia explained, this power is broader than under other clauses of the Constitution.

There is good reason for treating Elections Clause legislation differently and more favorably from laws enacted under other congressional powers because Congress, in the Elections Clause area, Congress isn't acting in a place where the States had preexisting authority before the Constitution.

Now, there is a question of where Congress' Elections Clause power ends and the Qualifications Clause power begins, which I am happy to address in my response. But the bottom line is that Supreme Court precedent confirms that the Elections Clause means what it says—that Congress has the broad power to make or alter the rules governing the time, place, and manner of conducting congressional elections.

Thank you, Madam Chairperson.

[The statement of Mr. Tokaji follows:]

Testimony of Daniel P. Tokaji

"The Elections Clause: Constitutional Interpretation and Constitutional Exercise"

Committee on House Administration

July 12, 2021

It is an honor and a pleasure to have the opportunity to speak with you today about Congress's power under the Elections Clause of Article I, Section 4 of the U.S. Constitution. My name is Daniel P. Tokaji, and I am the Fred W. & Vi Miller Dean and Professor of Law at the University of Wisconsin Law School, a position I have held since August 1, 2020. Before that, I was a law professor at The Ohio State University Moritz College of Law for 17 years. At Ohio State, I was the Charles W. Ebersold & Florence Whitcomb Ebersold Professor of Constitutional Law from 2014 until 2020, and Associate Dean for Faculty from 2018 until 2020. My C.V. is being submitted with this written testimony.

My primary area of research is Election Law, with a special focus on voting rights, electoral institutions, and democratic inclusion. I have published over 50 law review articles and other scholarly papers on these and related subjects. I am also co-author of *Election Law: Cases and Materials* (6th ed. 2017), and the author of *Election Law in a Nutshell* (2d ed. 2016). One of the topics of my research is the scope of Congress's power under the Elections Clause of Article I, Section 4 of the U.S. Constitution. I teach courses in the fields of Election Law, Constitutional Law, Legislation and Regulation, and other areas. This testimony is offered solely on my own behalf, with my institutional affiliations provided for the purpose of identification only.

The subject of this hearing is the scope of Congress's authority under the Elections Clause. In a word – one the U.S. Supreme Court has repeatedly used for 142 years – Congress's power over congressional elections is "paramount." *Ex Parte Siebold*, 100 U.S. 371, 384, 385, 386, 388 (1879). Under the unambiguous text of the Elections Clause and a long line of Supreme Court precedent, Congress has broad plenary authority to regulate the time, place, and manner of congressional elections. The most recent example is Justice Scalia's opinion for seven justices in *Arizona v. Inter Tribal Council of Arizona* ("*ITCA*"), which reaffirmed the "broad" and "'comprehensive'" scope of the Elections Clause power. 133 S. Ct. 2247, 2253 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). As Professor Derek Muller puts it: "It is left purely to Congress's discretion as to whether, and how, to regulate the time, places, and manner of elections."[1] Congress may choose to take over regulation of this area entirely, to leave regulation to the states, or to have some combination of federal and state regulation of congressional elections,[2] as it has done throughout most of the nation's history.

The remainder my testimony will provide background on what the Elections Clause means and how it has been construed by the Supreme Court. My testimony focuses primarily on judicial interpretations of the Elections Clause, mostly leaving the history of its adoption and congressional interpretations for others to address.

Before turning to judicial precedent, it is helpful to examine the text and purpose of the Elections Clause. Article I, Section 4, Clause 1 of the Constitution states:

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[1] Derek Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310, 312 (2014).
[2] *Id.*

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Elections Clause thus allows states to prescribe rules for the conduct of congressional elections "only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997). The main reason for giving Congress broad power to "make or alter" rules governing congressional elections was to ensure that the states could not undermine the nascent national government. As Justice Scalia explained for the Court in *ITCA*: "This grant of congressional power was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." 133 S. Ct. at 2253. Quoting the *Federalist Papers*, the Court observed that the federal government must be given "'the means of its own preservation," without which its existence would be at the mercy of state legislatures that "could at any moment annihilate it by neglecting to provide for the choice of a person to administer its affairs.'" *Id.* (quoting *The Federalist No. 59*, 362-63 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The Elections Clause was thus driven in part by a distrust of state lawmakers, as well as the Framers' concern that Congress be a genuinely representative assembly.[3]

Congress has exercised its broad power to regulate federal elections on numerous occasions since the Constitution became the supreme law of the land. The 1842 Apportionment Act, requiring states to elect their congressional representatives from single-member districts, was an early exercise of Congress's authority to displace state laws.[4] After the Civil War, Congress exercised its constitutional authority under the Elections Clause to adopt the Enforcement Acts of 1870 and 1871, which protected the voting rights of recently freed African Americans.[5] In more recent years, Congress has relied on its Elections Clause power to enact the National Voter Registration Act of 1993 ("NVRA") and the bipartisan Help America Vote Act of 2002 ("HAVA").[6]

The Supreme Court has consistently confirmed Congress's broad and comprehensive authority to regulate congressional elections under Article I, Section 4 of the Constitution.[7] In *Ex Parte Siebold* (1879), the Court repeatedly characterized Congress's power over federal elections as "paramount," in upholding provisions of the Reconstruction-era Enforcement Acts that regulated federal elections. 100 U.S. at 384, 385, 386, 388 Defendants in *Siebold* had been convicted of violating state laws in connection with a Maryland congressional election. In upholding Congress's power to make violations of state law a federal offense, the Court declared that "Congress has plenary and paramount jurisdiction over the whole subject" of regulating congressional elections. *Id.* at 388. Of Congress's authority over congressional elections, the Court wrote:

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[3] Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873499.

[4] Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 BOSTON U. L. REV. 317, 345-46 (2019).

[5] *Id.* at 358-59.

[6] Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. FORUM 171, 177 (2019), *available at* https://www.yalelawjournal.org/forum/the-elections-clause-and-the-underenforcement-of-federal-law.

[7] Nicholas Stephanopoulos, *The Sweep of the Electoral Power*, CONST. COMMENT. (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715826.

> It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to 'make or alter.'

Id. at 384. Both the states and Congress can make laws on the subject, but the "paramount character" of congressional legislation on the subject means that state laws must give way to federal law. *Id.* at 386. *See also Ex Parte Clarke*, 100 U.S. 399, 403-04 (1879) (Congress had constitutional power to enact a law punishing state election officers for violating their duties under state laws with respect to a congressional election).

The Court has repeatedly affirmed the broad scope of Congress's power to regulate congressional elections in the fourteen-plus decades since *Siebold*. In *Smiley v. Holm* (1932), the Court reiterated the expansive scope of congressional power under the Elections Clause, identifying examples of the topics over which federal election legislation may extend:

> It cannot be doubted that these comprehensive words embrace authority to provide a *complete code for congressional elections*, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of 'times, places and manner of holding elections,' and involves lawmaking in its essential features and most important aspect.

285 U.S. 355, 366 (emphasis added). Although the greater constitutional power does not always include the lesser, it does here. As *Smiley* explained, Congress's authority to "provide a complete code for congressional elections" embraces the power to regulate some aspects of those elections while leaving others to the states. Because Congress has "general supervisory power over the whole subject" of congressional elections, it may choose either to add to existing state regulations or to "substitute its own" for those enacted by states. *Id.* at 366-67 (quoting *Siebold*, 100 U.S. at 387).

Congress's power under Article I, Section 4 includes primary as well as general elections. For a brief period in the early 20th Century, the Court understood the Elections Clause power *not* to reach primary elections, on the rationale that primaries were unknown to the Framers. Thus, in *Newberry v. United States*, 256 U.S. 232, 250, 258 (1921), the Court held that the Federal Corrupt Practices Act's limitation on disbursements in congressional primary elections lay outside that power. That interpretation of the Elections Clause, however, was overruled two decades later in *United States v. Classic*, 313 U.S. 299 (1941). If the Elections Clause power did not extend to primary elections, the *Classic* Court reasoned, then Congress would be "left powerless to effect the constitutional purpose." *Id.* at 319. Because primary elections are "a necessary step" in choosing members of Congress, they lie within the scope of the Elections Clause power. *Id.* at 320.

Although Congress's power under the Elections Clause is exceptionally broad and deep, it is not unlimited. The authority to prescribe rules for the time, place, and manner of congressional elections does not encompass "the power to dictate election outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995). Accordingly, the Court in *U.S. Term Limits* struck down a state law that precluded people who had served a prescribed number of terms in Congress from having their names put on the ballot in subsequent congressional elections. *Id.* at 835. Nor could a state disfavor congressional candidates who declined to

support term limits, by requiring a notation of that position on the ballot. *Cook v. Gralike*, 531 U.S 510, 524-26 (2001). The authority to regulate the process by which congressional elections are conducted does not allow states to impose term limits or to disfavor candidates because of their position on a particular issue. Although *U.S. Term Limits* and *Cook* both involved the power of *states* (not Congress) the logic of these decisions suggests that this limitation would apply to comparable federal legislation.

The Court's most recent – and arguably most important – explication of the Elections Clause's scope is Justice Scalia's majority opinion in *Arizona v. ITCA*. That case concerned a provision of the NVRA requiring that state's "accept and use" a uniform federal registration form. Arizona argued that this provision should be interpreted narrowly, so as to allow the state to impose a proof-of-citizenship requirement that the federal form did not require. 133 S. Ct. at 2254. Arizona further argued that, without this narrowing construction, the NVRA would exceed Congress's authority under the Elections Clause. *Id.* at 2257. The Court rejected this argument, noting that the usual presumption against federal pre-emption of state laws does *not* apply to legislation enacted under the Elections Clause. As Justice Scalia explained, "[t]here is good reason for treating Elections Clause legislation differently" from laws enacted under other constitutional powers. *Id.* at 2256. When Congress legislates under the Elections Clause, "it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *Id.* at 2257 (original emphasis). In addition, the federalism concerns that arise when Congress pre-empts state are not as strong when Congress regulates congressional elections. *Id.* While states historically enjoyed broad police powers over other matters, their regulation of congressional elections has always been subject to congressional revision or reversal. *Id.* The *ITCA* Court thus reaffirmed Congress's "paramount" authority to regulate congressional elections, whether by providing for a complete federal code governing those elections or by selectively overriding state laws. *Id.* at 2253-54.

Under these precedents, Congress enjoys broad plenary authority to regulate congressional elections under Article I, Section 4. That said, there is one significant area as to which there remains some uncertainty as to the scope of congressional power vis-à-vis the states. While the Elections Clause gives Congress broad power to regulate the *time, place, and manner* of conducting congressional elections, it does not say that Congress may determine the qualifications for voting in those elections. Under the Qualifications Clauses of Article I, Section 2 and Article I, Section 3 (as amended by the Seventeenth Amendment), voters in congressional elections are to have the qualifications for voting in the larger chamber of the state legislature. As a general matter, then, states determine the qualifications for voting in congressional elections, while Congress has the ultimate power to determine the rules governing the time, place, and manner of those elections.

The difficult question is where Congress' power to set time, place, and manner regulations ends and the states' power to set qualifications begins. In *ITCA*, the majority noted that it would raise "serious constitutional doubts if a federal statute precluded a State from obtaining information necessary to enforce its voter qualifications." 133 S. Ct. at 2258-59. The NVRA did not raise such doubts, since states still had the means to ensure that their qualifications were enforced. *Id.* at 2259. So *ITCA* does not definitively resolve the tension between Congress's power to dictate the time, place, and manner of federal elections and states' power to set qualifications. But it does suggest that constitutional tension would arise if and only if a federal law sought to displace a state rule that are "necessary" to enforce state-prescribed qualifications.

That in turn raises the question: What exactly is a qualification? As Professor Muller has explained, a "qualification" is "generally tethered to some concept of who may participate in the political

process, such as capacity or responsibility."[8] Thus, requirements that voters be of a certain age, have the requisite mental capacity, or be citizens are qualifications. On the other hand, registration and identification requirements are not qualifications, though they may be "means of enforcing qualifications."[9] It bears emphasis that serious constitutional questions would arise only if federal law purports to displace a state rule that is *necessary* to enforce qualifications. So long as states can enforce their qualifications through other means without running afoul of federal law, there is no conflict between Congress's Elections Clause power and states' general authority to set qualifications for voting.

In sum, Supreme Court precedent confirms that the Elections Clause means what it says. Congress has broad power to "make or alter" rules governing the time, place, and manner of congressional elections. That includes the authority to override specific state election laws, or to write a comprehensive code governing the entire process for conducting congressional elections. States generally have authority to set qualifications for voting in state legislative elections, which in turn presumptively determine who can vote in congressional elections. But federal laws governing the process for conducting congressional elections fall squarely within the scope of the Elections Clause power, and a serious constitutional question in this realm would arise only if Congress attempted to pre-empt a state rule that is "necessary" to enforce qualifications. While I do not address specific legislative proposals in this written testimony, I would be happy to answer any questions that committee members might have and look forward to discussing this important topic with you.

[8] Muller, *supra* note 1, at 316 n.82.
[9] *Id. See also* Daniel P. Tokaji, *Responding to* Shelby County*: A Grand Election Bargain*, 8 HARVARD L. & POL'Y REV. 71, 106 (2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387516.

The CHAIRPERSON. Thank you very much, Dean.

Last we have Secretary of State Michael Adams.

Thank you for joining us, Secretary Adams, and you are now recognized for five minutes.

STATEMENT OF MICHAEL G. ADAMS

Mr. ADAMS. Thank you so much, Madam Chairperson and Members of the committee. Good afternoon. I am Michael Adams, Kentucky's Secretary of State. It is an honor to be with you today.

I understand the topic of discussion is the Elections Clause of our Constitution. Any day that Congress spends considering the text and intent of our Constitution is a good day, and I wish you every success. My purpose here is to address policy concerns with Congress increasing Congress' role in elections for Congress.

First, some background. I took office last year, and the elections I supervised as my State's chief election official all took place amid the pandemic. I asked our legislature for and received emergency powers, to be shared with our Democratic Governor, to permit us to implement temporary changes to our election system to ensure public safety, voter access, and election security. We expanded absentee voting, and we established early voting for the first time in Kentucky history.

In the days before our June 2020 primary election, Kentucky was singled out in a national campaign of harassment and hate, with false accusations of voter suppression. Our phones were clogged with angry callers from Washington, D.C., California, and New York cursing at us, sometimes threatening violence. This was directed at us by celebrities on Twitter, including a certain Member of Congress who now chairs the Senate committee analogous to yours.

When the dust settled, however, Kentucky had conducted the most successful election in America at that point in the pandemic—safe, orderly, and with high turnout. Kentuckians knew better how to run an election in Kentucky than did the national media or national politicians.

The expanded voting reforms and enhanced security measures we implemented proved so successful and so popular that our legislature just made most of them permanent, with the votes in both chambers bipartisan and nearly unanimous.

Kentucky is the national leader this year in election reform. But we are not alone. Bipartisan legislation expanding voting opportunities has passed in Louisiana and Vermont too.

Why was Kentucky able to pass a bipartisan election reform measure, the most significant modernization of our system since 1981, that made it both easier to vote and harder to cheat, that had widespread support across the political divide? Why did Louisiana and Vermont follow suit? Well, because you did not stop us. You allowed democracy to work.

There are two lessons here.

One, Kentucky knows best what is best for Kentucky, and I would urge you to let Kentucky be Kentucky, let Louisiana be Louisiana, and Vermont be Vermont, and respect the laboratories of democracy that lead to innovation in a decentralized election system.

Vermont passed mail-in voting that reflects their political culture. In Kentucky, even with expanded absentee voting—and even in a pandemic—most voters last year, including most Democrats, voted in person. That reflects our political culture.

The second lesson is that election policy should be made not by a caucus, not by a think tank, but by election administrators who work in a bipartisan fashion.

Bipartisanship not only leads to a better product, with concerns on both sides accomplished, it also shows voters on both sides that the rules are not being rigged to favor one party over another.

I understand the concern many of you have with State legislatures acting in a partisan fashion in passing election legislation, and I would encourage you to avoid doing the same thing yourselves. Do not be victims of a false narrative.

I don't agree with every election law that has been offered by some Republican State legislators, but the reality on the ground is more complicated and far better than what you are hearing about here in this Beltway echo chamber.

The desire to accuse red States, especially Southern ones, of voter suppression is so strong that media outlets covering Kentucky's achievement are rewriting their own coverage to fit that narrative.

On April 8, CNN reported, "Kentucky Governor Beshear signs into law bipartisan elections bill expanding voting access."

On June 30, CNN reported, "Seventeen States have enacted 28 laws making it harder to vote," and included Kentucky in their count.

On April 8, The Washington Post reported, "Democratic Governor in deep-red Kentucky signs bill to expand voting."

On June 2l, The Washington Post included Kentucky in their list of 17 States that allegedly were undermining democracy.

The cognitive dissonance is so strong that these outlets don't even accept facts from their own reporting when it contradicts this narrative.

Our politics has grown increasingly harsh, even dangerous, the more our big decisions are federalized rather than resolved at the State and local levels. I urge you to respect the diversity of our country and the majesty of our 50 different but well-functioning election systems.

Thank you so much.

[The statement of Mr. Adams follows:]

Madame Chairwoman and Members of the Committee:

Good afternoon. I'm Michael Adams, Kentucky Secretary of State. It's an honor to be with you today.

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[1] https://twitter.com/amyklobuchar/status/1274856741784748033.

[2] https://www.washingtonpost.com/politics/primaries-voting-kentucky-new-york/2020/06/22/a14ec922-b4ab-11ea-a8da-693df3d7674a_story.html

expanded absentee voting and even in a pandemic, most voters last year, including most Democrats, voted in-person. That reflects our political culture.

The second lesson is that election policy should be made not by a caucus, not by a think tank, but by election administrators who work in a bipartisan fashion. Bipartisanship not only leads to a better product, with concerns on both sides accommodated; it also shows voters on both sides that the rules are not being rigged to favor one party over another. I understand the concern many of you have with state legislatures acting in a partisan fashion in passing election legislation, and I would encourage you to avoid doing the same thing yourselves.

Do not be victims of a false narrative. I don't agree with every election bill that has been offered by a Republican state legislator, but the reality on the ground is more complicated, and far better, than what you're hearing here in this echo chamber. The desire to accuse red states, especially southern ones, of voter suppression is so strong that media outlets covering Kentucky's achievement are rewriting their own coverage to fit the narrative.

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Our politics has grown increasingly harsh, even dangerous, the more our big decisions are federalized rather than resolved at the state and local levels. I urge you to respect the diversity of our country and the majesty of our 50 different but well-functioning election systems. Thank you.

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[3] https://www.cnn.com/2021/04/07/politics/kentucky-voting-bill-signed-beshear/index.html

[4] https://www.cnn.com/2021/06/30/politics/voter-suppression-restrictive-voting-laws/index.html

[5] https://www.washingtonpost.com/nation/2021/04/08/democratic-governor-deep-red-kentucky-signs-bipartisan-bill-expand-voting-bucking-national-trend/

[6] https://www.washingtonpost.com/opinions/republicans-are-gnawing-at-the-foundations-of-americas-free-and-fair-elections/2021/06/13/3f40ffa0-cacd-11eb-a11b-6c6191ccd599_story.html

The CHAIRPERSON. Thank you, Mr. Secretary.

We now come to the time when Members of the committee may ask questions for five minutes. I will turn first to Congressman Raskin, who is also a constitutional law professor.

So, Mr. Raskin, you are recognized for five minutes.

Mr. RASKIN. Madam Chairperson, thank you so much for calling this important hearing, and thanks to all the witnesses for their testimony.

Dean Tokaji, let me start with you.

In American history, States have sometimes been in the forefront of expanding and defending the franchise. I know that New Jersey gave women the right to vote at the very beginning of the Republic. But at the same time, the States have often been in the forefront of disenfranchising people with, like, literacy tests, poll taxes, grandfather clauses, other attempts to disenfranchise.

So what do you make of the claim we just heard from Secretary Adams that we should just trust the States and let Kentucky be Kentucky and let New York be New York and let every State be itself? Is that consistent with how we have respected voting rights over the last century, for example?

Mr. TOKAJI. Thank you so much for that question, Representative Raskin.

There are two important principles here, and we have to recognize both of them.

States are, of course, laboratories of democracy. It is a great thing about our federalist system that States can experiment, as they so often do and that includes experimenting with election reforms, like same-day registration. A number of States have experimented with and have proved quite successful in making it more convenient to vote and increasing turnout.

On the other hand, there is a competing principle, which is that, in the end, Congress must have the authority to regulate congressional elections, and that includes regulating to protect the fundamental right to vote, as it has sometimes had to do.

The first noteworthy example of this, or at least one of the first, are the Enforcement Acts, which Dean Tolson has written about in her scholarship and has addressed in her testimony.

In the Reconstruction period it was absolutely vital for Congress to exercise its authority under the Elections Clause, as well as the 14th and 15th Amendments to the United States, in order to protect the voting rights of newly freed African Americans. And so, too, after the appalling disenfranchisement of African Americans that took place after Reconstruction and throughout most of the 20th century, it was, again, necessary for Congress to act, in part under its Elections Clause authority, to protect the right to vote.

So, yes, we do want States to be laboratories of democracy. At the same time, Congress has to have the ability to protect the right to vote, particularly in Federal elections, as the Elections Clause allows.

Mr. RASKIN. Thank you for that.

Dean Tolson and Professor Rakove, I want to go to the other point that was raised by Secretary Adams about election administrators. So I guess it is two parts.

One, what do you make of the claim that we should really delegate this decision to election administrators, that they are a better judge of what America needs in terms of voting than, say, the representatives of the people in Congress, in the House and the Senate?

I was struck by that, especially when the good witness said let Kentucky be Kentucky. There is no one more powerful than his U.S. Senator, Mitch McConnell, in all of Congress. I don't think he has got to worry about Kentucky's point of view being represented in Congress.

But, in any event, I noticed there is an attack on election administrators going on. I mean, we saw that in 2020 when Donald Trump literally was calling election administrators and telling them to revise their vote totals. Most famously, of course, he called the Secretary of State in Georgia, Brad Raffensperger, and said, "Just go find me 11,781 votes. That is all I am looking for."

And then, after that appalling attempt at election fraud was exposed to the whole world, rather than everybody apologizing for it, running from it, and trying to figure out what we could do to protect election administrators, now there is an effort to displace him and run somebody against him so they have a sufficiently sycophantic and subservient Secretary of State in Georgia. It is absolutely amazing to watch that.

But what about the idea that these increasingly partisan election officials who are being targeted around the country should be deferred to in terms of the voting rights of the people?

And, Dean TOLSON, start with you, and then Professor Rakove.

Ms. TOLSON. Okay. Thank you so much for that question, Representative.

I do think that I appreciate Secretary Adams' point, because the States are important laboratories, but sometimes they are actually laboratories that produce some of the most disenfranchising measures in our history.

So if you look at the Mississippi Constitution of 1890, that is a Constitution where a State substantially disenfranchised most of the African Americans within the State, and other Southern governments followed suit, mimicking Mississippi's efforts. So, yes, the laboratory point is well taken, but at the same time, States sometimes use their laboratories for ill.

I look at H.R. 1 as a list of best practices. So, it is a list of things that will further a national conception of democracy.

To some extent, democracy cannot be a State-level conception. We must have some sense of who we are as a national democracy if we are going to hold ourselves out as a democracy. I think H.R. 1 furthers that goal while leaving election administrators sufficient discretion over the election apparatus within the State.

Mr. RASKIN. Madam Chairperson, my time is up. Would it be okay if Professor Rakove just addressed my question?

The CHAIRPERSON. Sure.

Mr. RAKOVE. I don't really have very much to add to the discussion beyond noting that in the founding years, the whole idea of having bureaucracy was itself also something of an innovation.

I mean, I think the best way to think about this is from kind of a quasi-originalist perspective, simply to recognize that the funda-

mental conflict would have—or the fundamental tension would have been seen as one involving two levels of the legislatures. The idea that you would actually have anything like a Secretary of State at the State level responsible for administering elections, obviously extremely common today, would have been an anomaly in that period.

So, the basic tension that Madison and others were worried about was the idea of the political motivations working really at the legislative level more than at the bureaucratic level.

The CHAIRPERSON. The gentleman's time has expired.

We will now turn to the gentleman from Georgia, Mr. Loudermilk for five minutes.

Mr. LOUDERMILK. Well, thank you, Madam Chairperson. I appreciate everyone being a part of this hearing today.

The first thing before we get into my questions, I think we need to separate the argument that we are having over the constitutionality of Congress' ability to set the times, place, and manner.

There are really two issues that are being conflated in this argument.

The first is the qualification of electors. And that is very specific within the Constitution, and our Founders and the courts have upheld that the Constitution establishes clearly the qualification of electors.

And this is a lot of the argument I am hearing, and a lot of the Court cases have upheld that, yes, the Federal Congress has the ability, through the Constitution, to establish who the electors can be, and the States do not have the ability to usurp that, because that is set in the Constitution. It has been upheld several times.

The second aspect of the argument is the times, places, and manner, which our Founders said should be taken literally. The British system was very broad when it talked about time, places, and manner. It included electors in that system. Our Founders, through their debates in the Constitution and in the Federalist Papers, were very specific on the time, places, and manner.

As it was brought up earlier, yes, Hamilton made the argument that every government ought to contain within itself the means of its own preservation.

The reason for this was, during the ratification of the Constitution, the Anti-Federalists and those who were opposed to this provision believed that factions or parties, as we would call it today, could manipulate election laws so they could stay in office indefinitely. That was their argument.

Hamilton, however, a quote that comes out of the Federalist that I haven't heard quoted here today, clarified that. After he said every government ought to have—ought to contain within itself the means of its own preservation, he argued that the provision was a reasonable compromise that gave Congress default or secondary powers that would be exercised—and here is the quote—"whenever extraordinary circumstances might render that interposition necessary to its safety."

So what Hamilton is saying is the States have the primary power, that Congress only has a secondary or default power. And his argument was in case of States setting times, places, and manners to where they would not fulfill the seats for Congress, that

they could manipulate, they could hold Congress hostage per se if they didn't.

And that was the secondary argument that they were making, and that is why Congress has that secondary power, not the primary.

Yes, the Federal Government has a primary on qualification of electors, and this is getting convoluted in the argument here, and so I think we need to separate that. And the Republicans' argument here is not with the qualification of electors. Our argument is that, would the States provide or hold the primary responsibility for times, places, and manners?

With that, Secretary Adams, as you know, according to Article I, Section 4, as we have been talking about through all of this, the time, places and manners, as I have laid out, that the States have the primary responsibility for setting that. But even still, many of my colleagues on this committee and others are pushing this Article I, which is a national takeover of elections, which would, in my opinion, circumvent the true intent of our Founders and our Constitution.

My question is, how would this one-size-fits-all approach impact the election administration across the country? Let's say especially in Kentucky. Look at the provisions that would substantially—potentially substantially change how you hold elections in Kentucky.

Mr. ADAMS. Well, thank you, Congressman.

Let me give you a pretty riveting example. Back in December, as I was drafting my election reform measure for Kentucky, the biggest change of our system, modernization of our system since 1891, we made absentee voting easier, we expanded early voting, and so forth, I had a meeting with a high-level official in our State NAACP. And to my surprise, he told me, "Secretary Adams, please don't expand mail-in voting." He said, "My community doesn't want that."

And that really struck me, that you think of, for example, mail-in voting—which, by the way, I am not here to support or oppose. It is just, should that be implemented from outside of our State on our State because of what other States like?

Look, if Utah wants it, that is great for them. I respect that. But in Kentucky, African Americans want to vote in person, Democrats want to vote in person, everybody does. That is our culture. We are just different. That is our tradition, and that is how people feel like they have a voice. And so I think we have to respect that. The best way to do that is to let each State do it their own way.

Mr. LOUDERMILK. All right. Thank you.

I see my time has expired, and I will submit my other questions for the record.

Let me just say in response to your answer there, we know historically by far in-person voting is the most secure. That is why many people prefer to do that. Much more secure than mail-in voting. And traditionally that is where we have seen the largest amount of fraud.

With that, Madam Chairperson, I yield back.

The CHAIRPERSON. The gentleman yields back.

The gentleman from North Carolina, Mr. Butterfield, is recognized for five minutes.

Mr. BUTTERFIELD. Let me thank you very much, Madam Chairperson, for convening this very important hearing today.

And certainly thank you to the witnesses for your testimony.

And it is good to see all of my colleagues. I look forward to our return to Washington.

Madam Chairperson, as a law student many, many years ago, as a lawyer, as a trial judge, supreme court justice, over the years I have had many occasions to read and re-read and study court opinions and law review articles all about the Elections Clause. I have come to the same conclusion every time I read it and read about it: The Elections Clause seems to me to be unambiguous.

So, I want to begin today by asking each one of our witnesses the very same question. Should Congress choose to pass a regulation affecting Federal elections, do you agree or disagree that such regulation will preempt those passed by a State?

Let me go to each one of the witnesses. I guess I can go in the same order that you testified.

Mr. RAKOVE. I am just a working historian and I would be a little averse to offering these kinds of judgments. But, yes, I mean, the basic answer I would offer is yes. And I see no harm in it.

Mr. BUTTERFIELD. Is it unambiguous in your world?

Mr. RAKOVE. Say again?

Mr. BUTTERFIELD. Is it unambiguous——

Mr. RAKOVE Yes.

Mr. BUTTERFIELD [continuing]. The Elections Clause?

Mr. RAKOVE. Yes.

Mr. BUTTERFIELD. All right.

The next witness.

Ms. TOLSON. It is going to preempt contrary State laws, and it will create new law in some places. So for those States that already have independent commissions, for example, it wouldn't preempt those laws because it requires it for Federal elections. But in some cases, if there are State laws that conflict, then absolutely preempts.

Mr. BUTTERFIELD. Sure.

Mr. TOKAJI. Representative Butterfield, I do agree. It is unambiguous that under the Elections Clause Congress has broad plenary power over the time, place, and manner of conducting congressional elections. And you don't have to take my word for it. That is what Justice Scalia wrote in the *Arizona v. ITCA* opinion reaffirming over almost a century and a half of precedent.

Mr. BUTTERFIELD. Yes.

Secretary Adams, before you respond, you noted in your testimony that you were testifying today primarily about policy; in other words, on whether Congress, whether we should pass election legislation.

And for the sake of clarity, when it comes to the narrow and legal question of whether Congress can pass legislation—and that is what my first question is about—would you agree that the Elections Clause gives us, Congress, broad and expansive authority to regulate congressional elections, putting aside the policy concerns?

Mr. ADAMS. Well, I think that is kind of a subjective question with kind of a subjective answer. Clearly, there are certain things Congress could do that would go beyond its authority. There are

guardrails in our constitutional system. We are a system of dual sovereignty, States and the Congress. We have seen that time and time again in Supreme Court decisions. For example, Congress can't require States to do Medicaid and they can't take away their——

Mr. BUTTERFIELD. What about mail-in voting? What about mail-in voting? Do we have that authority?

Mr. ADAMS. If I could finish my answer.

There are limits on what Congress can tell the States to do, how much they can commandeer them, whether they can require them to do certain things in exchange for Federal funds.

So if you are asking do I think that you have significant authority, I certainly think that you do, but it is not unlimited.

Mr. BUTTERFIELD. Does that include mail-in voting?

Mr. ADAMS. I can't tell you that I have researched this issue. Perhaps the other scholars have. I don't know that you do or don't——

Mr. BUTTERFIELD. You mentioned a moment ago that African Americans in Kentucky want to vote in person. How did you arrive at that conclusion?

Mr. ADAMS. Well, a couple of things. One, I was told that by a high-ranking official of the State NAACP, which——

Mr. BUTTERFIELD. And I can assure you that poll after poll all across the country is contrary to that position. Minority groups and all groups want the ability to vote absentee as well as early voting.

Let me just move on if I can. My time is running out, Madam Chairperson, let's see how much time. Twenty seconds. I don't have enough time, Chairperson Lofgren, for my final question, so I will yield back.

Thank you.

The CHAIRPERSON. The gentleman yields back.

Mr. Steil is recognized for five minutes.

Mr. STEIL. Thank you very much, Madam Chairperson. My tour of the rural Wisconsin continues. I have not found a Kinko's, but I find more and more people that do have access to camera phones. It is also great to see Dean Tokaji from the University of Wisconsin Law School, my alma mater, as well as everybody else on today.

I would like to direct my first question if I could to Secretary of State Michael Adams.

Ballot access and methods of voting have been subject to several of our Election Subcommittee hearings. Some have suggested the importance of providing a mandatory vote by mail. Would that guarantee an increase in voter turnout in your analysis?

Mr. ADAMS. Well, in Kentucky, no, I don't think that it would. In Kentucky, again, our culture is people want to vote in person. Before I took office, we were 98 percent vote in person, two percent absentee, and I have certainly worked hard to make voting as easy as possible. But I don't know that it would make much of a difference. I think people really want to vote in person. That is why, in Kentucky, for example, I just quadrupled the number of days people get to go vote in person. That is how we choose to vote.

Mr. STEIL. Can I dig in on that? It seems like there are—political cultures are different in different States how people prefer to vote. For example, in Kentucky you may want to cast your ballots in one manner, which may be different than Utah or Wisconsin. Can you

expound on your understanding on that point of how different political cultures exist in different States in the United States?

Mr. ADAMS. Yes. And if I could make one overall point today, I am not here to criticize the components of H.R. 1. I don't agree with many of them, but that is not my argument so much. My argument is I don't want to see a Democratic or Republican national bill change the election rules. I think California and Colorado would be upset if the Republicans did that when they held power.

So seats are different. Utah has a vote-by-mail system. They are more Republican than Kentucky is, and they seem to like that, and I don't question that at all. It is super for them, but I don't think in Kentucky we would take to that as equally. I think the best way to expand a franchise in Kentucky, what we saw last year is, even though we made absentee voting available to all people, they didn't want to vote absentee; they wanted to vote in person, and they still came to vote in person. So the easiest way and, actually, the most cost-efficient way to expand access to the ballot was to expand the number of days people could vote in person.

Mr. STEIL. And so knowing our States have different political cultures as well as very significant diversity in our geographic footprints, is the best level of government to make these decisions to encourage everyone to vote, make it easy to vote and hard to cheat? Is the best level of government to deal with that the State government or the national government?

Mr. ADAMS. Well, I think you just look at the record. Look at what we have accomplished in Kentucky compared to, respectfully, what the national government has with regard to election administration. I am really proud of what our State's achieved, and we can only do that because you all didn't take over the system. You allowed us to actually have breathing space for Democrats and Republicans to come together around the table and pass something with almost unanimous votes. That is something that was idealized by a Republican secretary of state and signed into law by Democratic Governor.

Mr. STEIL. So, you are a Secretary of State. You are also an elections attorney. Could you walk us through your interpretation of the Elections Clause? Just dive in a little further in your testimony.

Mr. ADAMS. Yes. Look, I would be first to admit I have never researched that issue in a scholarly fashion. I have never had it pop up in a case I have had for any client of mine. So, I don't have a whole lot to add in terms of the history or the text of that. I think it speaks for itself.

Mr. STEIL. I appreciate your testimony here today.

And, with that, Madam Chairperson, from rural America, I yield back.

The CHAIRPERSON. The gentleman yields back.

Representative Scanlon is now recognized for five minutes.

Ms. SCANLON. Thank you so much. Is this coming through okay? I am traveling myself.

The CHAIRPERSON. She is in rural Pennsylvania. So, yes, you are coming through.

Ms. SCANLON. Okay. Thank you, Chairperson Lofgren.

And I have been anxious to have this discussion about Article I, Section 4 and, of course, I am pleased to see my former professor, Professor Rakove, who, as he said, we knew each other way back in the day, longer than I care to admit, but it is great to have him on this hearing today because, of course, he is a preeminent national authority on the original meanings of the Constitution. In fact, he authored a book that won a Pulitzer Prize with that title, "Original Meanings." So I guess I would like to direct my first question to him about the clause that we are talking about here Article I, Section 4. We have heard an awful lot about time, place, and manner, but the second half of that clause is what gives Congress the power to do something different than the State legislatures choose to do.

Can you talk about the drafting of such a clause and what the second part of it, giving Congress the power, means with respect to the authority that is given to States in the first part?

Mr. RAKOVE. To talk briefly about the drafting, the clause did not originate in the larger body of the Convention. It came out of the work of the Committee of Detail, which, you know, met between July 26 and August 6, 1787, when the Committee took the general resolutions the Constitution had at the Convention adopted at that point and turned them into the working text of the Constitution.

So the idea of speaking more specifically about the conduct of elections originated in Committee; it was only discussed on the single day of August 9. And it was discussed primarily, not solely, but primarily because the two South Carolina delegates said the clause was superfluous; we should just trust the States to do what they did.

It is worth noting in South Carolina was kind of a peculiar State or distinctive State in the sense that they had a long tradition of the colonial, the State legislature dominating the politics of its State. Once they made this proposal, four or five other delegates spoke, and they spoke pretty robustly in opposition to it.

I think the important point I want to stress and it is—I think it does involve thinking historically about change over time as much as legally about decisions and enactments, is to realize that, you know, this was a deeply experimental process. There was no example of designing the kind of national political system that the Framers were creating.

In my written statement, I talk a bit about the British practice, which is, you know, two knights for every shire or county and then give Parliamentary representation done on a corporate basis, but there is no idea of having expanding electorate of the kind that Americans were bound to have. And there was a lot of genuine uncertainty in the very beginning about, you know, were we going to represent the States, you know, as aggregate constituencies? Pennsylvania voted—in Pennsylvania in 1789, you vote for the entire State delegation. Would you do it by districts with voters in individual districts? Vote for Representatives from each district in the State? These were all the possibilities.

So I think the important thing to stress, you know, Congresswoman Scanlon, is that there was a strong prospective dimension and indeed a kind of experimental dimension to the clause, the idea that you would learn more about how the national political

system would work on the basis of experience. That experience would also include the question of whether issues of discrimination as we think about them now but for which there were—there was an 18th century way to think about this, that you have an equal interest in society should be equally represented in the legislature. In some ways, that is a very modern notion as well.

So I think thinking about the second half or the latter part of the clause in these terms I think would be really helpful. It is not just about protecting the States; it is about, aren't—there better models of national representation broadly defined that Congress would want to accept.

Ms. SCANLON. Well, I mean, coming from Pennsylvania, where over the past decade we have had a number of different voter ID laws, gerrymandering, et cetera, with a Republican legislature where the house majority leader was recorded saying that many of these provisions were implemented in order for his party to retain power, that seems to be like the very type of conduct that the Framers were rightly skeptical of. And as we are hearing about, you know, States having certain cultures of voting, we also know that certain communities have cultures of voting. Take, for example, the Black community that has a tradition of voting on Sunday after church, and we have recently seen some State legislatures try to undermine that tradition of voting.

So I guess just finally I was interested in what you wrote about Madison and the skepticism of the types of activities they were afraid that State legislatures might undertake, including closing polling places or preferring certain voters over other types of voters. I don't know if we can get an answer to that, but I will yield back because I see my time has expired.

The CHAIRPERSON. The gentlelady's time has expired.

I recognize the gentlelady from New Mexico for her five minutes. Unmute, though.

Ms. LEGER FERNANDEZ. There we go. Thank you, Chairperson Lofgren, and our witnesses for their important discussion on the constitutionality of Federal voting laws.

Professor Rakove, you discussed how the Founders so eloquently described the need to protect the ability of voters to elect a Representative for assembly that in John Adams words was a miniature, an exact portrait of the people at large of the country. You discussed how that representation might not be what it is today, but today it is supposed to be every citizen whether they be Native American, Black, Latino, whatever, right, that they need to be able to elect Representatives that reflect them, and our concern is that that is not happening, that the restrictions in terms that are being enacted really are targeted so that certain communities cannot—cannot—succeed in getting that beautiful portrait of themselves in Congress.

Can you explain how the Elections Clause and its history apply to these present-day concerns? Aren't they in some ways the concern is similar, correct?

Mr. RAKOVE. Well, certainly. In some ways, I would just assume to defer to my two colleagues who have written so much about the periods of discrimination, the practice of voting. The phrase we heard earlier was "laboratory"—the States viewed as laboratories

of democracy, but you could say equally, well, the States have often served as laboratories of discrimination. I mean, that is the whole history of the Jim Crow era restrictions on a Black electorate once it was created during the time of Reconstruction. The question all of us are actively considering today, particularly in the aftermath of the Shelby County decision, is whether we are seeing, you know, not—obviously not a full-scale revival on the basis of what happened, you know, in the 1890s and after 1900, but whether the kinds of laws being enacted at the State level will that have kind of discriminatory effect.

Congress, as you all know, went to great lengths in its periodic reenactments of the Voting Rights Act to adduce the data that the Court now seems fairly anxious to deny. But I think the question, just quickly on the history side, I mean, the question of a mirror, it was something that both the Federalists and anti-Federalists actively debated. If you want to hear the other side of the question, there is a fascinating passage from a guy named Melancton Smith from New York, also known as the Federal Farmer, tried to imagine what an ideal Congress should look like. And his idea was actually it would be good if it had a kind of what we would call a middle class quality, that it is easy for the great to associate. It is easy for people of wealth to kind of get together and decide what they are going to do, and they are going to intimidate these other characters like these Representatives. It is very important now in the 18th century—actually, every Member of Congress today should know this, but the ambition of being reelected was not the dominant motive in 18th century politics. The mean term of service in the House of Representatives down to about 1890 was three years, meaning that most Members served one term or two.

So, the whole idea that our politics would be driven, including the whole gerrymandering process or, as I said in my written statement, the idea that, in the United States, voters don't choose Representatives, Representatives choose their voters; that idea would have been kind of hard to grasp or accept in the late 18th or 19th century because, by and large, it was thought that most Representatives would be amateurs. They would come, and they would go. They would rotate in office. So, you know, the striking thing to me, though, is—and I think Madison is a good example of this. I mean, how much of what we are debating about today was actively in a certain sense anticipated by Madison, including, to be honest, the distrust of State legislatures. I mean, the whole animus behind the Federalist movement was the belief that State legislatures could not be relied upon to do their Federal duty, that they were, indeed, subject to kind of partisan concerns, and Madison's hope—and maybe he is wrong about this—was the idea that, in fact, if you had large electoral districts, you might get less partisan politics.

Ms. LEGER FERNANDEZ. Thank you, Professor.

I wanted to get to at least one other question, and it strikes me that, unlike rural Wisconsin, where we heard earlier today that everyone has good access to basic infrastructure, I represent a rural district, and many of the rural areas I represent don't have such infrastructure. And in high poverty areas of my rural district, especially in Tribal areas, access to fancy phones is actually hard.

In response to State laws that were hindering Native Americans' access to the ballot, H.R. 1 has important provisions for Native Americans voting. It also includes provisions to ensure that States receive HAVA funds so that we have fair and equitable ratings.

Professor Tolson, what is your response to those who suggest that these and other provisions in H.R. 1 are unconstitutional?

Ms. TOLSON. They are not, you know, and part of it is that, you know, the text mean what it says. And this is something that has come out over the course of this hearing. The text is, although States are mentioned first, that is because States get a first crack at setting the times, place, and manner of Federal elections. It is not because States are the primary focus of the Elections Clause.

In fact, if you look at the history as recounted by Professor Rakove, brilliantly I might add, you know, consider the fact that there was one consideration on the table for the general veto of all State laws by the national government versus a more limited veto in the context of the Elections Clause. I think the fact that the general veto was rejected and they accepted the limited veto in the context of the Elections Clause really does illustrate the distrust that the national government had with respect to State legislatures over this issue. In short, the Elections Clause provides broad authority for all of H.R. 1.

And let me just make one other point. There has been a lot of talk about political culture, but making voting harder is not a political culture, right? Partisan gerrymandering is not a political culture, right? So we can respect the ability of States to set time, place, and manner as a first instance, but where States are abusing that authority, Congress has power to step in.

Ms. LEGER FERNANDEZ. Thank you so much.

My time has expired.

The CHAIRPERSON. The gentlelady's time has expired.

I see the Ranking Member, Mr. Davis, has joined us.

Mr. Davis, you are now recognized for five minutes.

Mr. DAVIS. Well, thank you, Madam Chairperson. It is great to see the witnesses. Sorry I haven't been able to be on the entire time, but we have been keeping tabs on the testimony. Of course, we are keeping an eye on Mr. Steil. I don't want a coup d'etat on the minority side, but it is great to see everybody. I can't wait to see you all in person again.

I want to start my questions with my good friend Mr. Adams. Mr. Secretary, I do want to say thank you for coming here today. It was great to see you a few weeks ago in Washington. As the chief election official for the State of Kentucky, do you believe the Federal Government should mandate how States and jurisdictions administer elections?

Mr. ADAMS. Well, I certainly don't have a problem with the Voting Rights Act and some basic provisions, HAVA, the NVRA. There is some good stuff that Congress has done in the past. What I don't want to have is a micromanagement of our election systems because States are just simply different. That is my first argument.

My second argument is, with respect to Congress, I think we do a better job at the State level of finding space across the aisle to actually work with each other and get things done. It is a less toxic atmosphere than what you have in Washington.

Mr. DAVIS. Well, I mean, it is pretty easy to get a less toxic atmosphere anywhere compared to Washington, D.C. But, you know, if you look at the last two election cycles, Mr. Secretary, we saw record midterm turnout in 2018 and record Presidential year turnout in 2020, and the Democrats on this Committee have not been able to produce a single voter whose vote was suppressed? Of course, even Stacey Abrams has testified before this Committee that voter turnout really doesn't matter. So can you explain that one to me?

Mr. ADAMS. I am sorry. What was the last part of your question?

Mr. DAVIS. I said even Stacey Abrams testified before this Committee that voter turnout, that it doesn't really matter. So I am at a loss. Can you explain how that makes sense when we have had record turnout, have not been able to see—this Committee has not been able to put forth a single voter whose vote was suppressed, and their leading voice on voter suppression, Ms. Abrams, said that voter turnout doesn't matter. I think it does. Do you?

Mr. ADAMS. Well, sure, I think it does. I am really proud that in our election last year, in the midst of a pandemic, we had the highest turnout we ever had; over two million voters voted. And I am proud of it. I took some hits from my side of the aisle for some decisions I made to make voting easier, but we did it in a way that protected the security of our elections, its integrity, and we made voting easier. We expanded early voting. We found that about seven out of ten voters even in a pandemic preferred to vote in person instead of by absentee.

Again, I don't have a problem with absentee voting, but I think we should permit the States to respect the wishes of their constituencies and come up with a model that works for them.

Mr. DAVIS. Well, did any of these changes you made, like voter ID, impact voter turnout?

Mr. ADAMS. Well, interestingly, the first laws that I got passed was the photo ID to vote law. That was an issue that I ran on, and there were Chicken Little concerns about the sky falling and so forth, but we didn't find that that disenfranchised anybody. We had, again, record turnout notwithstanding that.

Now to be clear, our voter ID law was very humanely drafted. We bent over backwards to sit down with interest groups on both sides to make sure that we didn't have anything in there that would unduly prevent anyone from voting. So, we were very humane in how we did it.

But the fact is we implemented in a pandemic even and we still managed to ensure people got to vote, but we verified who they were first.

Mr. DAVIS. Well, you guys had to work with local election officials on these reforms prior to enactment, and I know you offered vote by mail in 2020. Can you tell us briefly how did you work with the local election officials to get these reforms that many of my colleagues on this Committee may think are impossible to implement and how did your vote-by-mail process impact in-person voting in Kentucky in 2020?

Mr. ADAMS. Well, I think it is important that election administrators be at the table, at the center of the table in devising election rules. These things shouldn't be written up by a caucus or a

think tank; they should be done with election administrators at the table who are less ideological on these things or more practical. We have to engage in the customer service business and that is helping people vote.

So, in our State, we found that democratic county clerks, urban county clerks didn't like relying on mail-based voting as the primary method. They found that their constituents preferred voting in person where possible. Obviously, if you have an age or disability and you need to vote absentee, we respect that. We allow for that. It is actually a right in our State constitution, but all of that said, we found that the way that most Democrats wanted to vote, most Republicans wanted to vote was in person. So the question was, how do we achieve that? And to do so, we expanded early voting for the first time in our history.

Mr. DAVIS. Well, thank you very much to all the witnesses. I ran out of time talking to you, Mr. Secretary, so I didn't get a chance to ask questions of the others. I appreciate the opportunity, Madam Chairperson. I am going to have to jump off, so thanks, again, everyone.

The CHAIRPERSON. The Ranking Member yields back.

And I now recognize myself for a few questions.

Dean Tokaji, it has been alleged that, if Congress exercises its jurisdiction in the Elections Clause, it would constitute constitutional problems of anticommandeering, and specifically I am interested in the redistricting provisions and whether the court has really addressed this issue per se, for example, in the *Rucho v. Common Cause* case.

Can you address that?

Mr. TOKAJI. Yes. Thank you for that question.

And, in fact, in the *Rucho* decision, which Committee members will recall, rejected a constitutional challenge to partisan gerrymandering. The courts reaffirmed Congress' broad power to regulate congressional elections, specifically including redistricting. The Court referenced favorably the Apportionment Act of 1842, which was the first exercise of Congress' power over the process of drawing congressional districts and the congressional representation process, and went on to explain that Congress specifically does have the power to make laws regarding congressional districting.

So there wasn't really much question about Congress' power to regulate congressional reapportionment or redistricting before *Rucho*, but if there ever was, *Rucho* definitively resolves that. There is simply no doubt that Congress, under the Elections Clause, has the ultimate in power over the rules regarding congressional districting.

The CHAIRPERSON. Well, let me ask you, Professor Rakove, why were the Framers concerned, in particular, about State lawmakers drawing district lines?

Mr. RAKOVE. I think the best answer really involves reconstructing the political adversary of the 1780s. Essentially, it is a function of the fact that the first—our first system of American Federalism under the Articles of Confederation allowed Congress to recommend to the States what needed to be done for national purposes. Congress would pass requisitions, resolutions, recommendations. It is basically a system of Federalism based upon the vol-

untary compliance of the States with, you know, decisions made by the Continental Congress. It was the criticism of what Madison would call the vices of that system, its recurring tendencies to break down, that, in fact, represent a fundamental decision that for the national government to work, it had to be competent to enact, execute, and adjudicate its own laws.

Now elections represented, you know, kind of more complicated—because you are trying to elect both local, State, and Federal officials, but I think my general argument that general failure of the States to fulfill their Federal duties was the entire pretext for setting up a bicameral national legislature that would act legally. There is interesting comparison which I think Congresswoman Fernandez made, between, you know, the time, place, and manner clause and the ability of Congress by law to override, and you know, Madison's idea of giving Congress, you know, a negative on State laws, when, in effect, you know, the Article I, Section 4, is in its own way a version of Madison's negative on State laws. And, I think, the point I was trying to make is it has both negative and positive connotations; that is to say, you may see, you know, distortions being committed at the State level, you know, including kind of pre-*Baker v. Carr* issues of malapportionment on the one hand, or you may come up with better ideas how Representatives would be elected, which is what happened in 1842.

The CHAIRPERSON. Let me ask you this: Madison, as you noted in your testimony, warned at the Constitutional Convention that States might try to manipulate election laws for partisan gain. Do you see any parallels between that worry at that time and current events?

Mr. RAKOVE. Just randomly, yeah, obviously, I do. I mean, as you know, Congresswoman, I am, first and foremost, an 18th century guy, but I do read the newspapers fairly regularly. So, yeah, there is this whole slew of legislation out there whose consequences we are waiting to see.

If you ran—I will speak for Madison, since I spent almost every day thinking about him—if you ran this by Madison, he would not be surprised to see this. It is consistent with his analysis of what was wrong with State politics or worse, specifically, why you are more likely to get the wrong kind of factuals at the State level than hopefully you would at the national level. It fits within a Madisonian aegis of rubric very neatly.

The CHAIRPERSON. I thank you very much. My time is expired and the time of all Members has expired. I would just like to note as we close that I, very rarely, had concern about local election officials. Our concern has been with partisan legislative bodies that are enacting legislation that governs those actions.

Before we conclude, with unanimous consent, we will add the following items to the record: Federalist Papers Nos. 59, 60, and 61; the Constitutional Authority Statement for H.R. 6882, of the 116th Congress; the Constitutional Authority Statement for H.R. 3412, in the 116th Congress; the Constitutional Authority Statement for H.R. 7905, from the 116th Congress; several Law Review articles discussing the breadth and scope of the Elections Clause.

And hearing no objection, those materials will be made part of the record.

The CHAIRPERSON. As has been noted, Members may have additional questions for each of our witnesses. If so, we will submit them to you in writing, and we request that you would answer them if you are able to. The record will be open to receive the answers to those questions.

I want to thank this panel for outstanding testimony today. Very enlightening, very smart, a real contribution to our understanding of the Constitution, and we thank you.

And, without objection, then, the Committee on House Administration will stand adjourned.

[Whereupon, at 2:29 p.m., the Committee was adjourned.]

HEARING
COMMITTEE ON HOUSE ADMINISTRATION
"THE ELECTIONS CLAUSE: CONSTITUTIONAL INTERPRETATION AND CONGRESSIONAL EXERCISE."
JULY 12, 2021
MAJORITY QUESTIONS FOR THE RECORD
FOR
JACK RAKOVE
W. R. COE PROFESSOR OF HISTORY AND AMERICAN STUDIES
PROFESSOR OF POLITICAL SCIENCE, EMERITUS
STANFORD UNIVERSITY

1. Could you provide more historical context regarding our Nation's experience under the Articles of Confederation and how that experience affected the Framers' approach to both constitutional drafting generally, and to the drafting of the Elections Clause specifically?

This is as open-ended a historical question as one could ask, and whole books have been written on the subject (including a few of my own, notably counting *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979) and *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996), as well as many of my writings on James Madison).

The controlling fact about the Articles of Confederation (drafted in 1776-77, finally ratified in 1781, in effect from March 1781-March 1789) was that the unicameral Continental Congress generally relied on the states to implement its resolutions, recommendations, and requisitions for funds, manpower, and supplies. Congress lacked statutory authority in its own name; it could not enact laws binding individuals; and although the Articles required states to abide by congressional decisions, it provided no enforcement mechanism that Congress could implement against delinquent states. In general, the states were working as hard as they could to carry out congressional decisions, but the burden of waging a military war exceeded their capacities.

As Madison and others analyzed the "imbecility" of the Confederation in the mid-1780s, the lack of legal authority that Congress had over states and individuals became a paramount concern. Well into 1786, the particular subjects that seemed most important involved giving the national government an independent authority to levy taxes and collect revenue and to regulate foreign and interstate commerce. But in the months preceding the scheduled assembling of the Federal Convention at Philadelphia in May 1787, and in the immediate aftermath of Shays' Rebellion, some proto-Federalists, led by Madison, began thinking in more expansive terms. Now they were troubled by internal governance *within* the individual states, worrying about the "vices" that Madison labeled the "multiplicity," "mutability," and worst, the "injustice" of state legislation. Madison's analysis of the sources of these vices within the states marked the leading edge of his

creative constitutional thinking, setting the basis for the famous arguments of *Federalist* 10 and 51, as well as his futile proposal to give the bicameral Congress that the Federal Convention would propose a negative (we would say veto) on state laws.

In constitutional terms, the main consequence of this critique of the weakness of the Confederation and the internal vices of state legislation was the consensual decision of the Federal Convention to create a bicameral legislature that would enact laws all citizens would have to obey. That course of action was briefly challenged in mid-June when the delegates considered the New Jersey Plan, which would have essentially preserved the unicameral Continental Congress and vest it with a few additional powers. But the New Jersey Plan was rejected quickly and decisively, and the Convention stuck to the framework of the Virginia Plan. Under its aegis, rather than continuing to allow the state legislatures to implement national policies, the Constitution would empower the national government to enact, execute, and adjudicate its own laws, acting independently of the states (which, however, would also be bound by the Supremacy Clause of Article VI).

In creating this new Congress, the Convention had to make important decisions about the character of political representation. Under the Confederation, members of Congress were annually elected by the state legislatures; could serve three years out of six (as it happened, Madison was the first member to be term limited out of office in the fall of 1783!); and voted as members of a state delegation, each of which had one vote. As everyone knows, the main disputes over representation at the Convention pivoted (a) on whether each state would retain their equal vote in the Senate, and (b) how to apportion seats in the House of Representatives among the states.

The Convention also had to decide how to select each house. Although several means of appointing senators were proposed, the precedent of following the Confederation and vesting that power in the state legislatures became the consensus option. With the House, however, no obvious precedent existed. Representation in the American colonies and states was based on existing legal communities (counties, towns or townships), and that model could not be transposed nationally without creating an overly large lower house. It was also an open question, theoretically, exactly how states would be represented: on a statewide basis, under a unit or general ticket system; or as a set of districts chosen either by their residents or, conceivably, with voters in each district casting their ballots for representatives from each of the state's districts.

There was thus a sense in which the Elections Clause was inherently experimental in nature. Because the House was conceived to represent the people as citizens of individual states, the framers gave the state legislatures the initial task of determining how its members would be elected. But that did not preclude the possibility that Congress, in its wisdom and reasoning from experience, could decide that there were indeed optimal modes for electing members of the House that it could apply nationally. Nor did the Clause ignore the concerns that had shaped Madison's agenda-setting activities prior to the Convention. The revisionary power over elections that Congress retained was not identical with Madison's negative on state laws, because Congress was obligated to provide a positive alternative to whatever system it was rejecting. But one major animus justifying this power was the wholly plausible suspicion, inherited from the past decade

of experience, that state legislatures, acting from improper partisan motives, would willfully defy the established norms of "equal" representation or even, if they were sufficiently "anti-federal" in their motivations, refuse to participate in national elections. Viewed in this context, the Elections Clause reflected one of the recurring motifs of the Federalist movement.

2. What do Federalist Papers 59, 60 and 61 tell us about the Framers' intent to include the Elections Clause in the Constitution?

The three essays that Hamilton devoted to the Elections Clause do not number among his best-known contributions to *The Federalist*. Perhaps because the Clause seems somewhat peripheral to the main academic concerns with *The Federalist*, they have attracted little scholarly attention. When I co-edited *The Cambridge Companion to The Federalist* (2020) with Prof. Colleen Sheehan of Arizona State University, it did not occur to us to recruit an essay on this subject. Retrospectively, given the events of the past few years, Prof. Sheehan and I probably erred by not soliciting an article on the essays devoted to the Elections Clause and the discussions of impeachment and presidential election.

Nevertheless, the fact that Hamilton devoted three full essays to this Clause is itself a significant indication of its importance to the framers. Although Hamilton was not present on August 9, the one day the Clause was actively debated, he did attend the Convention four days later and again at the end of the month. One can plausibly assume that he had personal knowledge of the concerns animating the framers from the outset.

More important are the themes Hamilton's stresses in these essays, which illustrate the acuity of his political intelligence. His first substantive comment on the Clause in *Federalist* 59 confirms a motif that appears elsewhere in his writings: "Its propriety rests upon the evidence of this plain proposition: that *every government ought to contain in itself the means of its own preservation.*" This proposition strikingly parallels his statement in *Federalist* 23, where he argued that, in the realm of providing for the common defense, "These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.*" Though the dangers posed under the headings of congressional elections and overt threats to national security may seem quite different, in both cases Hamilton presupposes that the survival of the Constitution and the federal republic will similarly be at stake. Once one makes that presumption, it follows deductively that any limitation on federal power is inherently dangerous.

There were, Hamilton continued, three possible frameworks for regulating elections to Congress: entrust the responsibility solely to the states, solely to the federal government, or do exactly what the Constitution proposed, allow the states to do so individually, and make their decisions subject to federal revision. Given the American commitment to federalism, on the one hand, and the potential threat to the constitutional system, on the

other, Hamilton thought there was no doubt that the Convention had done exactly the right thing.

What makes Hamilton's analysis more intriguing is how he distinguished the dangers the country would respectively face from state efforts to impair, obstruct, or even prevent the election of senators and representatives. The Senate could not become a source of concern, he reasoned, because its rotating membership on the six-year cycle would minimize the net danger to the institution as a whole. The case with the House of Representatives, however, was radically different. Giving the state legislatures "an exclusive power of regulating elections" could provoke a crisis every two years, "if the leaders of a few of the most important States should have entered into a previous conspiracy to prevent an election." Here Hamilton carefully distinguished the attachments of the popular electorate from the personal and political ambitions of "the particular rulers of particular States, stimulated by the natural rivalship of power" between the Union and the states, "and by the hopes of personal aggrandizement, and supported by a strong faction in each of those States." Hamilton was alluding to the recent history of the Confederation, implicitly evoking the anti-federal policies of Rhode Island and his own state of New York, as well as the notion that the creation of a stronger national government in the United States would encourage foreign powers to meddle in American elections. More important, Hamilton recognized that while the people of a state could remain attached to the national government, an ambitious majority in the state legislature might form ambitious, arguably seditious aims of their own.

In the remaining two essays Hamilton wrote on the Elections Clause, he turned his attention to two other issues. *Federalist* 60 essentially argues that Anti-Federalist charges about the potential misuse of the Clause are completely improbable and impracticable. Or, in other words, "Of all chimerical suppositions, this seems to be the most chimerical." There is no plausible political explanation, Hamilton argued, of how one would form an effective national coalition devoted to the active misuse of this power, and even if there were, it is impossible to imagine how such a coalition would unite both houses of Congress and the president without provoking massive resistance from voters in the states. In *Federalist* 61, Hamilton noted that there was really no difference between the federal Constitution and the New York constitution in determining how the places of holding elections could be set. But he then concluded this essay with one fresh and "positive" thought: that at some future point a uniformity in assigning a date for congressional elections might prove adavantageous.

3. Can you elaborate more on the state ratification debates regarding the Elections Clause and what those debates tell us about how we should interpret the clause?[1]

Although the Elections Clause did not rank at the top of the list of the issues at dispute during the ratification debates of 1787-88, it did elicit some intriguing comments that fairly

[1] In this section, source citations come from John Kaminski et al., eds., *Documentary History of the Ratification of the Constitution* (Madison: State Historical Society of Wisconsin, 1976-), here abbreviated in the text as *DHRC*.

represent the conflicting perspectives of the Federalist supporters of the Constitution and its Anti-Federalist opponents. Not surprisingly, the views of the former are fairly predictable. They follow the political logic that drove the Convention debate of August 9, 1787 and Hamilton's three essays on the subject in *The Federalist*. The Anti-Federalist statements are more engaging because while they, too, have a predictable side, they also illustrate a desire to use the Elections Clause more ambitiously, to lay down national norms of representation that the states would have been obliged to follow.

The most predictable aspect of the Anti-Federalist criticism of the Elections Clause was the charge that Congress would use its power arbitrarily, requiring states to hold elections at some distant, inconvenient place that would effectively exclude or discourage most voters from balloting. In this view, there was nothing to stop Congress from "ordering the representatives of a *whole* state to be elected at *one* place and that too the most *inconvenient,"* as the Anti-Federalist writer Centinel complained (*DHRC*, XIII, 464) "Who in Pennsylvania would think it adviseable to elect Representatives on the shore of Lake Erie; or even at Fort Pitt?" asked the author of an untitled piece in the Philadelphia *Freeman's Journal* of September 26, 1787, which was also the first published criticism of the Constitution. (*DHRC*, XIII, 245). In this situation, the Federal Farmer (Melancton Smith of New York), observed, the political advantage would fall to the wealthier members of society, who could travel to the polling place more easily, or to the residents of more populous towns. Like other Anti-Federalist writers, he worried that Congress "may make the whole state one district—make the capital, or any place in the state, the place or places of election." It was therefore "easy to perceive how the people who live scattered in the inland towns will bestow their votes on different men—and how few men in a city, in any order or profession, may unite" to choose the winning candidates (*DHRC*, XIV, 31). Brutus, another sophisticated New York Anti-Federalist writer, enlarged the point: "the consequence would be, that none but men of the most elevated rank in society would attend, and they would as certainly choose men of their own social class" (*DHRC*, XIV, 301).

Occasionally, Anti-Federalist criticisms of the Elections Clause veered toward the zany edge of political rhetoric. In the Virginia ratification convention, for example, Patrick Henry, invoking his own "unenlightened understanding," called on the history of ancient Rome to demonstrate that with its control over the "manner" of conducting elections, "Congress may tell you, that they have a right to make the vote of one Gentleman go as far as the votes of 100 poor men," and establish property qualifications for the suffrage that Article I, Section 2, Clause 1, would seem to deny (*DHRC*, IX, 1071). Henry's "unwarrantable" claim would only make sense, Governor Edmund Randolph replied, if "Virginia will agree to her own suicide, by modifying elections in such a manner as to throw them into the hands of the rich" (ibid., 1099).

There was, however, a greater complexity to the Anti-Federalist critique of the Elections Clause, one that treated the Clause as both an opportunity and a threat, and thus illustrated how establishing a popularly elected House of Representatives was a spur to creative constitutional thinking. The best evidence for this comes from Melancton Smith, who published *An Additional Number of Letters from the Federal Farmer* in the spring of 1788. The twelfth letter in this series examined the election of members of the House at some length, including a sustained discussion of Article I, Section 4. In the Federal Farmer's view, the ideal form of representation should require the states to be divided into electoral districts of equal size, with members required to be

residents of their district (and not merely the state), and to be selected by a majority vote. The House should be made "sufficiently democratic, or substantially drawn from the body of the people" (*DHRC*, XX, 1024). The Elections Clause could "easily be made useful or injurious," Smith reasoned (ibid. 1026). The idea that state legislatures would deny their constituents the right to be represented in Congress was not a threat that he took seriously; nor did he think it likely that the people of the state would need to appeal to Congress to make sure they were represented.

What the Federal Farmer found more attractive was using the Elections Clause to correct other omissions in the Constitution. "[B]y far the most important question in the business of elections," Smith argued, was "whether the choice shall be by a plurality or a majority of votes" (ibid. 1021). The Constitution being silent on this point left that fundamental matter unresolved and thus opened up the possibilities for the kind of manipulation that worried Anti-Federalists more generally. But the Clause could also be used constructively, the Federal Farmer implied. Given that the House was elected biennially, while nearly all of the state legislatures were elected annually, it would for example be possible to use the latter to cast what the Federal Farmer called "the votes of nomination" to limit the number of candidates available for "what we may call, by way of distinction, votes of election" to be cast a year later (ibid. 1025). In effect state elections could function as a primary system for the entire electorate (without any connection to competitive political parties).

When the New York ratification convention assembled in June 1788, Melancton Smith proposed a constitutional amendment directly derived from this analysis. Rather than leave the manner of electing members of the House of Representatives to the future discretion of the individual state legislatures, subject to congressional review, he would have effectively revised the Elections Clause to require the states to create electoral districts equal to their total numbers of seats in the House and to have members resident in each district elected by majority vote (*DHRC*, XXII, 1910). James Duane, a prominent Federalist, replied that Smith's proposed amendment went too far. "Will it not seem extraordinary," he asked, "that any one state should presume to dictate to the union?" Better to let the states exercise their own discretion, and if they "do their duty, the exercise of this discretion is sufficiently secured" (ibid., 1911). In the end, the New York ratification convention proposed a different amendment that would have limited the use of the Elections Clause only to occasions when a delinquent "State shall neglect or refuse to make Laws or Regulations for the purpose," or prove "incapable of making the same" (*DHRC*, XXIII, 2330).

These comments from the ratification debates demonstrate two essential points: first, that a concern with states defaulting on their constitutional obligations was not limited to the members of the Federal Convention; second, and more important, that the purposes of the Elections Clause could be read expansively, as a mechanism that could be deployed, and also substantively improved, to make sure that the regulations governing congressional elections fulfilled the fundamental purposes of representative government in a democratic republic.

That was the point James Madison asserted when his friend James Monroe, then an Anti-Federalist, questioned the Elections Clause in the Virginia convention. The framers had indeed thought or hoped, Madison observed, that the regulation of congressional elections "should be uniform throughout the Continent. Some States might regulate the elections on the principles of

equality, and others might regulate them otherwise. This diversity would be obviously unjust." It already existed in some states, Madison added, explicitly citing the over-representation of Charleston in the South Carolina legislature. "Should the people of any State, by any means be deprived of the right of suffrage, it was judged proper [by the framers] that it should be remedied by the General Government." (*DHRC*, X, 1259-60)

Madison's conception of equality and his use of the phrase "by any means" both indicate that the scope of the Elections Clause should be read expansively. It marks no anachronism in historical thinking to link his comments to the dominant modern norm of one person, one vote representation, or to conclude that, even prior to the adoption of later constitutional amendments, that ideal of fully "democratical" standards of representation was available to and appreciated by the framers of the Constitution.

975 Bascom Mall
Madison, WI 53705

August 4, 2021

The Honorable Zoe Lofgren
Committee on House Administration
1309 Longworth House Office Building
Washington, DC 20515

Re: The Elections Clause: Constitutional Interpretation and Congressional Exercise

Dear Chairperson Lofgren:

This letter responds to the questions posed in your July 21, 2021 letter, regarding the committee hearing on the above-referenced subject on July 12, 2021. As with my previous testimony, these responses are solely on my own behalf and do not reflect the views of any institutions with which I am affiliated. The questions appear in boldfaced type below, followed by my responses.

1. **In *Buckley v. Valeo*, the landmark campaign finance case, the Court cited the Elections Clause in a footnote when it wrote that "The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case."**

   a. **To your knowledge, does the Elections Clause authorize federal campaign finance regulations, such as those in H.R. 1?**

Yes. Under settled precedent, the Elections Clause provides authority for federal campaign finance regulations like those in H.R. 1. In *Buckley v. Valeo*, the Court explained: "The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case." 424 U.S. 1, 13 (1976). In the footnote mentioned in the question, the Court explained (citing authority) that the Elections Clause of Article I, Section 4 gives Congress power to regulate *congressional* elections. *Id.* at 13, n. 16. That footnote also affirmed Congress's power to regulate *presidential* elections: "The Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President." *Id.* For that proposition, the *Buckley* Court cited *Burroughs v. United States*, 290 U.S. 534 (1934), which upheld the Federal Corrupt Practices Act of 1925's regulation of contributions seeking to influence presidential and vice-presidential elections. Because this legislation sought to "preserve the purity of presidential and vice-presidential elections," and did not interfere with the manner in which state electors are appointed, it did not infringe on the state's authority under Article I, Section 2. *Id.* at 544.

Among the provisions of the Federal Election Campaign Act (FECA) amendments that *Buckley* upheld was the presidential public financing scheme. As the Court explained: "Congress has power to regulate Presidential elections and primaries ... and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power." 424 U.S. at 90. As I understand it, H.R. 1 does not interfere with state's power to appoint electors in the manner they see fit, but simply seeks to regulate campaign finance in congressional and presidential elections. Accordingly, it falls within Congress's power.

b. If this is the case, would Congress have the authority, under the Elections Clause, to pass legislation including:
i. Enhanced disclosure of political spending, particularly by dark money groups?
ii. A voluntary small-donor matching system for Congressional elections?
iii. A restructuring of the Federal Election Commission, the agency responsible for enforcing these rules, from a 6-member to a 5-member body?

Yes. In my view, all these hypothetical laws would fall squarely within Congress's power under the authorities cited above, so long as they regulated campaign finance in federal elections (as opposed to state or local elections).

2. In your testimony, you noted that registration and identification requirements are not voter qualifications but are a "means of enforcing qualifications." Critics of H.R. 1 object to the voter ID provision, claiming that the provision infringes on states' rights to determine voter qualifications. However, voter ID requirements arguably falls under the "manner" of holding federal elections. Further, the voter ID provision in H.R. 1 does not deprive states of being able to confirm the eligibility or qualification of their voters. Can you elaborate further on the constitutionality of the voter ID provision in H.R. 1 in which a voter can sign a sworn statement to meet a state ID requirement?

This is a straightforward question, in my opinion. As explained in my written testimony, voter registration and identification requirements are not themselves qualifications. They are instead means by which state and local election authorities can ensure that people who seek to vote have the requisite qualifications, such as age, residency, and citizenship. Thus, a law regulating voter ID requirements in federal elections would be a "manner" regulation that Congress is authorized to enact under Article I, Section 4. That includes a provision like the one in Section 1903 of H.R. 1, which permits the use of a sworn written statement to meet identification requirements. This provision would not, in my view, displace any state rule that is *necessary* to enforce qualifications, especially since the law itself provides an alternative means of verifying identity and thus ensuring that the voter meets state-prescribed qualifications. Accordingly, this provision of H.R. 1 falls squarely within Congress's Elections Clause power.

3. Can you provide your perspective on the sources of constitutional authority that support the felon re-enfranchisement provision in H.R. 1?

This component of H.R. 1 presents the most difficult question of congressional power, because it concerns a qualification for voting. There are several potential sources of congressional power for these provisions.

One is the Elections Clause, although there is some uncertainty about Congress power to alter state qualifications for voting under this provision. Justice Hugo Black's opinion in *Oregon v. Mitchell* states that "it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set qualifications for voters for electors for those offices." 400 U.S. 122, 124 (1970). In that case, the Court upheld the Voting Rights Act of 1970's provision enfranchising 18 year olds in *federal* elections, but held that the enfranchisement of 18 year olds in *state and local* elections was beyond Congress's power. Justice Black's opinion was controlling. Later cases, however, have called into question whether the Elections Clause provides authority for Congress to alter state qualifications. *See Arizona v. ITCA*, 133 S. Ct. 2247, 2258-59 (2013).

Other potential sources of authority are the enforcement clauses of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. Legislation would fall within Congress's enforcement powers if it is a "congruent and proportional" remedy for the violation of constitutional rights. The constitutional rights for which this portion of H.R. 1 might be a congruent and proportional remedy include (1) the right to be free from intentional race discrimination in the voting process, and (2) the right to vote –specifically, to participate in the electoral process. This right is subject to a balancing standard under the *Anderson-Burdick* standard adopted by a majority of justices in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). I addressed these sources of congressional power in my article "Intent and Its Alternatives: Defending the New Voting Rights Act," 58 *Alabama Law Review* 349, 357-65, 368-74 (2006).

Another right that Congress can enforce under Section 5 of the Fourteenth Amendment is the right to travel. One component of the right to travel is the right of U.S. citizens to move from one state to another and be treated as an equal citizen of their new state. *Saenz v. Roe*, 526 U.S. 489, 502 (1999). This right is grounded in the Fourteenth Amendment's Privileges or Immunities Clause, and protects newly arrived state citizens' right to be given "the same rights as other citizens of that state." *Id.* at 503 (quoting *Slaughter-House Cases*, 16 Wall 36, 80 (1872)). The idea that some federal voting protections can be justified as an exercise of Congress's authority to enforce the right to travel finds support in Justice Potter Stewart's concurring and dissenting opinion in *Oregon v. Mitchell*, which was joined by two other justices. Justice Stewart did not agree with Justice Black that Congress had the power to alter qualifications for voting (including the age requirement) under Article I, Section 4. Nevertheless, Justice Stewart concluded that Congress had the power to set durational residency requirements for voting in presidential elections, as an exercise of its authority to enforce the right to travel. 400 U.S. at 285-87.

The right to travel might also justify uniform national rules for when people convicted of a crime may vote in federal elections. There is evidence of broad variation and misunderstandings of laws governing the disenfranchisement of people convicted of crimes, which poses a

particular problem for people with criminal convictions who move from one state to another. Alec Ewald, *A 'Crazy Quilt' of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law* (2005). Documenting such problems, and showing a pattern of constitutional violations, would support the conclusion that the voting rights restoration provisions of Subtitle E of H.R. 1 are a permissible exercise of Congress's authority to enforce the right to travel under the Fourteenth Amendment.

4. **In your testimony, you stated that Congress has ultimate power over the rules regarding congressional redistricting.**
   a. **Would Congress have the authority, under the Elections Clause, to pass legislation requiring:**
      i. **A set of redistricting criteria applicable to all map drawers for Congressional district lines?**
      ii. **States to establish independent redistricting Commissions? Or,**
      iii. **To expressly prohibit partisan gerrymandering of Congressional maps?**

Yes. Congress has the power to enact legislation doing all three of these things. As stated in my testimony, Congress has paramount power to regulate the time, place, and manner of conducting congressional elections under Article I, Section 4. That includes power over redistricting and gerrymandering. The Supreme Court's recent decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) removes any doubt on that question. In that case, the Supreme Court held that partisan gerrymandering claims under the Fourteenth Amendment are nonjusticiable political questions. Part of the Court's rationale was that it is *Congress*, and not the federal courts, that is entrusted with regulating congressional redistricting. As the Court explained: "Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering." *Id.* at 2495. It cited as examples the Apportionment Act of 1842, the Enforcement Act of 1870, and statutes adopting compactness and equal-population requirements in 1872 and 1901. *Id.* While Congress's authority over congressional redistricting was clear even before *Rucho*, after that decision, there is absolutely no question that Congress has the power to set criteria for redistricting, require states to establish independent commissions, expressly prohibit partisan gerrymandering, or otherwise regulate congressional redistricting.

5. **How has Congress's authority to pass election laws that commandeer states been tested in the courts and how have these decisions come down?**

While there are limitations on Congress's authority to commandeer state and local governments in other contexts, the courts have upheld Congress's authority to commandeer state government when it comes to the manner of conducting congressional elections. Although the Court's decision in *Arizona v. ITCA* (described in my written testimony), did not use the term "commandeering," the statute it upheld engages in something that might be deemed to fall within that term. Specifically, the National Voter Registration Act required state offices to "accept and use" the uniform federal voter registration form. Justice Scalia's opinion for the Court in *Arizona v. ITCA* held this to be a permissible exercise of Congress's Elections Clause authority. 133 S. Ct. at 2257. This is consistent with lower court decisions which upheld other provisions

of the NVRA that even more dramatically commandeered the apparatus of state government, by requiring their agencies to help register voters in federal elections. In *Voting Rights Coalition v. Wilson*, for example, the Ninth Circuit held: "Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators." 60 F.3d 1411, 1415 (9th Cir. 1995); *see also Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 796 (7th Cir. 1995) (rejecting states' argument "that to make a state administer federal elections fatally compromises state sovereignty" and upholding NVRA against constitutional challenge). Under these authorities, Congress's power to regulate the manner of congressional elections includes the power to commandeer states to implement federal requirements.

Thank you for soliciting my views and please let me know if I can provide any additional information.

Sincerely,

Daniel Tokaji

Daniel P. Tokaji
Fred W. & Vi Miller Dean and Professor of Law
University of Wisconsin Law School

Title and affiliation provided for identification only

HEARING

COMMITTEE ON HOUSE ADMINISTRATION

"THE ELECTIONS CLAUSE: CONSTITUTIONAL INTERPRETATION AND CONGRESSIONAL EXERCISE."

JULY 12, 2021

MAJORITY QUESTIONS FOR THE RECORD

FOR

FRANITA TOLSON

PROFESSOR OF LAW

VICE DEAN FOR FACULTY AND ACADEMIC AFFAIRS

UNIVERSITY OF SOUTHERN CALIFORNIA

1. In your recent *Yale Law Journal* article, you wrote that the Elections Clause has been utilized by Congress for the regulation of federal elections "far less than the Fourteenth and Fifteenth Amendments (or the Commerce Clause) even though it is not similarly constrained by federalism concerns."
    a. Can you please elaborate on why the Elections Clause is not constrained by federalism?

Our system of federalism is structured based on the notion of "dual sovereignty," in which the states and federal government have final policy making authority over different substantive areas. The Supreme Court has generally adhered to the view that sovereignty entails that each level of government retain final policymaking authority in their designated policymaking areas, insulated from interference from one another.[1] The Constitution gives limited powers to the federal government.[2]

[1] Gregory v. Ashcroft, 501 U.S. 452, 457-58 (1991) (reviewing the "system of dual sovereignty between the States and the Federal Government"). *See also* Katzenbach v. McClung, 379 U.S. 294, 302 (1964) ("The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purposes of executing some of the general powers of government.'") (internal citation omitted).

[2] *See* U.S. CONST. ART. I, SEC. 8 (listing some of the powers of Congress); *id.* at ART. VI, CL. 2 (the Supremacy Clause).

The states retain final policymaking authority over all areas not designated to the federal government.[3] While federal and state governments sometimes exercise concurrent power in certain domains,[4] federal law is supreme when Congress is acting pursuant to its powers conferred by the Constitution.[5]

The Elections Clause is one of areas in which the Constitution has deemed federal power to be paramount.[6] Under the Clause, states have autonomy—the Clause empowers them to set the "Times, Places, and Manner" of federal elections in the first instance—but Congress can, at any time, "make or alter" those regulations, making federal power supreme.[7] Because the Clause gives final policymaking authority to Congress, it deprives the states of the sovereign authority that is the hallmark of our federalist system.

The Elections Clause is also exempt from many of the doctrines that Supreme Court has developed to protect the sovereignty of the states within our system of federalism such as the anticommandeering doctrine (discussed in response to question two below); the presumption against preemption; and the clear statement rule. For example, the presumption against preemption is rooted in federalism concerns and, as such, specifically designed to protect the sovereignty of the states when Congress has been ambiguous about its intention to displace state law in an area traditionally regulated by the states.[8] Yet the Supreme Court has held that presumption against preemption does not apply to the Elections Clause.[9]

A similar observation can be made with respect to the clear statement rule, which requires Congress to "make its intention [to alter the usual constitutional balance between the states and the federal government] 'unmistakably clear in the language

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[3] *See* U.S. CONST. AMEND. X.

[4] For example, both the states and the federal government have the power to tax, to build roads, and to create lower courts.

[5] *See Gregory*, 501 U.S. at 460 ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system.").

[6] Ariz. v. Inter Tribal Council of Ariz., 570 U.S. 1, 8-9 (2013) ("The Clause's substantive scope is broad. 'Times, Places, and Manner'...are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections'... In practice, the Clause functions as 'a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.' The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'") (internal citation omitted).

[7] *Id.*

[8] *See, e.g., In re* Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98, 110, 112 (2d Cir. 2016) (declining to apply the presumption against preemption because bankruptcy, governed by Article I, Section 8, Clause 4 of the Constitution, is not an area "recognized as traditionally one of state law alone").

[9] *Inter Tribal Council of Arizona*, 570 U.S. at 14 (The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to "make or alter" state election regulations. Art. I, §4, cl. 1. When Congress legislates with respect to the "Times, Places and Manner" of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the States.").

of the statute.'"[10] The Sixth Circuit Court of Appeals declined to apply the clear statement rule to exercises of federal power under the Elections Clause because:

> the Clause expressly presses states into the service of the federal government by specifying that state legislatures "shall" prescribe the details necessary to hold congressional elections. This stands in stark contrast to virtually all other provisions of the Constitution, which merely tell the states "not what they must do but what they can or cannot do."[11]

As the constitutional text shows, the Elections Clause has less to do with federalism, as that term is typically understood as a vehicle for protecting the sovereignty of the states, and more to do with providing an organizational structure that gives the states broad power to regulate federal elections subject to congressional oversight.

b. Critics suggest that H.R. 1, although authorized by the Elections Clause, is a "federal takeover." What is your perspective on this claim?

This claim does not have any merit for two reasons. First, H.R. 1 does not go as far as federal laws that have been implemented in the past, undermining the argument that this is a "federal takeover." For example, section 4(b) and 5 of the Voting Rights Act of 1965 suspended *all* changes to voting laws in covered jurisdictions unless the changes were approved by the federal government.[12] H.R. 1 is quite modest in comparison. Not only does H.R. 1 leave in place much of the states' ability to make substantial changes to their election systems without federal oversight, H.R. 1 only applies to federal, and not state, elections.

Second, H.R. 1's scope touches on specific substantive areas that states and/or the courts have poorly handled, to the detriment of the voters, including voter

[10] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

[11] Harkless v. Brunner, 545 F.3d 445, 454 (6th Cir. 2008) (quoting ACORN v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995)).

[12] My written testimony also details how H.R. 1 is less far reaching than the Enforcement Acts of 1870 and 1871, which implemented a system of federal oversight for congressional elections and provided federal liability for state election officials who violated state law. In my work, I have also compared how H.R. 1 is also less far reaching than the Federal Election Bill of 1890, which would have been constitutional had it been enacted. *See* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171 (2019).

registration,[13] felon disenfranchisement,[14] and gerrymandering.[15] The increased levels of partisan polarization in our country and the contentiousness of these issues have threatened the health of American democracy and the vitality of federal elections. The view that H.R. 1 is a "federal takeover" ignores that Congress cannot sit back and ignore these threats in the face of state and judicial apathy. Indeed, Congress is obligated to act.

2. You wrote in your testimony that "Congress can commandeer state officials to implement Elections Clause legislation." Can you elaborate further on why the anti-commandeering doctrine does not apply to the Elections Clause and what the courts have said on this issue?

The Supreme Court created the anticommandeering principle to protect the sovereignty of the states and to ensure political accountability. In *Printz v. United States*, the Court held that this principle was violated when Congress directed state law enforcement officers to participate in a federally enacted regulatory scheme."[16] *Printz* involved the Brady amendments to the Gun Control Act of 1968 that required state law enforcement officials to run criminal background checks on prospective gun owners. The majority noted that the Constitution entrusts the Executive branch with the responsibility of administering the laws "to insure both vigor and accountability," accountability that would be "shattered...if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.[17]

In the Court's view, the Brady amendments not only undermined state sovereignty by forcing the states to internalize the political and economic costs of administering federal programs, but the lack of political accountability distorted the political

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[13] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (holding that two Arizona voting laws—one that prohibits ballot collection by anyone other than election officials and close family members, and another that requires ballots cast anywhere other than an assigned precinct be discarded—do not violate Section 2 of the Voting Rights Act despite conclusive evidence that both restrictions disproportionately disenfranchised voters of color relative to whites). *See also* Ariz. v. Inter Tribal Council of Ariz., 570 U.S. 1 (2013) (finding that Arizona's documentary proof of citizenship requirement was preempted by the National Voter Registration Act). Notably, the documentary proof of citizenship requirement had a discriminatory impact against voters of color. *See* Franita Tolson, *The Spectrum of Congressional Authority over Elections,* 99 B. U. LAW REV. 317 (2019).

[14] *See, e.g.,* Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir. 2020) (upholding SB 7066, which required that individuals with felony convictions who would otherwise be entitled to vote first pay all fines and fees imposed as a part of any criminal sentence). The state legislature passed SB 7066 after Florida voters, by a wide margin, voted to reenfranchise those with felony convictions in the state. Notably, SB 7066 affected more than 774,000 people in Florida who are disenfranchised because of outstanding financial obligations, most of whom do not have the ability to pay. *See* Franita Tolson, *"In Whom is the Right of Suffrage?": The Reconstruction Acts as Sources of Constitutional Meaning,* 169 Penn. L. Rev. (forthcoming 2021).

[15] *See, e.g.,* Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering claims are nonjusticiable despite evidence that these gerrymanders rendered meaningless the votes of those in the opposition party).

[16] Printz v. United States, 521 U.S. 898, 924–25 (1997).

[17] *Id.* at 921.

process by generating confusion about which political actors—state or federal—should be held responsible by the electorate for various policy choices.[18] The Court arrived at this conclusion because the language of the Commerce Clause authorizes Congress, and not the states, to regulate commerce directly.[19] Thus, there was no textual authorization for Congress to impress state officials into federal service.

There are important differences between the text of the Elections Clause and the text of the Commerce Clause. The key distinction is that the Elections Clause expressly empowers Congress to force compliance through its ability to "make or alter" state regulations. Just as the use of the word "shall" is a mandate to Congress to regulate commerce, the use of this term in the Elections Clause also mandates that the states must act to set the "Times, Places and Manner" of federal elections. In other words, the Clause's provision that, "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed* in each State by the Legislature thereof" is very different from Congress's authority, which "*may at any time* by Law make or alter such Regulations."[20] The use of the mandatory language "shall be prescribed" to described state authority and "may ... make or alter" to describe congressional authority illustrates that Congress can act if it chooses, but states must act, even if at the behest of Congress. The Commerce Clause does not have analogous language that imposes a mandate on the states.

Congressional practice corroborates this interpretation of the text. Over the past two centuries, Congress has stepped in to facilitate election administration when the states have been unable or unwilling to do so, by commandeering state officials, state facilities, and state law to ensure the continued health of federal elections. During the Reconstruction era, for example, Congress sought to force state election officials to comply with state law by making noncompliance with state law a federal crime.[21] The Enforcement Act of 1870 incorporated by reference substantive state

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[18] *See also* New York v. United States, 505 U.S. 144, 168 (1992) (noting that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished").

[19] *Printz*, 521 U.S. at 937. *See also* U.S. CONST. ART. I, SEC. 8 ("The Congress shall have the power...[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

20.U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

[21] *See* The Enforcement Act of 1870, § 22, ch. 114, 16 Stat. 140, 145 (1870). For example, Section 22 of the Act provided:

> That any officer of any election at which any representative or delegate in the Congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States or by or under any State, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election ... shall be deemed guilty of a crime and shall be liable to prosecution and punishment therefor.

Id.

law that governed the mechanics of federal elections,[22] exposing state officials to dual liability that blurred the lines of accountability.[23]

More recently, Congress has commandeered both state officials and state offices by imposing affirmative obligations on the states to implement the National Voter Registration Act ("NVRA"). Under section 10 of the NVRA, each state must designate a state officer as the chief state election official responsible for coordinating the requirements of the Act.[24] The NVRA also requires each state to designate as voter registration agencies all offices in the state that provide either public assistance or state-funded programs primarily engaged in providing services to persons with disabilities.[25]

In *Voting Rights Coalition v. Wilson,* California argued that these provisions violated the Tenth Amendment by commandeering state agencies to administer a federal election scheme.[26] The Ninth Circuit rejected this argument, holding that "Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators. The exercise of that power by Congress is by its terms intended to be borne by the states without compensation."[27] Courts in both Pennsylvania and South Carolina declined to apply the anti-commandeering principle to the NVRA for similar reasons, recognizing that the Elections Clause empowers Congress to directly regulate the state's manner and means of voter registration.[28]

3. There are multiple sources of constitutional authority that support the felon re-enfranchisement provision in H.R. 1.

    a. What are those sources of constitutional authority?

Congress cites the Elections Clause and the Guarantee Clause as well as the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments as constitutional authorization for the H.R. 1. No less than four of these provisions – the Elections Clause, the Guarantee Clause, and the Fourteenth and Fifteenth Amendments—support the felon re-enfranchisement provision of H.R. 1. By invoking several constitutional provisions that empower it to regulate voter qualification standards as well as the time, places, and manner of federal elections,

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[22] *Id.* § 2.

[23] *See Ex parte* Clarke, 100 U.S. 399, 408 (1879) (Field, J., dissenting) (making this argument).

[24] 52 U.S.C. § 20509 (Supp. III 2016).

[25] § 20506(2)(A)-(B); *see* Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen, 152 F.3d 283, 285 (4th Cir. 1998) (holding that NVRA applies to public colleges); Nat'l Coal. for Students with Disabilities v. Taft, No. 2100-CV-1300, 2002 WL 31409443, at *2 (S.D. Ohio Aug. 2, 2002) (same). *See also* United States v. New York, 700 F. Supp. 2d 186, 203-04 (N.D.N.Y. 2010) (holding that NVRA applies to public colleges and community colleges).

[26] Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995).

[27] *Id.*

[28] *See* Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Ridge, 1995 WL 136913, at *6-7 (E.D. Pa. 1995); Condon v. Reno, 913 F. Supp. 946, 963 (D.S.C. 1995).

Congress short circuits many of the federalism based arguments that threaten to derail H.R. 1.

First, even if there are federalism constraints on Congress ability to legislate pursuant to some of the Reconstruction Amendments, the Elections Clause is not so constrained (see answer to question 1(a) above and 3(b) below). H.R. 1 would prohibit states from barring individuals who are no longer in custody from voting, thereby deterring broad felon-disenfranchisement laws intended to indefinitely disenfranchise a significant percentage of the electorate. As the Supreme Court has recognized, Congress has the power under the Elections Clause to "protect the elections on which its existence depends"[29] and "to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself."[30]

Second, the Guarantee Clause significantly bolsters Congress' authority to regulate with respect to felon disenfranchisement, and augments Congress' enforcement authority under the Reconstruction Amendments. As I argue in a forthcoming article, states violate the Guarantee Clause's requirement of republican government when they disenfranchise voters for crimes that were not felonies at common law (as almost all states do).[31] In addition to the Elections Clause, Congress has authority to address these violations of the Republican ideal either directly,[32] or through its enforcement authority under the Fourteenth Amendment.[33]

b. Can you elaborate on what you meant when you wrote in your testimony that "there are limited circumstances in which Congress can reach voter qualifications under the Elections Clause"?

My testimony states that Congress can reach voter qualifications if states have abused their power in a way that affects turnout and participation in federal elections. In addition, my statement points to the Uniformed and Overseas Absentee Voting Act ("UOCAVA"), enacted pursuant to the Elections Clause, as one such example of legislation that affects voter qualification standards precisely

[29] *Ex parte* Yarbrough, 110 U.S. 651, 658 (1884).
[30] *Id.* at 666.
[31] Tolson, *"In Whom is the Right of Suffrage?", supra* note 14.
[32] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) (holding that it is Congress, and not the courts, that has the authority to enforce the Guarantee Clause's requirement of republican government).
[33] Tolson, *In Whom is the Right of Suffrage*, supra note 14 ("[W]hen states disenfranchise their citizens in violation of Section 2 [of the Fourteenth Amendment] and the Guarantee Clause... these violations constitute an abridgment of the right to vote, rendering their governments unrepublican in form. Because Congress' enforcement authority empowers it to prevent such abridgments, that body has substantial authority, pursuant to Section 5 of the Fourteenth Amendment, to remedy this disenfranchisement through either reduced representation or other appropriate penalties.").

because military voters had been overlooked and/or ignored under state law in the past. The statute created a uniform federal ballot specifically for use by military personnel, incorporating state voter qualification standards to determine which personnel were entitled to vote.[34] As illustrated by UOCAVA, Congress arguably has reserve power to set voter qualifications under both Article I, Section 2 and the Elections Clause to guard against the possibility that states will refuse to regulate with respect to federal elections.

It is also important to emphasize that Congress can reach voter qualifications under the Elections Clause because the overlap between voter qualification standards and manner regulations makes it difficult, if not impossible, to completely segregate federal power from the states' authority over voter qualifications.[35] For example, one could argue that voter identification laws are more like manner regulations than voter qualification standards, and Congress, through its authority under the Elections Clause, can prevent the state from enacting stringent and unnecessary voter identification restrictions that infringe on a prospective voter's right to cast a ballot.[36] Requiring that a voter show identification to prevent fraud or to ensure the integrity of the electoral process aligns more with regulating the mechanics of the actual election, as opposed to functioning as a voter qualification standard that determines whether a person is qualified to vote (such as age or residency requirements). Yet defining these laws as voter qualification standards, despite this definitional uncertainty, could place this category firmly beyond the reach of federal law regardless of its overall impact on voter participation in federal elections.

A similar argument can be made with respect to proof-of-citizenship requirements, which are an unusual mix of voter qualification standards and election procedure. In recent years, states have enacted proof-of-citizenship requirements under the guise of preventing non-citizen voting, but the effect of these regulations has been to depress turnout among individuals who can legally cast a ballot.[37] These regulations implicate questions of whether a voter is qualified to cast a ballot in the first instance and also whether the voter has presented sufficient evidence of citizenship such that they can register to vote. Given their hybrid nature, these laws illustrate that the Elections Clause can and should reach voter qualification standards if states adopt stringent proof-of-citizenship requirements that

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[34] 52 U.S.C. § 20310 (defining eligible voters as those who, notwithstanding their absence, would otherwise be qualified to vote in last place in which they resided).

[35] *See Inter Tribal of Ariz.*, 133 S. Ct. at 2258-59 (noting that a federal statute precluding a state from enacting voting qualifications would be constitutionally questionable). *But see* Or. v. Mitchell, 400 U.S. 112, 122 (1970) (referring to the single-member district requirement for congressional elections as a voter qualification standard).

[36] *See* Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2269 (2018) (arguing that the Court must "conced[e] the sovereignty that Congress has under the [Elections] Clause, which may, in some limited instances, permissibly interfere with state control over voter qualifications").

[37] BRENNAN CTR. FOR JUSTICE, NYU SCH. OF LAW, VOTING RIGHTS & ELECTIONS SERIES: PROOF OF CITIZENSHIP 1 (Sept. 12, 2006), http://www.brennancenter.org/sites/default/files/analysis/Proof%20of%20Cistizenship.pdf [https://perma.cc/9TRG-DPXB] (indicating that proof-of-citizenship requirements disenfranchise many eligible voters).

undermine turnout and participation in federal elections. There is a sufficient nexus between proof-of-citizenship requirements as voter qualification standards and proof-of-citizenship requirements as voter registration/manner regulations that arguably justifies this view of congressional authority.

4. What is your perspective on the issue of state takeover of local election boards, such as what is now allowed under Georgia's new voting law? Can Congress, in exercising its authority under the Elections Clause, address this concern if there is a nexus to a federal election? For example, could Congress create a standard for removal of a local election administrator, ensuring they are only removed with respect to the administration of an election for Federal office for inefficiency, neglect of duty, or malfeasance? Or, could Congress create a private right of action for local election officials to bring into an appropriate Federal district court a claim related to an improper removal or a process of notice to the U.S. Attorney General?

Provided that these regulations apply only to federal elections, Congress is empowered, pursuant to the Elections Clause, to create a standard for removal for election administrators or, alternatively, to create a private right of action for election officials to contest their removal. Importantly, these proposals do not touch on voter qualifications, where federal power under the Clause is at a lower ebb, but fall squarely within the domain of the times, places and manner regulations that Congress can legislate under the Clause. As the Supreme Court noted in *Smiley v. Holm* and recently reaffirmed in *Arizona v. Inter Tribal Council of Arizona,* Congress' power under the Elections Clause is broad enough to justify this type of change that would affect the oversight of the election:

> The subject matter is the "times, places and manner of holding elections for Senators and Representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, **supervision of voting**, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[38]

[38] Smiley v. Holm, 285 U.S. 355, 399 (1932). *See also* Ariz. v. Inter Tribal Council of Ariz., 570 U.S. 1, 8-9 (2013) (emphasis added).

This broad language provides sufficient authority for Congress to prevent states from disempowering local election boards that oversee the administration of federal elections.

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The Federalist Papers : No. 59

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Concerning the Power of Congress to Regulate the Election of Members
From the New York Packet. Friday, February 22, 1788.

HAMILTON

To the People of the State of New York:

THE natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members. It is in these words: "The TIMES, PLACES, and MANNER of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter SUCH REGULATIONS, except as to the PLACES of choosing senators. "1 This provision has not only been declaimed against by those who condemn the Constitution in the gross, but it has been censured by those who have objected with less latitude and greater moderation; and, in one instance it has been thought exceptionable by a gentleman who has declared himself the advocate of every other part of the system. I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION. Every just reasoner will, at first sight, approve an adherence to this rule, in the work of the convention; and will disapprove every deviation from it which may not appear to have been dictated by the necessity of incorporating into the work some particular ingredient, with which a rigid conformity to the rule was incompatible. Even in this case, though he may acquiesce in the necessity, yet he will not cease to regard and to regret a departure from so fundamental a principle, as a portion of imperfection in the system which may prove the seed of future weakness, and perhaps anarchy.

It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety. Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say, that a neglect or omission of this kind would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection. Nor has any satisfactory reason been yet assigned for incurring that risk. The extravagant surmises of a distempered jealousy can never be dignified with that character.

If we are in a humor to presume abuses of power, it is as fair to presume them on the part of the State governments as on the part of the general government. And as it is more consonant to the rules of a just theory, to trust the Union with the care of its own existence, than to transfer that care to any other hands, if abuses of power are to be hazarded on the one side or on the other, it is more rational to hazard them where the power would naturally be placed, than where it would unnaturally be placed. Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment; and, to an unbiased observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect, to the pleasure of the State governments. An impartial view of the matter cannot fail to result in a conviction, that each, as far as possible, ought to depend on itself for its own preservation.

As an objection to this position, it may be remarked that the constitution of the national Senate would involve, in its full extent, the danger which it is suggested might flow from an exclusive power in the State legislatures to regulate the federal elections. It may be alleged, that by declining the appointment of Senators, they might at any time give a fatal blow to the Union; and from this it may be inferred, that as its existence would be thus rendered dependent upon them in so essential a point, there can be no objection to intrusting them with it in the particular case under consideration. The interest of each State, it may be added, to maintain its representation in the national councils, would be a complete security against an abuse of the trust. This argument, though specious, will not, upon examination, be found solid. It is certainly true that the State legislatures, by forbearing the appointment of senators, may destroy the national government. But it will not follow that, because they have a power to do this in one instance, they ought to have it in every other. There are cases in which the pernicious tendency of such a power may be far more decisive, without any motive equally cogent with that which must have regulated the conduct of the convention in respect to the formation of the Senate, to recommend their admission into the system.

So far as that construction may expose the Union to the possibility of injury from the State legislatures, it is an evil; but it is an evil which could not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the national government. If this had been done, it would doubtless have been interpreted into an entire dereliction of the federal principle; and would certainly have deprived the State governments of that absolute safeguard which they will enjoy under this provision. But however wise it may have been to have submitted in this instance to an inconvenience, for the attainment of a necessary advantage or a greater good, no inference can be drawn from thence to favor an accumulation of the evil, where no necessity urges, nor any greater good invites. It may be easily discerned also that the national government would run a much greater risk from a power in the State legislatures over the elections of its House of Representatives, than from their power of appointing the members of its Senate. The senators are to be chosen for the period of six years; there is to be a rotation, by which the seats of a third part of them are to be vacated and replenished every two years; and no State is to be entitled to more than two senators; a quorum of the body is to consist of sixteen members.

The joint result of these circumstances would be, that a temporary combination of a few States to intermit the appointment of senators, could neither annul the existence nor impair the activity of the body; and it is not from a general and permanent combination of the States that we can have any thing to fear. The first might proceed from sinister designs in the leading members of a few of the State legislatures; the last would suppose a fixed and rooted disaffection in the great body of the people, which will either never exist at all, or will, in all probability, proceed from an experience of the inaptitude of the general government to the advancement of their happiness in which event no good citizen could desire its continuance. But with regard to the federal House of Representatives, there is intended to be a general election of members once in two years. If the State legislatures were to be invested with an exclusive power of regulating these elections, every period of making them would be a delicate crisis in the national situation, which might issue in a dissolution of the Union, if the leaders of a few of the most important States should have entered into a previous conspiracy to prevent an election. I shall not deny, that there is a degree of weight in the observation, that the interests of each State, to be represented in the federal councils, will be a security against the abuse of a power over its elections in the hands of the State legislatures. But the security will not be considered as ... complete, by those who attend to the force of an obvious distinction between the interest of the people in the public felicity, and the interest of their local rulers in the power and consequence of their offices.

The people of America may be warmly attached to the government of the Union, at times when the particular rulers of particular States, stimulated by the natural rivalship of power, and by the hopes of personal aggrandizement, and supported by a strong faction in each of those States, may be in a very opposite temper. This diversity of sentiment between a majority of the people, and the individuals who have the greatest credit in their councils, is exemplified in some of the States at the present moment, on the present question. The scheme of separate confederacies, which will always multiply the chances of ambition, will be a never failing bait to all such influential characters in the State administrations as are capable of preferring their own emolument and advancement to the public weal. With so effectual a weapon in their hands as the exclusive power of regulating elections for the national government, a combination of a few such men, in a few of the most considerable States, where the temptation will always be the strongest, might accomplish the destruction of the Union, by seizing the opportunity of some casual dissatisfaction among the people (and which perhaps they may themselves have excited), to discontinue the choice of members for the federal House of Representatives. It ought never to be forgotten, that a firm union of this country, under an efficient government, will probably be an increasing object of jealousy to more than one nation of Europe; and that enterprises to subvert it will sometimes originate in the intrigues of foreign powers, and will seldom fail to be patronized and abetted by some of them. Its preservation, therefore ought in no case that can be avoided, to be committed to the guardianship of any but those whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust.

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1 Ist clause, 4th section, of the Ist article.

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The Federalist Papers : No. 60

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The Same Subject Continued
(Concerning the Power of Congress to Regulate the Election of Members)
From the New York Packet.
Tuesday, February 26, 1788.

HAMILTON

To the People of the State of New York:

WE HAVE seen, that an uncontrollable power over the elections to the federal government could not, without hazard, be committed to the State legislatures. Let us now see, what would be the danger on the other side; that is, from confiding the ultimate right of regulating its own elections to the Union itself. It is not pretended, that this right would ever be used for the exclusion of any State from its share in the representation. The interest of all would, in this respect at least, be the security of all. But it is alleged, that it might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others, by confining the places of election to particular districts, and rendering it impracticable to the citizens at large to partake in the choice. Of all chimerical suppositions, this seems to be the most chimerical. On the one hand, no rational calculation of probabilities would lead us to imagine that the disposition which a conduct so violent and extraordinary would imply, could ever find its way into the national councils; and on the other, it may be concluded with certainty, that if so improper a spirit should ever gain admittance into them, it would display itself in a form altogether different and far more decisive.

The improbability of the attempt may be satisfactorily inferred from this single reflection, that it could never be made without causing an immediate revolt of the great body of the people, headed and directed by the State governments. It is not difficult to conceive that this characteristic right of freedom may, in certain turbulent and factious seasons, be violated, in respect to a particular class of citizens, by a victorious and overbearing majority; but that so fundamental a privilege, in a country so situated and enlightened, should be invaded to the prejudice of the great mass of the people, by the deliberate policy of the government, without occasioning a popular revolution, is altogether inconceivable and incredible.

In addition to this general reflection, there are considerations of a more precise nature, which forbid all apprehension on the subject. The dissimilarity in the ingredients which will compose the national government, and Ã still more in the manner in which they will be brought into action in its various branches, must form a powerful obstacle to a concert of views in any partial scheme of elections. There is sufficient diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the Union, to occasion a material diversity of disposition in their representatives towards the different ranks and conditions in society. And though an intimate intercourse under the same government will promote a gradual assimilation in some of these respects, yet there are causes, as well physical as moral, which may, in a greater or less degree, permanently nourish different propensities and inclinations in this respect. But the circumstance which will be likely to have the greatest influence in the matter, will be the dissimilar modes of constituting the several component parts of the government. The House of Representatives being to be elected immediately by the people, the Senate by the State legislatures, the President by electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors.

As to the Senate, it is impossible that any regulation of "time and manner," which is all that is proposed to be submitted to the national government in respect to that body, can affect the spirit which will direct the choice of its members. The collective sense of the State legislatures can never be influenced by extraneous circumstances of that sort; a consideration which alone ought to satisfy us that the discrimination apprehended would never be attempted. For what inducement could the Senate have to concur in a preference in which itself would not be included? Or to what purpose would it be established, in reference to one branch of the legislature, if it could not be extended to the other? The composition of the one would in this case counteract that of the other. And we can never suppose that it would embrace the appointments to the Senate, unless we can at the same time suppose the voluntary co-operation of the State legislatures. If we make the latter supposition, it then becomes immaterial where the power in question is placed whether in their hands or in those of the Union.

But what is to be the object of this capricious partiality in the national councils? Is it to be exercised in a discrimination between the different departments of industry, or between the different kinds of property, or between the different degrees of property? Will it lean in favor of the landed interest, or the moneyed interest, or the mercantile interest, or the manufacturing interest? Or, to speak in the fashionable language of the adversaries to the Constitution, will it court the elevation of "the wealthy and the well-born," to the exclusion and debasement of all the rest of the society?

If this partiality is to be exerted in favor of those who are concerned in any particular description of industry or property, I presume it will readily be admitted, that the competition for it will lie between landed men and merchants. And I scruple not to affirm, that it is infinitely less likely that either of them should gain an ascendant in the national councils, than that the one or the other of them should predominate in all the local councils. The inference will be, that a conduct tending to give an undue preference to either is much less to be dreaded from the former than from the latter.

The several States are in various degrees addicted to agriculture and commerce. In most, if not all of them, agriculture is predominant. In a few of them, however, commerce nearly divides its empire, and in most of them has a considerable share of influence. In proportion as either prevails, it will be conveyed into the national representation; and for the very reason, that this will be an emanation from a greater variety of interests, and in much more various proportions, than are to be found in any single State, it will be much less apt to espouse either of them with a decided partiality, than the representation of any single State.

In a country consisting chiefly of the cultivators of land, where the rules of an equal representation obtain, the landed interest must, upon the whole, preponderate in the government. As long as this interest prevails in most of the State legislatures, so long it must maintain a correspondent superiority in the national Senate, which will generally be a faithful copy of the majorities of those assemblies. It cannot therefore be presumed, that a sacrifice of the landed to the mercantile class will ever be a

favorite object of this branch of the federal legislature. In applying thus particularly to the Senate a general observation suggested by the situation of the country, I am governed by the consideration, that the credulous votaries of State power cannot, upon their own principles, suspect, that the State legislatures would be warped from their duty by any external influence. But in reality the same situation must have the same effect, in the primative composition at least of the federal House of Representatives: an improper bias towards the mercantile class is as little to be expected from this quarter as from the other.

In order, perhaps, to give countenance to the objection at any rate, it may be asked, is there not danger of an opposite bias in the national government, which may dispose it to endeavor to secure a monopoly of the federal administration to the landed class? As there is little likelihood that the supposition of such a bias will have any terrors for those who would be immediately injured by it, a labored answer to this question will be dispensed with. It will be sufficient to remark, first, that for the reasons elsewhere assigned, it is less likely that any decided partiality should prevail in the councils of the Union than in those of any of its members. Secondly, that there would be no temptation to violate the Constitution in favor of the landed class, because that class would, in the natural course of things, enjoy as great a preponderancy as itself could desire. And thirdly, that men accustomed to investigate the sources of public prosperity upon a large scale, must be too well convinced of the utility of commerce, to be inclined to inflict upon it so deep a wound as would result from the entire exclusion of those who would best understand its interest from a share in the management of them. The importance of commerce, in the view of revenue alone, must effectually guard it against the enmity of a body which would be continually importuned in its favor, by the urgent calls of public necessity.

I the rather consult brevity in discussing the probability of a preference founded upon a discrimination between the different kinds of industry and property, because, as far as I understand the meaning of the objectors, they contemplate a discrimination of another kind. They appear to have in view, as the objects of the preference with which they endeavor to alarm us, those whom they designate by the description of "the wealthy and the well-born." These, it seems, are to be exalted to an odious pre-eminence over the rest of their fellow-citizens. At one time, however, their elevation is to be a necessary consequence of the smallness of the representative body; at another time it is to be effected by depriving the people at large of the opportunity of exercising their right of suffrage in the choice of that body.

But upon what principle is the discrimination of the places of election to be made, in order to answer the purpose of the meditated preference? Are "the wealthy and the well-born," as they are called, confined to particular spots in the several States? Have they, by some miraculous instinct or foresight, set apart in each of them a common place of residence? Are they only to be met with in the towns or cities? Or are they, on the contrary, scattered over the face of the country as avarice or chance may have happened to cast their own lot or that of their predecessors? If the latter is the case, (as every intelligent man knows it to be,1) is it not evident that the policy of confining the places of election to particular districts would be as subversive of its own aim as it would be exceptionable on every other account? The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the TIMES, the PLACES, the MANNER of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

Let it, however, be admitted, for argument sake, that the expedient suggested might be successful; and let it at the same time be equally taken for granted that all the scruples which a sense of duty or an apprehension of the danger of the experiment might inspire, were overcome in the breasts of the national rulers, still I imagine it will hardly be pretended that they could ever hope to carry such an enterprise into execution without the aid of a military force sufficient to subdue the resistance of the great body of the people. The improbability of the existence of a force equal to that object has been discussed and demonstrated in different parts of these papers; but that the futility of the objection under consideration may appear in the strongest light, it shall be conceded for a moment that such a force might exist, and the national government shall be supposed to be in the actual possession of it. What will be the conclusion? With a disposition to invade the essential rights of the community, and with the means of gratifying that disposition, is it presumable that the persons who were actuated by it would amuse themselves in the ridiculous task of fabricating election laws for securing a preference to a favorite class of men? Would they not be likely to prefer a conduct better adapted to their own immediate aggrandizement? Would they not rather boldly resolve to perpetuate themselves in office by one decisive act of usurpation, than to trust to precarious expedients which, in spite of all the precautions that might accompany them, might terminate in the dismission, disgrace, and ruin of their authors? Would they not fear that citizens, not less tenacious than conscious of their rights, would flock from the remote extremes of their respective States to the places of election, to voerthrow their tyrants, and to substitute men who would be disposed to avenge the violated majesty of the people?

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1 Particularly in the Southern States and in this State.

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The Federalist Papers : No. 61

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The Same Subject Continued
(Concerning the Power of Congress to Regulate the Election of Members)
From the New York Packet.
Tuesday, February 26, 1788.

HAMILTON

To the People of the State of New York:

THE more candid opposers of the provision respecting elections, contained in the plan of the convention, when pressed in argument, will sometimes concede the propriety of that provision; with this qualification, however, that it ought to have been accompanied with a declaration, that all elections should be had in the counties where the electors resided. This, say they, was a necessary precaution against an abuse of the power. A declaration of this nature would certainly have been harmless; so far as it would have had the effect of quieting apprehensions, it might not have been undesirable. But it would, in fact, have afforded little or no additional security against the danger apprehended; and the want of it will never be considered, by an impartial and judicious examiner, as a serious, still less as an insuperable, objection to the plan. The different views taken of the subject in the two preceding papers must be sufficient to satisfy all dispassionate and discerning men, that if the public liberty should ever be the victim of the ambition of the national rulers, the power under examination, at least, will be guiltless of the sacrifice.

If those who are inclined to consult their jealousy only, would exercise it in a careful inspection of the several State constitutions, they would find little less room for disquietude and alarm, from the latitude which most of them allow in respect to elections, than from the latitude which is proposed to be allowed to the national government in the same respect. A review of their situation, in this particular, would tend greatly to remove any ill impressions which may remain in regard to this matter. But as that view would lead into long and tedious details, I shall content myself with the single example of the State in which I write. The constitution of New York makes no other provision for LOCALITY of elections, than that the members of the Assembly shall be elected in the COUNTIES; those of the Senate, in the great districts into which the State is or may be divided: these at present are four in number, and comprehend each from two to six counties. It may readily be perceived that it would not be more difficult to the legislature of New York to defeat the suffrages of the citizens of New York, by confining elections to particular places, than for the legislature of the United States to defeat the suffrages of the citizens of the Union, by the like expedient. Suppose, for instance, the city of Albany was to be appointed the sole place of election for the county and district of which it is a part, would not the inhabitants of that city speedily become the only electors of the members both of the Senate and Assembly for that county and district? Can we imagine that the electors who reside in the remote subdivisions of the counties of Albany, Saratoga, Cambridge, etc., or in any part of the county of Montgomery, would take the trouble to come to the city of Albany, to give their votes for members of the Assembly or Senate, sooner than they would repair to the city of New York, to participate in the choice of the members of the federal House of Representatives? The alarming indifference discoverable in the exercise of so invaluable a privilege under the existing laws, which afford every facility to it, furnishes a ready answer to this question. And, abstracted from any experience on the subject, we can be at no loss to determine, that when the place of election is at an INCONVENIENT DISTANCE from the elector, the effect upon his conduct will be the same whether that distance be twenty miles or twenty thousand miles. Hence it must appear, that objections to the particular modification of the federal power of regulating elections will, in substance, apply with equal force to the modification of the like power in the constitution of this State; and for this reason it will be impossible to acquit the one, and to condemn the other. A similar comparison would lead to the same conclusion in respect to the constitutions of most of the other States.

If it should be said that defects in the State constitutions furnish no apology for those which are to be found in the plan proposed, I answer, that as the former have never been thought chargeable with inattention to the security of liberty, where the imputations thrown on the latter can be shown to be applicable to them also, the presumption is that they are rather the cavilling refinements of a predetermined opposition, than the well-founded inferences of a candid research after truth. To those who are disposed to consider, as innocent omissions in the State constitutions, what they regard as unpardonable blemishes in the plan of the convention, nothing can be said; or at most, they can only be asked to assign some substantial reason why the representatives of the people in a single State should be more impregnable to the lust of power, or other sinister motives, than the representatives of the people of the United States? If they cannot do this, they ought at least to prove to us that it is easier to subvert the liberties of three millions of people, with the advantage of local governments to head their opposition, than of two hundred thousand people who are destitute of that advantage. And in relation to the point immediately under consideration, they ought to convince us that it is less probable that a predominant faction in a single State should, in order to maintain its superiority, incline to a preference of a particular class of electors, than that a similar spirit should take possession of the representatives of thirteen States, spread over a vast region, and in several respects distinguishable from each other by a diversity of local circumstances, prejudices, and interests.

Hitherto my observations have only aimed at a vindication of the provision in question, on the ground of theoretic propriety, on that of the danger of placing the power elsewhere, and on that of the safety of placing it in the manner proposed. But there remains to be mentioned a positive advantage which will result from this disposition, and which could not as well have been obtained from any other: I allude to the circumstance of uniformity in the time of elections for the federal House of Representatives. It is more than possible that this uniformity may be found by experience to be of great importance to the public welfare, both as a security against the perpetuation of the same spirit in the body, and as a cure for the diseases of faction. If each State may choose its own time of election, it is possible there may be at least as many different periods as there are months in the year. The times of election in the several States, as they are now established for local purposes, vary between extremes as wide as March and November. The consequence of this diversity would be that there could never happen a total dissolution or renovation of the body at one time. If an improper spirit of any kind should happen to prevail in it, that spirit would be apt to infuse itself into the new members, as they come forward in succession. The mass would be likely to remain nearly the same, assimilating constantly to itself its gradual accretions. There is a contagion in example which few men have sufficient force of mind to resist. I am inclined to think that treble the duration in office, with the condition of a total dissolution of the body at the same time, might be less formidable to liberty than one third of that duration subject to gradual and successive alterations.

Uniformity in the time of elections seems not less requisite for executing the idea of a regular rotation in the Senate, and for conveniently assembling the legislature at a stated period in each year.

It may be asked, Why, then, could not a time have been fixed in the Constitution? As the most zealous adversaries of the plan of the convention in this State are, in general, not less zealous admirers of the constitution of the State, the question may be retorted, and it may be asked, Why was not a time for the like purpose fixed in the constitution of this State? No better answer can be given than that it was a matter which might safely be entrusted to legislative discretion; and that if a time had been appointed, it might, upon experiment, have been found less convenient than some other time. The same answer may be given to the question put on the other side. And it may be added that the supposed danger of a gradual change being merely speculative, it would have been hardly advisable upon that speculation to establish, as a fundamental point, what would deprive several States of the convenience of having the elections for their own governments and for the national government at the same epochs.

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H.R.6882 - Election Fraud Prevention Act

116th Congress (2019-2020)

Sponsor: Rep. Davis, Rodney [R-IL-13] (Introduced 05/15/2020)
Committees: House - House Administration
Latest Action: House - 05/15/2020 Referred to the House Committee on House Administration. (All Actions)
Tracker: Introduced

Summary (1) Text (1) Actions (2) Titles (2) Amendments (0) Cosponsors (11) Committees (1) Related Bills (3)

There is one summary for H.R.6882. Bill summaries are authored by CRS.

Shown Here:
Introduced in House (05/15/2020)

Election Fraud Prevention Act

This bill requires each state, in order to receive certain election assist
that was mailed to another person (commonly referred to as ballot ha

Constitutional Authority Statement ×

[Congressional Record Volume 166, Number 92 (Friday, May 15, 2020)]
[House]
From the Congressional Record Online through the Government Publishing Office [www.gpo.gov]
By Mr. RODNEY DAVIS of Illinois:
H.R. 6882.
Congress has the power to enact this legislation pursuant to the following:
Article I, Section 4
[Page H2261]

For Congressional Users

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H.R.3412 - Election Security Assistance Act

116th Congress (2019-2020)

Sponsor: Rep. Davis, Rodney [R-IL-13] (Introduced 06/21/2019)
Committees: House - House Administration; Intelligence (Permanent Select)
Latest Action: House - 06/21/2019 Referred to the Committee on House Administration, and in addition to the Committee on Intelligence (Permanent Select), for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. (All Actions)
Tracker: Introduced

Summary (1) Text (1) Actions (3) Titles (2) Amendments (0) Cosponsors (53) Committees (2) Related Bills (0)

There is one summary for H.R.3412. Bill summaries are authored by CRS.

Shown Here:
Introduced in House (06/21/2019)

Election Security Assistance Act

This bill addresses security threats to federal elections. Specifically, t

- authorizes grants to states for election technology and securit
- requires election poll books to meet voting system standards,
- allows for expedited security clearances for certain state elect
- requires federal entities to share information with the Departm
- requires DHS to share information with state and local officials

Constitutional Authority Statement

[Congressional Record Volume 165, Number 105 (Friday, June 21, 2019)]
[House]
From the Congressional Record Online through the Government Publishing Office [www.gpo.gov]
By Mr. RODNEY DAVIS of Illinois:
H.R. 3412.
Congress has the power to enact this legislation pursuant to the following:
Article 1, Section 4.
[Page H5037]

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H.R.7905 - EASE Act

116th Congress (2019-2020)

Sponsor: Rep. Davis, Rodney [R-IL-13] (Introduced 07/31/2020)
Committees: House - House Administration; Science, Space, and Technology
Latest Action: House - 07/31/2020 Referred to the Committee on House Administration, and in addition to the Committee on Science, Space, and Technology, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. (All Actions)
Tracker: Introduced

Summary (1) Text (1) Actions (3) Titles (3) Amendments (0) Cosponsors (16) Committees (2) Related Bills (3)

There is one summary for H.R.7905. Bill summaries are authored by CRS.

Shown Here:
Introduced in House (07/31/2020)

Emergency Assistance for Safe Elections Act or the EASE Act

This bill directs the Election Assistance Commission (EAC) to make p disease 2019) pandemic. Further, it establishes a specified technolog makes a state ineligible to receive certain funding for elections unless that was mailed to another person (commonly referred to as ballot ha

Constitutional Authority Statement

[Congressional Record Volume 166, Number 136 (Friday, July 31, 2020)]
[House]
From the Congressional Record Online through the Government Publishing Office [www.gpo.gov]
By Mr. RODNEY DAVIS of Illinois:
H.R. 7905.
Congress has the power to enact this legislation pursuant to the following:
Article I section IV of U.S. Constitution.
[Page H4214]

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The Washington Post

The framers would have been fine with sweeping national election reforms

Madison believed Congress should be a check on state legislatures when it came to voting laws

By Jack Rakove

Jack Rakove is the William Robertson Coe professor of history and American studies and a professor of political science emeritus at Stanford University. His book "Original Meanings: Politics and Ideas in the Making of the Constitution" received the 1997 Pulitzer Prize in history.

June 15, 2021 | Updated June 14, 2021 at 8:25 p.m. EDT

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The fate of the For the People Act is growing ever more precarious. It remains vulnerable to the whims of two Democratic senators, Joe Manchin III of West Virginia and Kyrsten Sinema of Arizona; to the massive hurdle of the filibuster; and to its own sweeping purposes. With its 10 titles and numerous subtitles, the bill offers the most ambitious program for comprehensive electoral and political reform that Americans have ever witnessed. It also marks a direct response to the turmoil that has disrupted the U.S. political system and a preemptive federal strike against the panoply of "securing the vote" laws that Republican-dominated state legislatures are considering — with the fate of American democracy seemingly resting on the outcome.

That ambition has made the legislation an easy target for criticism. (One recent example was George F. Will's column denouncing the act as a case of "constitutional vandalism.") In its opponents' view, the bill encroaches too much on the legislative power of the states to comport with basic principles of federalism. The Constitution, by default, left most of the key decisions about national elections to the state legislatures. They would decide who could vote in federal elections, how members of the House and presidential electors would be selected, and how elections would be conducted.

There was one main exception to this devolution of authority: the Times, Places, and Manner Clause of Article I (or the TPM clause), which empowered Congress to "make or alter such Regulations" as the states enacted to govern congressional elections. Even that Clause could be read narrowly, though, to imply, say, that Congress might intervene when individual states failed to provide for the election of representatives, but not to design a universal scheme for the design of districts.

As a matter of historical fact, however, this tailored view does justice neither to the reasons the clause became part the Constitution nor to the larger set of problems the framers were confronting. Looking at those factors, the argument for a robust historical view of the clause grows stronger — and also the argument that the sweeping reforms Congress is considering should pass constitutional muster.

The TPM Clause first appeared in the report that the Committee of Detail presented to the Constitutional Convention on Aug. 6, 1787. When the framers discussed it three days later, two South Carolina delegates moved to delete the provision authorizing Congress to alter whatever arrangements the states made. But their proposal earned few, if any, supporters. Four framers spoke against it, and the motion was rejected without even a roll call.

The most important opponent was James Madison, and his extended remarks merit our attention. Whether we describe Madison as the "father of the Constitution" or not, his agenda for reform did set the framework for the debates at the convention that he daily recorded. That agenda was dominated by his searching and acute criticisms of the shortcomings of the state legislatures. Those criticisms rested on the three-and-a-half uninterrupted years (from 1780 to 1783) he had spent in the Continental Congress, which needed the state legislatures to implement most of its decisions, and another three years as the dominant figure in the Virginia House of Delegates (from 1784 to 1786). Making sense of why the performance of the state legislatures was so disappointing — and indeed so threatening to the whole American experiment in creating republican governments — became the crucial problem Madison wrestled with in the mid-1780s. His answers to these questions, in turn, explain why he became America's most creative constitutionalist.

Madison's remarks on the TPM Clause fully reflected this critique. There were several reasons the state legislatures "ought not to have the uncontrolled right of regulating" congressional elections. "Times, places, and manner," he argued, "were words of great latitude" that made it "impossible to foresee all the abuses that might be made of the discretionary power." More important, creating any system of congressional elections would involve a host of complex decisions: "Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, should all vote for all the representatives [of a state] or all in a district vote for a number allotted to the district" — these points would all "depend on the Legislatures" and thus be open to partisan manipulation. "Whenever the State Legislatures had a favorite measure to carry, they would take care to mold their regulations as to favor the candidates they wished to succeed," he wrote. Another bias would exist whenever there was an "inequality of the Representation in the Legislatures of particular States," for then the existing population imbalances among communities would be replicated in the design of congressional districts.

In effect, Madison was offering an early vision of the one person, one vote rationale that has guided American thinking about representation since the landmark reapportionment case of the early 1960s.

This is a formidable list of objections and, given the lack of support the South Carolina motion received, it confirms that the scope of the TPM Clause should be interpreted broadly. The "manner" of holding elections is a capacious term, and it leaves ample room for a modern Congress to do everything possible to ensure access to the ballot.

Of course, many aspects of the For the People Act can certainly be disputed on their merits. But its underlying principle of using national legislative power to correct the political "vices" of the state legislatures is fully consistent with the original intentions of the framers.

Madison's extended remarks offer other important insights into the original design of our election system. By defaulting the initial decisions to the states, the framers made the process of constituting the House into an ongoing political experiment. At the outset, states could have elections where voters could choose a whole slate of statewide candidates; vote only in their own district; or even vote for candidates residing in each district of their state. How a state designed its system would thus reflect a considered judgment on how the entire state or all of its constituents (and constituencies) would be represented.

This experiment was quickly reduced to two options: district elections where voters would choose only their own representative, or a statewide system preferred by a few small states. In 1842, Congress made its first and most notable application of the TMP Clause by requiring all states to apply a district mode of election. But that left open a nagging question that the framers of the Constitution did not answer and which later generations have never adequately resolved.

What, after all, is a congressional district? In England and its colonies, the rule of representation was to award seats in the House of Commons and the American assemblies to political communities — shires, counties, boroughs, cities, towns — and, in England, to chartered corporate bodies. In a sense, it was the communities and entities that were being represented, not their individual members. That notion of communal representation collapsed with the creation of the House. Neither in 1789 nor in 2021 could one describe a congressional district as a community. Few of us know the number of our congressional district, much less its boundaries. A district is simply an arbitrary entity imposed on a map, an artifact of political arithmetic and geography that has only one purpose. It is that arbitrary character that makes congressional districting so vulnerable to political manipulation, as state legislatures, armed with ever more refined information about their constituents, redesign districts for partisan ends. As commentators like to say, in the United States, voters do not choose their representatives; the representatives choose their voters.

Yet one pervasive belief from the founding era can still be deployed against this dispiriting situation. It was a commonplace of American thinking in the 1770s and 1780s — and a belief repeated at the Constitutional Convention — to hold that a representative assembly should be a "mirror," "miniature," "portrait" or "transcript" of the population. That metaphor was not an American invention. It originated in the great constitutional quarrels of the English civil war of the 1640s. But no one in his right mind would ever claim that the 18th-century House of Commons, with its rotten and pocket boroughs and its minuscule electorate, offered a true "mirror" of the English people. By contrast, Americans believed that their assemblies already were, or should soon become, accurate representations of the larger society.

By our democratic standards, their notions of who constituted the people still fall short of our egalitarian ideals. But the aspiration was sincere. The notion of an accurate and equal representation of the entire people remains the American ideal. Whatever its fate, that is the goal the For the People Act was designed to secure. Far from being a wanton assertion of "constitutional vandalism" against the state legislatures, the bill is consistent with the Madisonian idea that the national government has a duty to correct whatever vices of state politics distort or corrupt our electoral system.

Updated July 1, 2021

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Here's where GOP lawmakers have passed new voting restrictions around the country

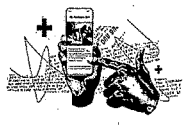
Texas: After defeating bill, Texas Democrats send loud message: 'We need Congress to do their part' | How the Texas voting bill would have created hurdles for voters of color

Florida: Florida ran a nearly flawless election in 2020. Republicans decided to change the voting rules anyway. Here's how.

Georgia: Expand access? A historic restriction? What the Georgia voting law really does.

By Jack Rakove

Jack Rakove is the William Robertson Coe professor of history and American studies and a professor of political science emeritus at Stanford University. His book "Original Meanings: Politics and Ideas in the Making of the Constitution" received the 1997 Pulitzer Prize in history. Twitter



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THE YALE LAW JOURNAL FORUM
NOVEMBER 18, 2019

The Elections Clause and the Underenforcement of Federal Law

Franita Tolson

ABSTRACT. H.R. 1 is proposed federal legislation that, if enacted, would address issues in voting, campaign finance, ethics, and legislative redistricting. Given its scope, it is unsurprising that the bill has encountered its fair share of critics, who portray the legislation as unprecedented and unduly intruding on the scope of state authority over elections. As this Essay argues, these concerns are unfounded because Congress has broad authority to regulate federal elections under the Elections Clause of Article I, Section 4 of the Constitution. This authority sometimes permits Congress to reach voter-qualification standards and state elections long considered to be the domain of the states. Congress has rarely used its power under the Clause, contributing to its underenforcement and also to misconceptions about the Clause's reach. But when utilized, the Clause has supported legislation, both enacted and proposed, that was much broader and more intrusive of state authority than H.R. 1. Even if H.R. 1 does not become law, it should serve as a model for future election reform bills enacted pursuant to Congress's authority under the Elections Clause.

INTRODUCTION

In January 2019, the 116th Congress introduced its very first bill in the House of Representatives, H.R. 1, aptly titled the "For the People Act of 2019." Relying on Congress's power under the Elections Clause,[1] the bill is an ambitious attempt to restructure the federal election system. It addresses campaign spending, expands voter registration, proposes independent redistricting commissions, prohibits felon disenfranchisement, and bolsters election security, among other

1. U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

things.[2] The bill has already seen its fair share of opposition. In a recent report, the Heritage Foundation argued that H.R. 1 is unconstitutional because it interferes with the states' constitutional authority to determine voter qualifications and administer elections.[3] The report alleges that H.R. 1 would "[s]eize the authority of states to regulate voter registration and the voting process by forcing states to implement early voting, automatic voter registration, same-day registration, online voter registration, and no-fault absentee balloting."[4]

By upending the manner in which federal elections are traditionally regulated—which is primarily through state law—H.R. 1 is one of the most novel and expansive exercises of federal power over elections in decades.[5] Congress often encounters substantial opposition when it enacts legislation that has few modern parallels, usually because these laws touch on an area of significant political controversy and do not comfortably fit within Supreme Court precedent. For example, various parties filed litigation challenging the Affordable Care Act (ACA) because, for the first time, uninsured individuals were forced to obtain healthcare or pay a tax. Although the Supreme Court ultimately upheld the ACA as a lawful exercise of Congress's taxing power, the Chief Justice pointed to the individual mandate's unique regulation of inaction—here, the failure to obtain health insurance—in finding the Commerce Clause insufficient to justify its scope.[6] In advocating for the ACA's unconstitutionality, the dissenters emphasized its

2. H.R. 1, 116th Cong. (2019). In March 2019, the House passed H.R. 1 in a vote of 234 to 193, but Majority Leader Mitch McConnell has yet to bring the bill to the Senate floor. *See* Ella Nilsen, *House Democrats Just Passed a Slate of Significant Reforms to Get Money Out of Politics*, VOX (Mar. 8, 2019, 11:25 AM), https://www.vox.com/2019/3/8/18253609/hr-1-pelosi-house-democrats-anti-corruption-mcconnell [https://perma.cc/CJV8-NKMG] (describing H.R. 1 as "dead on arrival in the Senate").

3. *The Facts About H.R. 1—the For the People Act of 2019*, HERITAGE FOUND. (Feb. 1, 2019), https://www.heritage.org/sites/default/files/2019-02/FS_182_0.pdf [https://perma.cc/E85Q-HH2M].

4. *Id.* at 1.

5. Even the preclearance regime of the Voting Rights Act (VRA), which imposed federal oversight for certain state political systems, is not a perfect analogy because the Elections Clause, by giving Congress comprehensive power to regulate federal elections, does not require any continuing evidence of racial discrimination for federal oversight to remain valid. *See generally* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1228-33 (2012).

6. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012) ("Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation . . . .").

novelty, noting that a scheme in which individuals are forced into commerce embraces "a definition of market participants [that] is unprecedented."[7]

Similarly, the Heritage Foundation report foreshadows the challenges that H.R. 1 will face should it ever become law because the bill involves the expansive use of federal power to regulate federal elections, an area of significant controversy that will become even more contested as we enter the 2020 round of redistricting. The Court's precedents have not definitively resolved many of the objections raised by the report, creating fertile ground for challenges to not only H.R. 1 but also any federal election law that touches on the state's power over voter qualifications or its own elections.

Congress has regulated federal elections at various points in our history, although federal legislation has become relatively rare in recent decades as the Supreme Court has increasingly rejected the expansive exercise of federal authority. Most famously, the Voting Rights Act of 1965 (VRA), enacted pursuant to the Fifteenth Amendment, prohibits racial discrimination in voting regardless of whether an election is state or federal.[8] Congress has also regulated the procedure of federal elections under the Elections Clause, but this power has been utilized far less than the Fourteenth and Fifteenth Amendments (or the Commerce Clause) even though it is not similarly constrained by federalism concerns.[9] Such efforts unavoidably affect voter-qualification standards and state elections, generating significant controversy. For example, the Enforcement Acts of 1870 and 1871 created, for the first time, a system of oversight for federal elections that was so controversial that Congress's attempt to expand the system twenty years later through the proposed Federal Elections Bill of 1890 led to huge Republican losses in the 1892 elections.[10] Despite firm footing in the Elections Clause, all of these efforts were challenged as both partisan endeavors and unconstitutional exercises of federal authority.

This Essay argues that when constitutional text is underenforced and has comparatively few governing precedents, there is a high risk that federalism

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7. *Id.* at 656 (Scalia, J., dissenting); *see also id.* at 708 (Thomas, J., dissenting) (describing the government's claim that "it may regulate not only economic activity but also *inactivity*" as "unprecedented").

8. 52 U.S.C. § 10301 (2018).

9. *See, e.g.*, National Voter Registration Act of 1993 (NVRA), 52 U.S.C. §§ 20501-20511 (2018) (regulating voter registration for federal elections). *See* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 321 (2019) (arguing that federalism does not constrain Congress when it acts pursuant to the Elections Clause); *see also* Arizona v. Inter Tribal Council of Ariz., Inc. (*Ariz. Inter Tribal*), 570 U.S. 1, 14 (2013) (upholding the NVRA's regulation of voter registration because the federalism concerns are weaker when Congress acts pursuant to the Elections Clause).

10. *See* source cited *infra* note 53.

objections to the exercise of this authority appear more credible than they actually are, creating a false equivalence between unprecedented or novel lawmaking and unconstitutional lawbreaking. If enacted, H.R. 1 would be the most expansive exercise of federal power over elections since the VRA and the most aggressive assertion of federal authority under the Elections Clause since Reconstruction. In defending H.R. 1's constitutionality, this Essay proceeds as follows. Part I briefly discusses the case law to show that the distinction between manner regulations and voter-qualification standards is arbitrary and can be difficult to distinguish in practice. It concludes that this distinction may not always matter because Congress can regulate voter qualifications in certain limited circumstances under the Elections Clause. In particular, H.R. 1's provisions reflect that the Constitution permits Congress to approach the regulation of federal elections comprehensively, making it difficult to disaggregate state and federal power over elections. As illustrated in Part II, which discusses the Enforcement Acts of the 1870s as well as the proposed Federal Elections Bill of 1890, history bears out that a law is not *de facto* unconstitutional just because it is novel and touches on areas of state authority. Federalism objections could nonetheless lead a law's novelty—and implied unconstitutionality—to be confused with Congress's prerogative to push the limits of its lawful authority under an otherwise underenforced constitutional provision.[11]

I. AND THE TWO SHALL NEVER MEET?: DISAGGREGATING STATE AND FEDERAL POWER OVER ELECTIONS

Given increasing concerns about federalism by the most conservative Supreme Court in decades, questions have inevitably arisen as to whether the Court has to account for the practical difficulties of election administration in thinking about the scope of federal power under the Elections Clause.[12] States have broad

11. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (arguing that constitutional provisions are valid "to their full conceptual limits" even when the Court refuses to enforce them based on institutional concerns such as federalism). To be clear, this Essay does not object to the use of constitutional arguments to challenge measures under current law, despite their novelty. People who substantively oppose a measure should feel empowered to raise all credible arguments to challenge it in any available forum, including legislatures, courts of law, and the court of public opinion. Instead, this Essay seeks to identify how these federalism arguments manifest in the unique context of the Elections Clause. Thanks to Michael Morley for pushing me on this point.

12. *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992). As the Court recognized,

> It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." . . . It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot

authority to regulate voter qualifications and state elections. The Court typically views our system of federalism as requiring that states be able to regulate these domains free of federal interference, subject only to limited exceptions.[13] But the nature of election administration—where states generally use a uniform system of regulation for both state and federal elections—suggests that the Court should be somewhat pragmatic, rather than strictly doctrinal, in considering the scope of federal power over elections. Because federal law under the Elections Clause often touches on voter qualifications and state elections, this can create confusion about which level of government has constitutional authority to legislate. Such confusion tends to inflate federalism concerns, even when it is impossible to disentangle state and federal power in this area. In *Arizona v. Inter Tribal Council of Arizona*, for example, the Court found that the requirement in the National Voter Registration Act (NVRA) that voters affirm their citizenship in order to register to vote for federal elections preempted Arizona's documentary proof-of-citizenship requirement.[14] Nonetheless, the majority recognized that there could be instances in which the NVRA interfered with state power over voter qualifications, noting that, in those instances, states could use the Administrative Procedure Act to challenge the statute as applied to their elections.[15]

Despite this concession, some Justices insist that courts should not account for practical implementation when deciding cases under the Elections Clause. At least two Justices believe that any federal interference with the state's power over voter qualifications is unconstitutional. In *Arizona Inter Tribal*, Justices Thomas and Alito dissented on the grounds that the NVRA's affirmation-of-citizenship requirement impermissibly interfered with Arizona's ability to enforce its own requirement that voters present documentary proof of citizenship, which they deemed a voter qualification. Justice Thomas, in particular, argued that the Voter Qualifications Clause of Article I, Section 2, which allows states to determine the

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> are absolute . . . . The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," § and the Court therefore has recognized that States retain the power to regulate their own elections . . . . Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."

Id. (citations omitted).

13. *See, e.g.*, U.S. CONST. amend. XIV (prohibiting denials or abridgments of the right to vote); *id.* amend. XV (prohibiting racial discrimination in voting).

14. *Ariz. Inter Tribal*, 570 U.S. 1, 14 (2013) ("Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent.").

15. *Id.* at 19-20.

electors for federal elections, prevented Congress from passing any regulation that undermined the states' "nearly complete control over voter qualifications."[16] Importantly, he dismissed precedents establishing that voter registration falls within the scope of Congress's power under the Elections Clause, distinguishing them as cases that "involved congressional redistricting, not voter registration."[17]

Similarly, Justice Alito rejected the Court's interpretation of the NVRA by focusing on state, rather than federal, authority under the Elections Clause. Pointing to the NVRA as an untraditional exercise of federal power, he would have imposed the equivalent of a clear-statement rule on Congress should it choose to exercise its authority to regulate the times, places, and manner of federal elections. He "presum[ed] that the States retain this authority [under the Elections Clause] unless Congress has clearly manifested a contrary intent," in order to protect Arizona's "compelling interest in preserving the integrity of its electoral process."[18]

The crux of these Justices' objections is that Congress's power to "make or alter" regulations that govern federal elections should have minimal or no impact on either state elections or the voter qualifications that states have primary authority to stipulate under Article I, Section 2. Like the Heritage report, Justices Thomas and Alito assume that, contrary to how the federal and state electoral systems interact in practice, federalism requires the complete disaggregation of state voter-qualification standards from the time, place, and manner regulations that Congress can enact pursuant to the Elections Clause and, also, that federal power has little or no impact on state elections.

A. The Unworkable Distinction Between Manner Regulations and Voter-Qualification Standards

The above view espoused by Justices Thomas and Alito miscomprehends the case law as well as the constitutional text and structure by trying to distinguish a voter-qualification standard set by the states from a manner regulation subject to federal authority in the absence of clear guidance.[19] For example, the Court has looked to the requirements of federal law to validate regulations that apply to both state and federal elections, making few distinctions between state and federal authority in those circumstances. In upholding Indiana's voter-identification law—a law that is not clearly a voter-qualification standard or a manner

16. *Id.* at 28 (Thomas, J., dissenting).

17. *Id.* at 34 (Thomas, J., dissenting).

18. *Id.* at 40 (Alito, J., dissenting).

19. Tolson, *supra* note 9.

regulation[20]—the Court justified the law by pointing to requirements imposed on the state by the NVRA and the Help America Vote Act (HAVA).[21] Both the NVRA and HAVA (which was also enacted pursuant to the Elections Clause) are prime examples of federal statutes that rely on state implementation and cooperation, making it difficult to deploy separate standards for each level of elections or to distinguish based on the category (voter-qualification standard or manner regulation) implicated. The NVRA establishes voter-registration criteria for federal elections and prohibits actions that would needlessly disenfranchise individuals;[22] if federal law sets one baseline for voter registration, it is difficult for states to set another. Similarly, HAVA requires state oversight of local election boards to avoid many of the voting problems that arose during the 2000 election.[23] H.R. 1 modifies and extends both laws,[24] making it even more difficult to limit their reach to only federal elections.

Practical concerns also muddy the scope of federal power over federal elections, which compounds the significance of these doctrinal gray areas.[25] Should the federal government want to impose a regulation that affects voter-qualification standards, it can only do so in limited circumstances.[26] If a state wants to regulate the time, place, and manner of federal elections, the federal government has significantly more authority to displace or alter state law. But what if a regulation has implications for both voter qualifications and the manner of federal elections? Proof-of-citizenship requirements to register for federal elections have presented this issue in a particularly stark fashion. After *Arizona Inter Tribal*, Kansas experienced difficulty trying to run parallel election systems when it sought to require proof of citizenship for voter registration but could only do so for state elections.[27] As the D.C. Circuit recognized, documentary proof-of-

20. Franita Tolson, *Congressional Authority to Protect Voting Rights After* Shelby County *and* Arizona Inter Tribal, 13 ELECTION L.J. 322, 323 n.6 (2014).

21. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008).

22. 52 U.S.C. § 20901 (2018).

23. *Id.* §§ 20901-21145.

24. *See, e.g.*, H.R. 1, 116th Cong., § 1001 (2019); *id.* § 1061.

25. For example, President Trump recently tweeted a call for federal legislation instituting national voter identification, but whether Congress has the authority to do so depends on whether voter identification is a voter-qualification standard or a manner regulation. Donald J. Trump (@realDonaldTrump), TWITTER (July 30, 2019, 9:41 AM), https://twitter.com/realdonaldtrump/status/1156243330952507394 [https://perma.cc/B6N8-CZBS] ("We should immediately pass Voter ID @voteridplease to insure the safety and sanctity of our voting system. Also, Paper Ballots as backup (old fashioned but true!). Thank you!").

26. *Ariz. Inter Tribal*, 570 U.S. 1, 26 (2013); Tolson, *supra* note 9.

27. *See* Fish v. Kobach, 840 F.3d 710, 716 (10th Cir. 2016) (upholding district court order granting plaintiff's motion for a preliminary injunction against enforcement of Kansas's documentary proof-of-citizenship law).

citizenship requirements that apply to state and local elections make it difficult to register voters for federal elections as well.[28] The Supreme Court has nonetheless upheld the NVRA's requirement that voters affirm their citizenship under the Elections Clause even though it inevitably affects voter qualifications and state elections,[29] creating another doctrinal gray area that contributes to the difficulty in delineating voter-qualification standards from manner regulations.

B. Congress's Limited Power to Regulate Voter Qualifications Under the Elections Clause

The artificial boundary between manner regulations and voter-qualification standards should not prevent Congress from using its authority under the Elections Clause to address a state's attempt to purposely circumscribe its electorate through its authority over voter qualifications. As I have argued in prior work, there are limited circumstances in which Congress can reach voter qualifications under the Elections Clause, including instances in which state regulations discourage voter turnout in federal elections.[30] For example, H.R. 1 prohibits the disenfranchisement of felons in federal elections after they have been released from custody, probably one of the most controversial parts of the bill.[31] Felony status has long been considered a voter qualification that states can use to exclude otherwise eligible voters. The Court has interpreted Section 2 of the Fourteenth Amendment to sanction felon disenfranchisement because it exempts felony status from the penalty of reduced representation imposed on any state that abridges or denies the right to vote.[32]

However, the Court has not resolved whether Congress can regulate felon disenfranchisement under the Elections Clause if states have abused their power in a way that, like documentary proof-of-citizenship requirements, affects turnout and participation in federal elections. Critics have attacked felon-

28. League of Women Voters v. Newby, 838 F.3d 1, 8 (D.C. Cir. 2016).

29. *Ariz. Inter Tribal*, 570 U.S. 1, 14 (2013). *But see id.* at 40 (Alito, J., dissenting) ("In light of the States' authority under the Elections Clause of the Constitution, Art. I, § 4, cl. 1, I would begin by applying a presumption against pre-emption of the Arizona law requiring voter registration applicants to submit proof of citizenship.").

30. Tolson, *supra* note 9. This is not an argument that Congress has plenary power over voter qualifications under the Elections Clause; rather, Congress can reach voter qualifications under the Clause when states' control over voter qualifications threatens the health of federal elections. My scholarship identifies two circumstances in which this is likely: when states under-legislate with respect to voter qualifications in order to facilitate discrimination, and when states try to use this power to deter turnout and participation in federal elections. *Id.* at Part III.

31. Thanks to Benji Cover for emphasizing this point.

32. Richardson v. Ramirez, 418 U.S. 24 (1973).

disenfranchisement laws as being overbroad attempts to disenfranchise minority voters beyond what the framers of Section 2 envisioned.[33] Many states prohibit felons from voting long after they have been released from custody or, alternatively, require them to petition the state for the restoration of their voting rights after a term of years.[34]

Recently, Florida voters approved a state constitutional amendment that would have restored the voting rights of those previously incarcerated, but the state legislature passed a law that would curb its effectiveness by requiring all fines and fees to be paid prior to the restoration of voting rights.[35] H.R. 1 would prohibit states from barring individuals who are no longer in custody from voting, thereby deterring broad felon-disenfranchisement laws intended to indefinitely disenfranchise a significant percentage of the electorate. As the Court has recognized, Congress has the power under the Elections Clause to "protect the elections on which its existence depends"[36] and "to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself."[37] Regulations like Florida's statute requiring the payment of fines and fees regardless of ability to pay, as well as instances in which states disenfranchise based on an overly broad category of offenses, have significant implications for turnout and participation in federal elections, such that these efforts fall within the limited instances in which Congress can reach voter qualifications under the Clause.

Exceptions must exist because, unlike the Fourteenth and Fifteenth Amendments, federalism does not function as a constraint on congressional authority under the Elections Clause. Concerns about federalism have hampered voting-rights enforcement in recent decades, famously culminating in *Shelby County v. Holder*'s invalidation of Section 4(b) of the VRA, which subjected mostly

33. Alec Ewald, *Escape from the "Devonian Amber": A Reply to* Voting and Vice, 122 YALE L.J.F. 319 (2013).

34. *Felony Disenfranchisement Laws in the United States*, SENTENCING PROJECT (Apr. 28, 2014), www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states [https://perma.cc/9PY7-MDLV].

35. *See* Voting Rights Restoration Efforts in Florida, BRENNAN CTR. FOR JUST. (May 31, 2019), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida [https://perma.cc/RQ72-T3ZD]. Recently, a federal district court granted a preliminary injunction blocking the Florida law requiring payment of all fines and fees before individuals with felony convictions could be reenfranchised. *See* Jones v. DeSantis, No. 19-cv-300 (N.D. Fla. Oct. 18, 2019) (order granting preliminary injunction), https://www.aclu.org/legal-document/order-1 [https://perma.cc/4HAW-WSMU].

36. *Ex parte* Yarbrough, 110 U.S. 651, 658 (1884).

37. *Id.* at 666.

southern jurisdictions with abysmal records on voting rights to federal oversight.[38] In contrast, the Supreme Court has interpreted the Elections Clause's text as allowing Congress to "make or alter" state regulations, and to implement "a complete code for congressional elections" that can displace state law for any reason or no reason.[39] Though the Elections Clause defaults to state power as an initial matter—which invites the conclusion, embraced by Justices Alito and Thomas, that congressional power is constrained—the text and structure of the Clause point to federal power that is robust, significant, and, most importantly, unencumbered by federalism.[40]

II. LAWS ARE NOT UNCONSTITUTIONAL BECAUSE THEY ARE NOVEL OR UNPRECEDENTED

Despite the Elections Clause's untapped potential, it has not been a source of much election-law legislation, which contributes to the perception that H.R. 1 is unprecedented and therefore unconstitutional. While the NVRA is the most recent regulation of voter registration under the Elections Clause, it is significantly less far-reaching than its predecessors, both proposed and enacted. The same is true of H.R. 1.

The Enforcement Act of 1870, typically categorized as Fifteenth Amendment legislation but also enacted pursuant to the Elections Clause, criminalized violations of state law that governed federal elections.[41] This exposed state officials to dual liability, created a category of nationally protected rights, and, in the process, raised significant questions about the scope of federal authority. Under the Act, election officials could be charged under federal law if they "hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify

38. 570 U.S. 529 (2013) (holding that Section 4(b)'s disparate application to mostly southern states and not equally culpable northern jurisdictions violated the equal sovereignty principle); *see also* Franita Tolson, *The Equal Sovereignty Principle as Federalism Sub-Doctrine: A Reassessment of* Shelby County v. Holder, *in* CONTROVERSIES IN AMERICAN FEDERALISM AND PUBLIC POLICY (Christopher P. Banks ed., 2018) (referring to the equal-sovereignty principle as "aggressive pro-federalism doctrine designed to shift previously delegated authority over elections from the federal government back to the states").

39. Smiley v. Holm, 285 U.S. 355, 366 (1932); *see also* Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2212 (2018) (arguing that Congress can commandeer state offices and state officials under the Elections Clause).

40. *Id.*

41. Enforcement Act of 1870, ch. 114, § 2, 16 Stat. 140, 140; *id.* § 22, 16 Stat. at 145-46; *see also* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011) (arguing that the President and Congress, not the Court, were the ones to abandon racial minorities during Reconstruction).

him to vote or from voting at any election."[42] This provision was a much more aggressive statement of federal power than the NVRA's requirement that states offer voter registration at all state offices that provide public assistance or, alternatively, H.R. 1's proposed requirement that states offer online voter registration.

The Enforcement Act of 1871 went further than its counterpart enacted a year earlier, instituting a system of federal oversight for congressional elections. This oversight system was designed to ferret out voter fraud and other behavior that prevented individuals from voting and had been prohibited by the 1870 Act.[43] Unlike the preclearance provisions of Sections 4(b) and 5 of the VRA, which applied to mostly southern jurisdictions, the 1871 Act applied to congressional districts nationwide. In contrast, the only oversight that would be created by H.R. 1 is a committee to oversee presidential inaugurations, a far cry from the system of oversight created by the 1871 Act. Effectively, both Enforcement Acts oversaw state elections and voter qualifications even though, by their terms, the oversight applied only to federal elections. These provisions were extremely controversial, with opponents questioning the statute's use of criminal penalties, its broad application to any denial of the right to vote, and its interference with state election systems.[44] Nonetheless, the Supreme Court upheld criminal prosecutions under

42. Enforcement Act of 1870, ch. 114, § 4, 16 Stat. at 141. This particular provision was invalidated in *United States v. Reese*, 92 U.S. 214 (1875), because of its failure to criminalize only race-based disenfranchisement. *But see* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 424 (2014) (arguing that *Reese* was wrongly decided).

43. Enforcement Act of 1871, ch. 99, 16 Stat. 433, 433 (incorporating Section 20 of the 1870 Enforcement Act); *see also id.* § 2, 16 Stat. at 433-34 ("[W]henever in any city or town having upward of twenty thousand inhabitants, there shall be two citizens . . . of different political parties . . . who shall be designated as supervisors of election."); *id.* § 5, 16 Stat. at 434-35 ("That it shall be the duty of the said supervisors of election, and they, and each of them, are hereby authorized and required . . . to challenge any vote offered by any person whose legal qualifications the supervisors . . . shall doubt"); *id.* § 8, 16 Stat. at 436 (designating marshalls to protect the election supervisors and to arrest individuals who violate the Act).

44. CONG. GLOBE, 41st Cong., 2d Sess. app. at 355 (1870) (statement of Sen. William Hamilton) (disputing that Congress can impose criminal penalties under the Fifteenth Amendment because "the denial of the exercise of a certain power by the Constitution to a State does not thereby confer upon Congress power over the subject-matter of such denial"); *id.* at 473-74 (comments of Casserly) ("It is needless to pursue further the argument as to the powers of Congress under the fifteenth amendment, and as to what is 'appropriate legislation to enforce its provisions.' I leave this part of the subject with a single observation. That observation is as to the difference between legislation by Congress to execute an express power exclusive in itself, and legislation to enforce a limitation of a general power exclusive in the States. In the former case Congress may claim a liberal construction in the aid of its express exclusive power. In the latter case the State has a right to restrict Congress to the very terms of the prohibition. This is especially true when the prohibition affects the power of the State over a subject such as the suffrage.").

the 1870 and 1871 Acts, reading broadly congressional power under the Elections Clause to enact this legislation.[45]

The proposed Federal Elections Bill of 1890, which failed by only one vote, further suggests that the nature of the objections raised by the Heritage report (and Justices Thomas and Alito) are not reflective of how Congress generally viewed its power under the Elections Clause.[46] Extending the reach of the 1870 and 1871 Enforcement Acts, the Federal Elections Bill would have instituted federal supervision of congressional elections, from registration to certification of the winners, if one hundred people within any given congressional district requested federal intervention.[47] Critics called the legislation the "Lodge Force Act," a reference to one of its chief sponsors, Representative Henry Cabot Lodge, and the controversy surrounding the proposal.[48] The *New York Times* noted that the bill was so controversial that major issues were being neglected to focus on its potential passage.[49]

With the Federal Elections Bill, Congress sought to build on the earlier Enforcement Acts and favorable Supreme Court precedents that, in sustaining portions of the Acts, had explicitly recognizing that Congress has broad authority under the Elections Clause to protect federal elections.[50] Congress had ample support for its belief that the bill was constitutionally sound. Nonetheless, critics argued that the bill was not a regulation of the manner of federal elections that its sponsors contended; rather, they framed it as a usurpation of and unconstitutional interference with state power.[51] The controversy over the Acts and the

45. *Ex parte* Clark, 100 U.S. 399 (1879); *Ex parte* Siebold, 100 U.S. 371 (1879).

46. Notably, the Supreme Court has also upheld exercises of federal authority under the Elections Clause even as it was invalidating similar exercises of power under the Fourteenth and Fifteenth Amendments.

47. Henry Cabot Lodge & T.V. Powderly, *The Federal Election Bill*, 151 N. AM. REV. 257, 266 (1890); *see* Federal Elections Bill of 1890, H.R. 10958, 51st Cong. (1st Sess. 1890); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 29-30 (1974).

48. Democrats referred to the Lodge Bill as a "Force Act" as a nod to an earlier voting-rights bill that had failed in 1875. *See* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 18 (1999); *see also* XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910, at 233-37 (1997) (noting that Republicans considered separating state and federal elections, or alternatively, taking the power of conducting congressional elections away from the states before settling on a regime of federal oversight).

49. *Gorman on the Stump: He Tells Truths About the Tariff and Force Bills*, N.Y. TIMES, Oct. 4, 1891, at 20.

50. Tolson, *supra* note 9.

51. 21 CONG. REC. 6854 (1890) (comments of Rep. Breckinridge) ("Any Federal election law, in my judgment, is unwise . . . . With the States controlling their elections there can be only local frauds and only temporary mischief. In the give and play of counteracting forces these frauds

Federal Elections Bill reveal that there are political risks attendant to legislating toward the outer limits of constitutional power, risks that tend to manifest at the ballot box, rather than within the legal system. Republicans would enact five enforcement acts in the early 1870s, which contributed to the 1874 defeat that cost them control of Congress for the first time since the Civil War.[52] Similarly, Republicans' support for the Federal Elections Bill cost them in the 1890 elections, with fissures in the Republican caucus ultimately leading to the bill's defeat in 1891, followed by huge Republican losses in the 1892 elections.[53] Democrats may face a similar fate with H.R. 1, but ultimately it should be the people, and not the Court, who determine the fate of novel federal legislation.

CONCLUSION

It is undisputed that the broad and comprehensive exercise of federal power over elections has been controversial. However, the juxtaposition of the controversy over H.R. 1 with the responses to its historical counterparts reveals that objections to broad federal power are often based on misplaced federalism concerns. Arguably, Congress has broad power under the Elections Clause to regulate federal elections, unchecked by the federalism concerns that have stymied

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will generally offset each other. The average result in a series of years will about be equal on either side . . . ."); *see id.* at 6858 (comments of Rep. Caruth) ("This is an effort here, Mr. Speaker, to perpetuate you Republicans in power. For the first time in quite a number of years the Republican party finds itself in possession of the executive office and of both bodies constituting the legislative department of the Government. The methods by which it secured this supremacy were, to say the least, questionable. The party fought with a desperation which seemed born of despair."). Contrary to these assertions, Lodge argued that the legislation would not disturb state election laws. *See* Lodge, *supra* note 47, at 258 ("The State systems, whether they provide for the secret and official ballot or otherwise, are all carefully protected under this law against any interference from United States officers."); *see also* WANG, *supra* note 48, at 234 (arguing that Lodge believed "the best way to eliminate southern suppression of black votes was to carry out comprehensive ballot reform").

52. WANG, *supra* note 48, at 110-13.

53. Richard M. Valelly, *Partisan Entrepreneurship and Policy Windows: George Frisbie Hoar and the 1890 Federal Elections Bill*, *in* FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING 127 (Stephen Skowronek & Matthew Glassman eds., 2007) (noting that the bill "died on January 26, 1891" and "[d]espite the passage of eighteen months time, Democrats actually ran against the Federal Elections Bill in 1892"); *Wanted, A Trusty Moses: Who Can Save the Perplexed Bay State Republicans*, N.Y. TIMES, June 3, 1891, at 3 ("There was no popular demand for the Force bill so persistently championed by Messrs. Hoar and Lodge. The voters of Massachusetts gave the measure only scant favor, and yet it was known that the Speaker secured the unanimous support of the Republican delegation for the tariff and other pet schemes in which he was interested by designating Mr. Lodge as their promoter and recognized sponsor on the floor of the House. The interests of the State as a manufacturing and purchasing community were therefore bartered and pledged in favor of a bill that evoked no enthusiasm among the thoughtful, but rather excited positive hostility.").

enforcement under the Fourteenth and Fifteenth Amendments. While Congress has used this authority sparingly, leading to confusion about its actual scope, there are historical precedents that go beyond H.R. 1 in their assertion of federal power. In any case, unprecedented or novel exercises of federal power should not be confused with unlawful uses of federal authority.

Vice Dean for Faculty and Academic Affairs and Professor of Law, University of Southern California Gould School of Law. *I am grateful to participants in the Election Law Roundtable at the Southeast Association of Law Schools Annual Conference for their feedback on the ideas featured in this Essay. Thanks to the editors of the* Yale Law Journal *for their terrific work on previous drafts.*

BRENNAN
CENTER
FOR JUSTICE

LEGAL ANALYSIS OF CONGRESS' CONSTITUTIONAL AUTHORITY TO RESTORE VOTING RIGHTS TO PEOPLE WITH CRIMINAL HISTORIES

This memo addresses the constitutionality of the Democracy Restoration Act (DRA), Title I, subtitle E of the For the People Act, which would permit all individuals who are not incarcerated to vote in federal elections, regardless of whether they have a criminal record that makes them ineligible to vote in state elections. The Brennan Center for Justice at NYU School of Law believes that such legislation is constitutional and that there are two sources for Congress' authority to enact subtitle E: (1) the Election Clause of Article I, section 4; and (2) Congress' enforcement powers under the Fourteenth and Fifteenth Amendments.

I. The Election Clause and Congress' Inherent Authority to Regulate Federal Elections

Congress has very broad powers to regulate federal elections under the Election Clause of Article I, section 4. This clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of chusing Senators." Indeed, the Clause was drafted with the intent of giving Congress great power to check the abuses of the States in regulating elections. Madison explained that without providing Congress this power, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." James Madison, *Notes of Debates in the Federal Convention of 1787* 423-24 (Athens: Ohio Univ. Press, 1985) (notes from Aug. 9, 1787). At the time of its drafting, it was understood to reserve such broad power to the federal government that the Clause engendered a great deal of opposition from anti-federalists, whose protests were ultimately unsuccessful.. Jackson Turner Main, *The Antifederalists: Critics of the Constitution, 1781-1788* 149-51 (Chapel Hill: Univ. of North Carolina Press, 1961).

Although the text of the Election Clause references regulating the time, place and manner of congressional elections, it has consistently been read more expansively to include Congress' authority to regulate presidential elections, as well as its authority to regulate other voting requirements for federal elections, including voter eligibility. *See, e.g., Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Oregon v. Mitchell*, 400 U.S. 112, 121, 124 (1970).

Mitchell upheld Congress' ability to lower the voting age in federal elections. In doing so, the Court clearly endorsed Congress' "ultimate supervisory power" over federal elections, including setting the qualification for voters. 400 U.S. at 124. Although a majority of Justices did not agree on the basis for Congress' power to set voter qualifications – some based the power on the Election Clause, others on Congress' enforcement powers – the Court itself has not viewed this disagreement as undercutting *Mitchell*'s holding. *See Kusper*, 414 U.S. at 57.

Even in those few instances where federal legislation would conflict with a state constitution, the legislation could nevertheless be implemented pursuant to the Supremacy Clause in Article VI of the Constitution, which provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Opponents of the legislation argue that notwithstanding its extremely broad power to regulate federal elections, Congress lacks the power to directly set qualifications for voters in federal elections because of the Qualifications Clauses of Article I and the Seventeenth Amendment. Opponents reason that since both clauses provide that voters in congressional elections "shall have the Qualifications requisite" for voters in state legislative elections, that must mean qualifications of voters in congressional elections must be identical to the qualifications of voters determined by States for State elections.

In support of this argument, they point to dictum from a 2013 decision from the Supreme Court, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) ("*ITCA*"). In an opinion penned by Justice Scalia, the Court signaled an unwillingness to extend the reasoning of the four Justices in *Oregon v. Mitchell* that relied on the Elections Clause to allow for congressional control over voter qualifications. Unlike in *Mitchell*, the question of Congress' power to regulate voter qualifications was not squarely before the Court in *ITCA*. Instead, the Court was addressing whether Congress could require a State to accept the federal voter registration form without imposing additional documentary requirements. The Court held that Congress was not attempting to expand (or contract) voter qualifications, but rather to prescribe registration procedures, so the interplay between the Elections Clause and the Qualifications Clauses was not really implicated.

Moreover, this argument does not accord with Supreme Court precedent that more directly addresses the scope of the Qualifications Clauses. As the Supreme Court's decision in *Tashjian v. Republican Party*, 479 U.S. 208 (1986), makes clear, the Qualifications Clause of Article I, which the Seventeenth Amendment adopted verbatim, was not intended to limit congressional power, or to require that qualifications for voting in federal elections be the same as those for voting in state elections. Instead, as the Court explained, "[f]ar from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections." *Id.* at 229. The Court concluded that the fundamental purpose of the Qualifications Clauses is satisfied if all those qualified to vote in state elections are also qualified to vote in federal elections. *Id.* Because the proposed recommendation expands rather than limits the group of qualified voters in federal elections, it does not run afoul of the Qualifications Clauses.

Recent cases interpreting the Elections Clause in the context of redistricting legislation underscore the fact that the purpose of the Elections Clause was to empower the voters and prevent State legislatures, and the parties that control them, from entrenching themselves in power by rigging election rules. The Supreme Court made this point clear in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2672 & 2677 (2015), relying heavily on Madison's explanation of its

importance. This reasoning was then recently embraced by the three-judge district court in *Common Cause v Rucho*, 318 F. Supp. 3d 777, 937-38 (2018), which relied on the Elections Clause to strike down a partisan gerrymander by North Carolina's legislature because it represented just such an attempt at entrenchment. These cases confirm the fact that the Elections Clause exists in part to protect the direct relationship envisioned by the Framers between voters and Congress. They also provide an additional reason for finding in the Clause the congressional power to limit criminal disenfranchisement powers. That is, at a time when it has become clear that criminal disenfranchisement laws are viewed as a bulwark against advances by one party, and a method for entrenching power, the Elections Clause should be read to provide Congress with the power to prevent this attempt by legislators to choose their voters.

II. Congress' Enforcement Powers under the Fourteenth and Fifteenth Amendments

Congress' enforcement powers under the Fourteenth and Fifteenth Amendments provide an additional basis for congressional authority to permit all individuals who are not incarcerated to participate in federal elections, even though some may be disenfranchised under state law as the result of criminal convictions. Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment both grant Congress the power to enforce the Amendments "by appropriate legislation." The Supreme Court has described this enforcement power as "a broad power indeed" – one that gives Congress a "wide berth" to devise appropriate remedial and preventative measures for unconstitutional actions. *Tennessee v. Lane*, 541 U.S. 509, 518, 520 (2004).

The right to vote, and the right to do so free of racial discrimination, are fundamental rights. Laws that are enacted out of racially discriminatory intent violate the Fourteenth Amendment generally, and violate the Fifteenth Amendment when they restrict voting. It is long settled by the Supreme Court that Congress' enforcement powers are a grant of broad authority to eradicate any racial discrimination in voting.

The Supreme Court has established an analysis for determining whether legislation falls within Congress' enforcement powers under the Fourteenth Amendment: the legislation must exhibit "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne v. Flores*, 521 U.S. 507, 520 (1997).

The first part of this analysis requires identifying the constitutional right that Congress seeks to enforce. *Lane*, 541 U.S. at 520. In order for Congress to properly utilize its enforcement powers, its legislation must be clearly remedial in nature – that is, aimed at remedying past constitutional violations – rather than expanding constitutional rights. The second part of the test determines whether the legislation is "an appropriate response" to a "history and pattern of unequal treatment." *Id.*

Rather than serving as a rigid doctrinal test, the Court's analysis has functioned as a sliding scale – making clear that Congress' enforcement authority is at its most expansive, and that "congruence and proportionality" are most likely to be found, when protecting against discrimination based on suspect classifications, *see e.g., Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003), or when protecting fundamental rights, *see Lane*, 541 U.S. at 523. Because the For the People Act protects the right to vote, arguably the most fundamental constitutional right, and attempts to remedy past and present racial discrimination, it meets the *Boerne-Lane* standard.

When acting pursuant to the Fifteenth Amendment, Congress's enforcement powers are at their pinnacle because such legislation involves both the fundamental right to vote and the suspect category

of race. Indeed, the Court has "compared Congress' Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause." *Lopez v. Monterey County*, 525 U.S. 266, 294 (U.S. 1999) (citing *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)). Legislation enforcing the Fifteenth Amendment is afforded deferential review from the courts because it necessarily protects against racial discrimination and deprivations of the fundamental right to vote. *See Johnson v. California*, 543 U.S. 499, 505 (2005); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

While the Supreme Court has found that Congress exceeded its Fourteenth Amendment powers when passing legislation requiring states to remedy various forms of discrimination, the concerns animating the Court are not present in legislation designed to combat race discrimination in voting. For example, in *Boerne*, the Court found that Congress exceeded its enforcement powers in passing the Religious Freedom Restoration Act (RFRA), which prohibited both federal and state governments from "substantially burdening" a person's exercise of religion, concluding that the law "attempted a substantive change in constitutional protections." 521 U.S. at 532. The Court rejected an attempt by Congress to "say what the law is," *Boerne*, 521 U.S. at 537 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)), the clear province of the courts.

Other cases have similarly been skeptical of Congressional action to combat discrimination unrelated to racial classifications or fundamental rights. *See, e.g. Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 373 (2001) (concluding that Congress could not enforce the Americans with Disabilities Act against state governments, and explaining that the "ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting Rights Act"); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (finding that Congress did not have the power to enforce the Age Discrimination in Employment Act against state governments and pointing to protection of voting rights as a valid use of congressional enforcement powers).

Finally, despite the power Congress has to act to remedy racially discriminatory voting laws, the Court struck down Section 4(b) of the Voting Rights Act, which provided the coverage formula for determining the reach of the Act's anti-discriminatory preclearance provision, in *Shelby County v. Holder*, 570 U.S. 529 (2013). But, as the dissent in that case noted, the majority did not purport to alter the deferential review applied in such cases. *Id.* at 569 (Ginsburg, J., dissenting). Instead, the Court struck down the coverage formula because it held that in the years since the law's initial passage, Congress had not sufficiently updated the formula or the record of discrimination that justified it in order to establish Section 4(b) as an appropriate remedial measure. *Id.* at 552-53.

Thus, in enacting the DRA, Congress should create a record of evidence that criminal disenfranchisement provisions have resulted in a "history and pattern of unequal treatment."[1] *Lane*, 541 U.S. at 520. It can do so by demonstrating that racial discrimination was a substantial or motivating factor in the adoption of specific felony disenfranchisement laws, and that racially neutral laws have been implemented or enforced in a discriminatory manner. *See Hibbs*, 538 U.S. at 731-32 (finding evidence that state medical leave laws discriminated on the basis of gender both intentionally and in the

[1] After the Civil War and enactment of the Fifteenth Amendment, numerous southern states adopted criminal disenfranchisement provisions, along with literacy tests and poll taxes, to exclude newly enfranchised African American voters. Criminal disenfranchisement provisions today continue to have a substantially greater impact on minorities, especially African American men. This disparate effect is particularly dramatic in states with laws that permanently disenfranchise criminal offenders. In some states, it is estimated that 30 percent of Black men are currently disenfranchised. For more information *see* Erika Wood, *Restoring the Right to Vote* (2009), available at http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/.

way in which they were applied). The findings section of the current legislation provides a strong foundation for building this record.

Opponents of the DRA may argue that Section 2 of the Fourteenth Amendment limits Congress' enforcement authority. That section provides for a reduction in a State's congressional representation "when the right to vote at any election. . . is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation in rebellion, or other crime* . . . ." U.S. Const. Amend. XIV, § 2 (emphasis added). Relying on this language, the Supreme Court rejected a nonracial equal protection challenge to California's felony disenfranchisement law in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

As long as the DRA is securely framed as legislation aimed at remedying past and current racial discrimination in the voting system, reliance on *Richardson* is misguided. In a subsequent decision, the Court clarified that Section 2 of the Fourteenth Amendment does not limit the Equal Protection Clause's prohibition on felony disenfranchisement laws that deny voting rights *on account of race. Hunter v. Underwood*, 471 U.S. 222, 233 (1985) ("[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [felony disenfranchisement laws] which otherwise violate § 1 of the Fourteenth Amendment.").

Even if Section 2 were found to somehow limit Congress' power under the Fourteenth Amendment to reach criminal disenfranchisement laws with racially discriminatory results, the Fifteenth Amendment's subsequent broad ban on race discrimination in voting clearly carries no such exception. The language and legislative history of the Fifteenth Amendment reveal that it does not replicate or incorporate Section 2, but replaces it with a clean ban on any disenfranchisement based on race. The Fifteenth Amendment takes a diametrically different approach from the Fourteenth Amendment. A few years after the Fifteenth Amendment was ratified, the Supreme Court explained that the Amendment "invested citizens . . . with a new constitutional right which is within the protecting power of Congress. The right is exemption from discrimination of the elective franchise on account of race, color, or previous condition of servitude." *United States v. Reese*, 92 U.S. 214, 218 (1875).

III. Conclusion

We believe that both the Elections Clause, which provides Congress with broad powers over federal elections, and Congress' enforcement powers under the Fourteenth and Fifteenth Amendments, offer two separate bases for congressional authority to pass the Democracy Restoration Act.

THE SWEEP OF THE ELECTORAL POWER

Nicholas O. Stephanopoulos*

Congress is on the cusp of transforming American elections. The House recently passed a bill that would thwart voter suppression, end gerrymandering, and curb the undue influence of the rich. Something like this bill could soon become law. In this Article, I provide a multilayered foundation for such sweeping electoral legislation. From a theoretical perspective, first, I argue that Congress poses less of a threat to democratic values than do the states or the courts. It's more difficult for a self-interested faction to seize control of federal lawmaking than to capture a state government or a judicial body. Second, surveying the history of congressional electoral regulation, I contend that it's remarkably benign. Most federal interventions have advanced democratic values—in marked contrast to many of the states' and the courts' efforts.

Third, I show that current law grants Congress the expansive electoral authority that, normatively, it ought to possess. In particular, the Elections Clause, the Guarantee Clause, and the Fourteenth Amendment's Enforcement Clause combine to empower Congress over most electoral levels and topics. And fourth, returning to the House's recently passed bill, I maintain that its most controversial elements are constitutional under the applicable doctrine. In fact, Congress could venture considerably further than, to date, it has tried to go. Together, these points should hearten legislators when they next turn to the project of electoral reform. Not only is aggressive federal action permissible in the American political system—it may be the only way to save it.

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INTRODUCTION

Although it came and went without much fanfare, March 8, 2019 was a momentous day in the history of American election law. On that day, the House of Representatives passed the For the People Act, the most sweeping electoral reform bill ever to win the support of a majority of a chamber of Congress.[1] Among (many) other things, the Act would have mandated automatic voter registration,[2] ended felon disenfranchisement,[3] required states to redraw district lines using

[1] *See* For the People Act of 2019, H.R. 1, 116th Cong. (2019). For other observers noting the bill's significance, see Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171, 174 (2019) ("If enacted, H.R. 1 would be the most expansive exercise of federal power over elections since the VRA and the most aggressive assertion of federal authority under the Elections Clause since Reconstruction."); and *For the People: Our American Democracy: Hearing Before the H. Comm. on House Administration*, 116th Cong. 14 (statement of Chiraag Bains) ("H.R. 1 [is] the boldest and most comprehensive proposal to strengthen our democracy since the aftermath of Watergate.").

As this Article goes to press (February 2021), Congress has again begun to consider omnibus electoral reform. *See* For the People Act of 2021, H.R. 1, 117th Cong. (2021). This Article doesn't explicitly address this more recent debate, whose twists and turns remain in the future.

[2] *See* H.R. 1 §§ 1011-21.

[3] *See id.* §§ 1401-08.

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independent commissions;[4] established a system of public financing for congressional candidates,[5] and restructured the agency responsible for regulating money in politics.[6] This set of proposals was more ambitious than Congress's most recent election laws—the National Voter Registration Act of 1993[7] and the Help America Vote Act of 2002[8]—which were limited to relatively minor aspects of registering to vote and casting ballots. The For the People Act was also more far-reaching than the post-Watergate reforms of campaign finance,[9] which didn't offer public funds to congressional (as opposed to presidential) candidates. The For the People Act even swept further than the Voting Rights Act of 1965[10] and its Reconstruction antecedents a century earlier.[11] Those monumental laws targeted only one evil (racial discrimination in voting) primarily in only one part of the country (the deep South).

The lack of hubbub over the For the People Act—despite its extraordinary content—had a simple explanation. It was just a bill. It wasn't an enacted law. After being passed by the House, it wasn't even debated, let alone ratified, by the Senate. Senate Majority Leader Mitch McConnell declared, "I get to decide what we vote on," and the For the People Act wasn't on his agenda.[12] McConnell's opposition to the bill had a simple legal explanation, too.[13] He thought it exceeded Congress's constitutional authority. In remarks on the Senate floor, he stated, "the Constitution clearly gives state legislatures primary responsibility" for running elections.[14] However, "[d]ecision after decision that our Constitution properly leaves to the states just melts away in this proposal."[15] So it amounts to a "federal takeover of elections across the nation" that "upsets th[e] constitutional balance."[16]

A chorus of conservative commentators echoed McConnell's view that Congress lacked the power to enact the For the People Act. Former Federal Election Commission member Hans von Spakovsky told a House committee that the bill unconstitutionally "interferes with the ability of states to determine the qualifications of their voters, to secure the integrity of the election process, and to determine the districts and boundary lines of their representatives."[17] Cato Institute scholar Ilya Shapiro labeled the bill "an unconstitutional abomination" because it "undermines basic principles of federalism."[18] For the same reason, former Department of Justice official J. Christian Adams testified that the bill was

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[4] *See id.* §§ 2400-15.
[5] *See id.* §§ 5101-16.
[6] *See id.* §§ 6001-10.
[7] 52 U.S.C. §§ 20501-11 (2018).
[8] 52 U.S.C. §§ 20901-21145 (2018).
[9] *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).
[10] Pub. L. 89-110, 79 Stat. 437 (1965).
[11] *See, e.g.*, An Act to Provide for the More Efficient Government of the Rebel States, 14 Stat. 428 (1867).
[12] Kate Ackley, *HR 1 Debate Gets Under Way as GOP Sharpens Attacks*, ROLL CALL, Mar. 6, 2019.
[13] Equally importantly, McConnell opposed the bill for the political reason that it would supposedly "rewrite the rules to favor Democrats and their friends." 165 CONG. REC. S730 (daily ed. Jan. 29, 2019).
[14] 165 CONG. REC. S776 (daily ed. Jan. 31, 2019).
[15] *Id.*
[16] *Id.*
[17] *For the People Act of 2019: Hearing on H.R. 1 Before the H. Comm. on the Judiciary*, 116th Cong. 2 (2019).
[18] Ilya Shapiro & Nathan Harvey, *What Left-Wing Populism Looks Like*, NAT'L REV. (Mar. 7, 2019).

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"grotesquely offensive to the Constitution that vests power in the state legislatures to determine the manner of choosing Representatives."[19] Summing up this position, the *National Review*, the house organ of contemporary conservatism, editorialized that the bill was "a frontal assault on the Constitution"—"the most comprehensively unconstitutional bill in modern American history."[20]

To say the least, then, the battle has been joined over Congress's authority to pass sweeping electoral reforms like those in the For the People Act. This question of congressional clout is my subject in this Article. Surprisingly, scholars haven't previously examined the full scope of Congress's power to regulate elections, under the whole array of relevant constitutional provisions.[21] These provisions really are an array; they number more than ten, in total, fixing the metes and bounds of Congress's electoral authority in more detail than any other congressional power. Yet the existing literature has mostly neglected this unusual profusion of constitutional text, focusing instead on Congress's ability to legislate under particular clauses or on particular topics.[22] This work is helpful, but it fails to convey the totality of the authority that Congress should and does possess over elections under the entire Constitution. The work tends to shine a narrow beam when what's needed is a floodlight.

You may have noticed my use of the normative: the electoral power that Congress *should* enjoy. Before addressing the influence that Congress *does* wield, under current doctrine, I think it's important to explain why, in a vast nation like ours characterized by checks and balances, the separation of powers, and federalism, we should prefer congressional electoral regulation to the alternatives: elections regulated by the states or by the courts. The reason is essentially Madisonian. It's very difficult for a faction, in the Framers' sense of a group that pursues its own interest at the expense of the public interest,[23] to seize control of the federal government. To do so, the group's members would have to win election after election in districts, states, and the country as a whole; and they would have to remain allied despite their cultural, political, and geographic differences. It's therefore unlikely that Congress would enact factional electoral legislation, suppressing or diluting votes to benefit a certain group. It's more plausible that congressional electoral supervision, when it occurs at all, would arise under more

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[19] *For the People Act of 2019: Hearing on H.R. 1 Before the H. Comm. on the Judiciary*, 116th Cong. 6 (2019).

[20] *The Democrats' Election-Reform Bill Is an Unconstitutional, Authoritarian Power Grab*, NAT'L REV. (Mar. 10, 2019).

[21] To be sure, some scholars have analyzed multiple electoral provisions in tandem—though not all the clauses that shape Congress's authority over elections. *See, e.g.*, Pamela S. Karlan & Daniel R. Ortiz, *Congressional Authority to Regulate Elections*, *in* THE FEDERAL REGULATION OF ELECTIONS: BACKGROUND REPORT OF THE TASK FORCE ON LEGAL AND CONSTITUTIONAL ISSUES 14, 14 (2001) (considering "[f]our major constitutional provisions [that] give Congress power to regulate how states and localities conduct elections"); Michael T. Morley, *Prophylactic Redistricting—Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2061 (2018) (considering the Elections Clause and the Enforcement Clauses of the Fourteenth and Fifteenth Amendments); Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 323 (2019) (also considering a "combination of the Elections Clause and the Fourteenth and Fifteenth Amendments").

[22] *But see supra* note 21 (noting some exceptions).

[23] *See* THE FEDERALIST NO. 10 (Madison).

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benign conditions: either bipartisan consensus that action should be taken or supermajority control by a single party committed to democratic progress.

In contrast, factional electoral legislation is easier to imagine at the state level. States lack the scale and diversity of the country in its entirety. States' legislative chambers are also both structured on the same basis—equal district population—and usually don't allow minorities to block measures from advancing. These features make states more susceptible to capture by a single group that can then manipulate the electoral process to consolidate its hold on power. Factional control of the courts is more readily achievable, too. It takes just five appointments, in particular, to gain a majority on the Supreme Court. These appointments can't be stopped by the House, the congressional chamber that more accurately reflects the will of the electorate. And when a likeminded President and Senate manage to make these appointments, the Court's consequent decisions are final under all but the most exceptional circumstances. The checks and balances that restrain the other branches of the federal government, that is, mostly don't apply to the Court.

It may seem odd to subject the courts to Madisonian factional analysis. The courts, after all, are the heroes of *Carolene Products*: the impartial arbiters tasked with intervening when self-interested politicians "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[24] But one of this Article's goals is to resist this way of thinking. Yes, the courts *can* step in when elected officials threaten democratic principles. (For example, one Court, the Warren Court, did so regularly.[25]) But the courts don't *necessarily* heed *Carolene*'s admonition. (In fact, most Courts, including the current Court, have ignored it.[26]) And the courts shouldn't even be expected to do a *better* job than Congress defending and improving American democracy. Because Congress is less vulnerable than the Court to factional takeover, it's less likely to "restrict[] those political processes,"[27] including elections, and more apt to enhance them. So Congress is better suited to playing the role that *Carolene* once envisioned for the Court.

Madisonian analysis is fine as far as it goes, but more than two hundred years have now passed since the Framing. Does this history substantiate the claim that congressional electoral regulation is generally more constructive than the activities of the states and of the courts? I think it does. The states have been the sources of almost all of America's democratically subversive policies. In earlier periods these included property and gender requirements for voting, poll taxes, literacy tests, and flagrant malapportionment. Today the states continue to require photo IDs to cast ballots, to deny and dilute minority votes, and to ruthlessly gerrymander their district maps. With the shining exception of the Warren Court, similarly, the Supreme Court has often eroded democratic values in its election law decisions. During Reconstruction, the Court famously neutered the landmark statutes that

[24] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
[25] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
[26] *See generally* Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111.
[27] *Carolene Prods.*, 304 U.S. at 152 n.4.

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sought to incorporate African Americans into the political community.[28] In our own time, as I have discussed elsewhere, the Roberts Court has never ruled in favor of a plaintiff alleging a franchise burden, dismantled the nation's campaign finance and voting rights laws, and announced its impotence to fight gerrymandering.[29]

By comparison, I named most of Congress's major electoral interventions in the Article's opening paragraph.[30] I think reasonable observers would agree that these policies serve important democratic ends: the political participation of racial minorities in the case of the laws of the First and Second Reconstructions, the prevention of corruption in the case of the post-Watergate reforms, and better election administration in the case of Congress's most recent efforts. Even a critic would have to concede that there isn't a democratic atrocity to be found in the roster of congressional action. There's no attempt to disenfranchise or to disempower. Nor is there any ratification of these practices, averring their compliance with the Constitution.

To be sure (and to return to Madison[31]), members of Congress are no more angelic than state politicians and judges. So my contention isn't that Congress's electoral interventions have been driven exclusively by disinterested considerations. In fact, I want to acknowledge that most of these statutes have had significant partisan bases. By enfranchising African Americans, Reconstruction Republicans hoped to preserve their party's influence in the South; by curbing money in politics, post-Watergate Democrats thought their party's less amply funded candidates would benefit; and so on. My argument, then, is that on the occasions when Congress has regulated elections, it has typically done so for *both* democratic and partisan reasons. Not being angels, members of Congress have rarely sacrificed their self-interest for the wellbeing of American democracy. But nor have they commonly compromised American democracy for their own advantage.

Accordingly, theory suggests, and history confirms, that congressional electoral regulation is generally preferable to the activities of the states and of the courts. So it would be sensible for the law to endow Congress, the most trustworthy institution in this context, with sweeping authority over elections. Fortunately, that's exactly what current doctrine does. I'll just mention three of the relevant constitutional provisions here—the Elections Clause, the Guarantee Clause, and the Fourteenth Amendment's Enforcement Clause—because they establish the basic architecture of Congress's electoral power. The Elections Clause of Article I, first, enables Congress to "make or alter . . . Regulations" of "[t]he Times, Places and Manner of [congressional] Elections."[32] It thus gives Congress close to full control of congressional elections: the "'authority to provide a complete code'" for these races,[33] to quote one of the most unexpected passages ever penned by Justice Scalia.

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[28] *See, e.g.*, United States v. Reese, 92 U.S. (2 Otto) 214 (1875).
[29] *See generally* Stephanopoulos, *supra* note 26.
[30] *See supra* notes 1-11 and accompanying text.
[31] *See* THE FEDERALIST No. 51 (Madison) ("If men were angels, no government would be necessary.").
[32] U.S. CONST. art. I, § 4.
[33] Arizona v. Inter Tribal Council, 570 U.S. 1, 8 (2013) (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).

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Second, if the Elections Clause empowers Congress directly with respect to congressional elections but only incidentally with respect to state elections, the Guarantee Clause of Article IV does just the opposite. Through that provision, Congress "guarantee[s] to every State . . . a Republican form of Government."[34] How states run their own elections plainly bears on whether they respect the principle of popular sovereignty that forms the core of republicanism.[35] In contrast, how states administer *another* sovereign's elections—those of the federal government—is less closely tied to the essence of republican rule. This distinction isn't critical, though, because the courts have held for almost two centuries that Guarantee Clause issues are nonjusticiable.[36] Consequently, when Congress legislates under the Guarantee Clause, not only is its power substantively broad, it's judicially unreviewable.

And third, the Fourteenth Amendment's Enforcement Clause undergirds the interlocking plates of the Elections Clause and the Guarantee Clause by authorizing Congress to prevent and remedy Fourteenth Amendment violations at *any* level, state or federal.[37] The list of electoral practices that can violate the Fourteenth Amendment is long; in fact, it comprises most of the field of election law. The provision can be offended by burdens on voting, restrictions on political parties, racially discriminatory measures, malapportionment, partisan gerrymandering, and geographically variable voter treatment.[38] All these potential breaches are thus fair game for congressional regulation, even under the current Court's dim view of the Enforcement Clause.[39] There only has to be "congruence and proportionality" between Congress's policies and the many Fourteenth Amendment harms that can arise in the electoral domain.[40]

While incomplete, this tour of the legal landscape suffices to show that the For the People Act's detractors are wrong. Even the bill's most controversial elements lie within Congress's electoral authority, and Congress could actually reach considerably further, if it were so inclined. Consider the bill's enfranchisement of ex-felons in federal elections,[41] and assume it extended to state elections, too. Under current doctrine,[42] the Elections Clause enables Congress to regulate essentially all aspects of congressional elections, including being able to vote after completing a prison sentence. Under the Guarantee Clause, likewise, Congress could reasonably conclude that the disenfranchisement of ex-felons in state elections is inconsistent with republican government, and in any event, its judgment would be nonjusticiable. And to the (significant[43]) extent that states

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[34] U.S. CONST. art. IV, § 4.

[35] *See generally* Akhil Reed Amar, *The Central Meaning of the Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).

[36] *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[37] *See* U.S. CONST. amend. XIV, § 5.

[38] For cites to representative cases, see Part III.D, *infra*.

[39] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

[40] *Id.* at 520.

[41] *See* For the People Act of 2019, H.R. 1 §§ 1401-08, 116th Cong. (2019).

[42] *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 120-31 (1970) (opinion of Black, J.).

[43] *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 229 (1985) (striking down an Alabama provision that "was enacted with the intent of disenfranchising blacks").

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stripped ex-felons of the franchise for racially discriminatory reasons, the Fourteenth (and Fifteenth) Amendments would reinforce the other pillars of congressional electoral power, with respect to state and federal elections alike.

Or take the For the People Act's mandate that congressional districts be designed by independent commissions,[44] and say this requirement also applied to state legislative districts. How congressional districts are crafted involves both the "Places" and the "Manner" of congressional elections, and so is in the heartland of Congress's Elections Clause authority.[45] Similarly, how state legislative districts are drawn implicates the norm of popular sovereignty, meaning that Congress could plausibly (and unreviewably) decide that the people are *not* sovereign when politicians are free to gerrymander. And while the current Court recently reversed decades of precedent in holding that partisan gerrymandering is nonjusticiable,[46] it still conceded that the practice, when extreme enough, transgresses the Fourteenth Amendment.[47] Congress would thus prevent and remedy Fourteenth Amendment violations by insisting on the use of commissions for congressional and state legislative districts.

An important caveat is in order here. Both in these examples and throughout the Article, I only address Congress's authority to enact electoral regulations. I don't comment on the distinct constitutional doctrines that these laws might violate. Put another way, the Constitution's *power-conferring* provisions are my present focus while its *power-limiting* elements are beyond this project's scope.[48] These power-limiting elements include the First Amendment, which has been construed to bar many campaign finance restrictions[49]; the equal protection principle of colorblindness, which threatens race-conscious remedies[50]; and the federalism values of anti-commandeering[51] and equal sovereignty,[52] which sometimes prevent Congress from ordering the states or treating them unequally. Thanks to these and other doctrines, electoral regulations that Congress has the authority to enact aren't necessarily constitutional. So my thesis here is just that Congress's electoral power should be, and is, vast. I don't maintain that every exercise of this power is valid.

The Article's structure mirrors the discussion to this point. I begin with constitutional theory in Part I: why, in a regime organized like ours, we should expect congressional electoral regulations to be less democratically corrosive than the activities of the states and of the courts. Next, in Part II, I survey the history of Congress's electoral interventions, showing that they have typically been driven by a mix of lofty democratic and less high-minded partisan motives. In Part III, I

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[44] *See* H.R. 1 §§ 2400-15.

[45] U.S. CONST. art. I, § 4.

[46] *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[47] *See, e.g., id.* at 2506 (acknowledging that "gerrymandering is incompatible with democratic principles" (internal quotation marks omitted)).

[48] *See* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 578 (2014) (also distinguishing between "internal limits" and "external limits" on congressional powers).

[49] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010).

[50] *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993).

[51] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997).

[52] *See, e.g.*, Shelby Cty. v. Holder, 570 U.S. 529 (2013).

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then turn to current law, explaining that it endows Congress with enormous authority over elections, at both the state and federal levels, under a range of constitutional provisions. Lastly, in Part IV, I consider a number of electoral reforms, some of them included in the For the People Act, and contend that Congress's sweeping electoral power encompasses them all.

I. CONSTITUTIONAL THEORY

I'm not an originalist; a clause's meaning at the time it was written is probative, in my view, but not dispositive. Nor am I an admirer of certain aspects of the Constitution; just think of the unrepresentative Senate, the Rube Goldberg Electoral College, the premodern omission of positive rights, and so on. But I do find persuasive one of Madison's most crucial arguments about one of the Constitution's most crucial institutions. Congress, Madison asserted, would rarely pass bad legislation—laws abridging people's rights—for two reasons. One was the huge scale and diversity of the country from which Congress was drawn, which would make it difficult for a single nefarious faction to command a congressional majority. The other was the series of hurdles that would have to be overcome for bad bills to become bad statutes: approval by two differently constituted legislative chambers as well as the consent of the President.

In this Part, I push the familiar Madisonian argument in two new directions. First, I apply it to the electoral context, adding to the list of bad legislation that Congress should seldom pass laws that undermine democratic values. Second, I make the argument comparative rather than absolute: Congress should be *less* likely than other actors, like the states and the courts, to imperil American democracy. I further respond to the objection that the constitutional commitment to federalism requires the limitation of Congress's electoral authority. Not so, I contend, if federalism matters because of its purported benefits and not just for its own sake. These benefits aren't diminished, and may even be amplified, by an expansive congressional electoral power.

One more note before proceeding: When I speak here of "American democracy" and "democratic values," I'm largely agnostic as to their content. I have expressed my view elsewhere that the *alignment* of the government's outputs with the people's preferences should be the guiding star of election law.[53] But for present purposes, I'm willing to group alignment with several other democratic principles: political participation, civic deliberation, governmental responsiveness, minority representation, the prevention of corruption, the efficient administration of elections, and the like. My claim is that Congress is less apt to threaten this full set of tenets than are the states and the courts.

[53] *See* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283 (2014).

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A. *Congress and the States*

In *The Federalist No. 10*, Madison ingeniously linked the scope of a representative government to the quality of its output.[54] The government of a large, heterogenous nation would "take in a great[] variety of parties and interests."[55] These many groups would continuously form and break alliances, negotiate and renegotiate with one another. In this unending, multipronged struggle, it would be "less probable that a majority of the whole [would] have a common motive to invade the rights of other citizens."[56] Even if an invidious purpose did animate a majority, "it [would] be more difficult for all who feel it to discover their own strength, and to act in unison."[57] "Extend the sphere," then, and you reduce the risk of governmental "oppression."[58]

This logic plainly applies to Congress: the representative assembly of the vast continental democracy that is the United States.[59] Does it also apply to the electoral domain? I think so. Laws that disenfranchise certain people or dilute their electoral influence are prime examples of governmental "oppression" that "invade[s] the rights of other citizens."[60] It's plausible, too, that a faction would want to pass these laws (because they would augment its political power), but that it would be unable to do so. The malignant group might not be sufficiently large to comprise a congressional majority. Or even if big enough, its members might be too culturally and ideologically diverse, drawn as they would have to be from the whole country, to legislative effectively. In either case, the democratically offensive bills would fail to become statutes, stymied by Madison's extended sphere.

While this rationale for trusting Congress not to enact abusive policies would reach any extended republic, Madison's other reason was specific to the U.S. Constitution. The Constitution separated powers not just among the branches of the federal government, he pointed out in *The Federalist No. 51*, but also within the legislative branch. It "divide[d] the legislature into different branches" and "render[ed] them, by different modes of election and different principles of action, as little connected with each other" as possible.[61] A faction intent on oppressive action would thus have to capture majorities of both the House, with its members allocated based on states' populations, and the Senate, with its members representing all states equally. The Constitution further checked and balanced

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[54] I'm not the only one who finds this argument ingenious. *See, e.g.*, Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1333 (1994) ("Recognizing the simultaneous terror, inevitability, and desirability of faction, and proposing conquest by division (the strategy of faction itself), is genius.").

[55] THE FEDERALIST NO. 10 (Madison).

[56] *Id.*

[57] *Id.*

[58] *Id.* Madison returned to this theme in *The Federalist No. 51*. "[B]y comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable," the likelihood of "oppression" or "injustice" is lowered. THE FEDERALIST NO. 51 (Madison).

[59] *See, e.g.*, Alan Gibson, *Madison's "Great Desideratum": Impartial Administration and the Extended Republic*, 1 AM. POL. THOUGHT 181, 201 (2012) (making the easy extension of *The Federalist No. 10* to Congress).

[60] THE FEDERALIST NO. 10 (Madison).

[61] THE FEDERALIST NO. 51 (Madison).

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congressional authority, Madison continued, by authorizing the President to veto bills. This "negative on the legislature" was another "natural defense" against a faction with tyrannical aims.[62] To implement its agenda, the group would have to control not just both congressional chambers but the presidency as well.[63]

Again, it's obvious that this point holds in the electoral context. A faction hoping to deny or dilute certain people's votes would have to dominate not just the House, constituted one way, but also the Senate, organized another way, and the President, too, selected along still other lines. In most cases, the group would be unable to achieve this much power in this many institutions. So democratic values would usually survive intact thanks to the Constitution's separation of powers and checks and balances.[64]

A logical question here is whether Madison's arguments are still valid. Is it still hard for a faction to win enough influence to pass democratically objectionable legislation? In one respect, it's harder. There are now more veto points in Congress than there were at the Framing due to committees and the Senate filibuster. In both congressional chambers, bills must generally begin in particular committees and win their approval before advancing to chamber-wide votes.[65] So a faction would need majority support not just in both full chambers but also in their relevant committees. Similarly, almost all electoral bills can be filibustered in the Senate, in which case their passage requires sixty votes rather than fifty.[66] So a faction would have to command a Senate supermajority to successfully subvert American democracy.[67]

However, another modern development—the rise of polarized parties—may cut the other way, at least in some circumstances. Madison was a proto-pluralist who thought that many shifting groups would perpetually jostle for advantage in Congress.[68] In recent times, though, Congress has looked nothing like this. To the contrary, it has been comprised of two partisan blocs that are increasingly

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[62] *Id.*

[63] For an example of a scholar echoing Madison, see Neal Riemer, *James Madison's Theory of the Self-Destructive Features of Republican Government*, 65 ETHICS 34, 38 (1954) (noting that the "separation of powers . . . would provide another safeguard against factional abuse of power").

[64] Hamilton made this exact argument in *The Federalist No. 60*. The federal government would not abuse its "power over the elections," he maintained, because of "the dissimilar modes of constituting the several component parts of the government." THE FEDERALIST NO. 60 (Hamilton). These dissimilar modes meant "there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors." *Id.*

[65] For a classic study, see WILLIAM L. MORROW, CONGRESSIONAL COMMITTEES (1969). However, "[b]oth chambers have procedures for calling up measures that have not been reported by a committee," so the committee veto point can be circumvented in some circumstances. JULIA SCHNEIDER, HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON 4 (2008).

[66] The only exception would be electoral bills that primarily involve revenue increases or decreases, which could be passed through the budget reconciliation process. *See generally* CONG. RES. SERV., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (2016).

[67] Of course, congressional committees and the Senate filibuster aren't prescribed by the Constitution. But their lack of constitutional grounding is irrelevant to my argument that it's very difficult for an undemocratic faction to seize control of Congress. The result is the same whether the faction is stymied by constitutional or non-constitutional structures.

[68] *See generally* John G. Gunnell, *The Genealogy of American Pluralism: From Madison to Behavioralism*, 17 INT. POL. SCI. REV. 253 (1996).

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monolithic internally and divergent ideologically from each other.[69] In this polarized environment, it could be easier for a faction with undemocratic aspirations to enact its preferred policies. The group would no longer have to compete with myriad other interests in the separate arenas of the House, the Senate, and the presidency. Instead, it would only have to convince one of the major parties of its views, and then wait for this party to gain unified control of the federal government. With unified control would come the opportunity for action, notwithstanding Madison's extended sphere and the Constitution's separation of powers and checks and balances.[70]

But the faction's wait for unified control might be a long one. Over the last half-century, divided government has been almost three times as common in Washington as unified government.[71] The moments when a single party has earned unified control *and* a Senate supermajority have been even more fleeting.[72] Moreover, even in this era of polarized parties, they're not perfectly internally homogeneous. So it might not suffice for a group with undemocratic goals to dominate a party with supermajority control of the federal government. A few dissenting voices within the party could still sink the group's legislative ambitions. Lastly, polarization isn't an exclusively federal phenomenon. It has also transformed state governments in recent years—in fact, to a greater degree than Washington in many cases.[73] So even if polarization has made it easier for Congress to erode democratic values *than in the past*, it hasn't necessarily made Congress more likely to do so *than the states*. It's to this issue of relative institutional threat that I now turn.

Madison certainly saw the states as greater dangers to people's rights than the newly created federal government. In the spring before the Philadelphia convention, he wrote an entire pamphlet on the "vices" of the states' "political system[s]."[74] Chief among these was the "injustice of the laws of the States," which manifested itself in "base and selfish measures," "unjust violations of the rights and interests of the minority," and "notorious factions and oppressions."[75] So "alarming" was this "injustice" that it "question[ed] the fundamental principle of republican Government," namely, that it is "the safest Guardian[] both of public

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[69] *See, e.g.*, Nicholas O. Stephanopoulos, *The Dance of Partisanship and Districting*, 13 HARV. L. & POL'Y REV. 507, 521-22 (2019) (surveying the political science literature on polarization).

[70] *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2338 (2006) ("Under unified governments, smaller partisan majorities will be able to effect major policy change without the full range of checks and balances that are supposed to divide and diffuse power in the Madisonian system."). In contemporary American politics, it's plainly the Republican Party that's more vulnerable to takeover by an antidemocratic faction. Indeed, given the high level of Republican support for measures like photo ID requirements for voting, limits on voter registration, and purges of voter rolls, the Party is arguably already committed to policies that impede democratic participation.

[71] *See Divided Government in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Divided_government_in_the_United_States (last visited Aug. 1, 2020).

[72] The only such periods over the last half-century were 1977-79 and 2009-11. *See Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (last visited Aug. 1, 2020).

[73] *See, e.g.*, Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546 (2011) (showing the levels of legislative polarization in Congress and all fifty states).

[74] *Vices of the Political System of the United States*, *in* SELECTED WRITINGS OF JAMES MADISON 35, 35 (Ralph Ketcham ed., 2006).

[75] *Id.* at 39-41.

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Good and private rights."[76] In more modern times, Justice Scalia has channeled Madison in another surprising passage. "Dispassionate objectivity," he wrote in a 1989 concurrence, is "substantially less likely to exist at the state or local level," where "discrimination against any group finds a more ready expression."[77] A "heightened danger of oppression from political factions" thus looms "in small, rather than large, political units."[78]

The reasons for Madison's and Justice Scalia's distrust of the states are straightforward. They're simply the opposite of the reasons for expecting Congress generally not to imperil American democracy. First, even the largest of the states are still smaller and less diverse than the nation as a whole. So state politics must feature fewer, bigger factions than federal politics; and it must be less difficult for a group keen on vote denial or dilution to seize control of the government. As Madison put it in *The Federalist No. 10*, "the same advantage . . . in controlling the effects of faction" that is "enjoyed by a large over a small republic" is also "enjoyed by the Union over the States composing it."[79]

Second, not only do the states lack the country's extended sphere, they don't fully share its separation of powers and checks and balances either. Since the reapportionment revolution of the 1960s, state senates have been constituted on exactly the same basis—one person, one vote—as state houses.[80] A party that earns a majority in one state legislative chamber can thus usually anticipate winning a majority in the other chamber, too. At present, notably, control of just *one* state legislature is divided.[81] Additionally, the gubernatorial veto is often less potent than its presidential counterpart. In more than a dozen states, governors' objections can be overridden by less than the two-thirds vote that's necessary in Congress.[82] In a few states, governors can't veto certain critical electoral bills—new district plans—at all.[83] And no state currently recognizes an equivalent of the Senate filibuster: an almost universally applicable supermajority vote threshold. Some states do require supermajorities for tax increases.[84] But these criteria never extend to any and all legislation. In Madison's words, this time in *The Federalist No. 51*,

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[76] *Id.* at 39. For examples of scholars noting Madison's distrust of the states, see Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 634 (1999), and James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 843 (2004).

[77] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 522-23 (1989) (Scalia, J., concurring in the judgment) (internal quotation marks omitted)).

[78] *Id.* at 523.

[79] THE FEDERALIST NO. 10 (Madison); *see also, e.g.*, Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 161 (2009) (arguing that, because "the range of represented interests tends to be smaller and the constituencies more homogenous" in the states, "oppressive legislation is easier to achieve").

[80] *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("[T]he seats in both houses of a bicameral state legislature must be apportioned on a population basis."). The irony isn't lost on me that Congress may be less likely to enact undemocratic policies in part *because* of an undemocratic institution (the malapportioned Senate).

[81] This state legislature is Minnesota's. *See State Partisan Composition*, NAT'L CONF. STATE LEGIS. (Mar. 31, 2020), https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx.

[82] *See Veto Overrides in State Legislatures*, BALLOTPEDIA, https://ballotpedia.org/Veto_overrides_in_state_legislatures#Veto_override_rules_in_state_legislatures (last visited Aug. 1, 2020).

[83] *See Who Draws the Lines?*, ALL ABOUT REDISTRICTING, https://redistricting.lls.edu/who-fed10.php (last visited Aug. 1, 2020).

[84] *See* Gen. Accounting Office, Letter to Sen. Larry E. Craig (June 2, 1998), https://www.gao.gov/assets/90/87978.pdf.

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even if the federal Constitution doesn't "perfectly" "give to each department [the] power of self-defense" against legislative overreach, the states' constitutions are "infinitely less able to bear such a test."[85]

To be clear, my claim here is a negative one: that Congress is less likely than the states to *undermine* democratic values, not that it's more apt than them to *improve* American democracy.[86] Unfortunately, the same structural attributes that thwart most anti-democratic legislation also prevent the adoption of many pro-democratic laws. Madison's extended sphere means that proponents of desirable reforms must bargain, frequently unsuccessfully, with many other groups. Likewise, the Constitution's separation of powers and checks and balances ensure that these advocates often lack enough influence, across enough institutions, to pass their beneficial policies. To illustrate, consider the For the People Act, which, among other things, would have facilitated voting, curbed candidates' dependence on private financing, and ended the scourge of gerrymandering.[87] For the first time ever, the bill's backers won majority support in the House: the agreement of many different interests (albeit all within the Democratic Party) that the bill was worthwhile. But this remarkable achievement still left the bill nowhere near enactment. There weren't sixty senators (enough to break a filibuster) willing to vote for the bill; in fact, there weren't even fifty senators ready to debate it. The President also adamantly opposed the bill. The For the People Act thus died a quiet and predictable death: another victim, like so much anti- *and* pro-democratic legislation, of our Madisonian system.[88]

By the same token, the states can be fonts of good ideas in addition to bad ones. Their more limited spheres make it easier for groups with pro-democratic agendas to acquire enough clout to implement their programs. So do the states' less separated powers and less stringent checks and balances. It shouldn't be a shock, then, that several elements of the For the People Act—the same bill that Congress couldn't pass—*have* been adopted by numerous states. Nineteen states provide for automatic voter registration[89]; sixteen states automatically restore ex-felons' voting rights upon their release from prison[90]; fourteen states entrust redistricting to independent commissions[91]; five states offer public financing to

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[85] THE FEDERALIST NO. 51 (Madison).

[86] My claim also isn't absolute. As I discuss briefly in the next Part, it's certainly *possible* for Congress to undermine democratic values. It plainly did so, for example, when it repealed the Reconstruction-era voting statutes in 1894 and when it eliminated most criteria for congressional redistricting in 1929. *See infra* notes 271-275 and accompanying text.

[87] *See supra* notes 1-6 and accompanying text.

[88] For other scholars noticing this aspect of our constitutional architecture, see Levinson & Pildes, *supra* note 70, at 2325-26 (describing Woodrow Wilson's view that "Madisonian government was dramatically ineffective and vulnerable to paralysis and stalemate"); and Riemer, *supra* note 63, at 38 ("Madison's theory is essentially negative: that it may block legislation in the public interest as well as legislation opposed to the public interest.").

[89] *See Automatic Voter Registration*, NAT'L CONF. STATE LEGIS. (Apr. 14, 2020), https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx.

[90] *See Felon Voting Rights*, NAT'L CONF. STATE LEGIS. (Oct. 14, 2019), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

[91] *See Redistricting Commissions: State Legislative Plans*, NAT'L CONF. STATE LEGIS. (Jan. 9, 2020), https://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx (reporting the figure for commissions with primary responsibility for state legislative plans).

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legislative candidates[92]; and so on. These policies couldn't run the fearsome gauntlet that's required for congressional authorization. But they were able to clear the lower hurdles for enactment in quite a few states.[93]

Even with these caveats, my argument remains fundamentally Madisonian, linking design features of the federal government and of the states with their respective odds of jeopardizing democratic values. But my position can also be usefully reframed through the lens of *Carolene Products* and political process theory. Recall that *Carolene* condemned regulations that "restrict[] those political processes" (like elections) "which can ordinarily be expected to bring about repeal of undesirable legislation."[94] John Hart Ely, the father of process theory, similarly bemoaned situations where "the ins are choking off the channels of political change" (again like elections) "to ensure that they will stay in and the outs will stay out."[95] In these terms, my view is that Congress is less likely to "restrict[] those political processes" and to "chok[e] off the channels of political change," and that the states are more apt to do so. I also concede that Congress should be expected to *enhance* those political processes and channels of political change—to make elections freer and fairer—less regularly than the states.

The benefit of this reframing is that it invokes the language of *Carolene* and of process theory without referring to the courts. The courts are the traditional protagonists of this school of thought: the institutions that are supposed to step in to fix malfunctions in American democracy.[96] But, this perspective reminds us, the courts' efforts are generally unnecessary at the federal level. Congress is quite unlikely to endanger democratic values and so to create a need for judicial intervention. Further, this account continues, the courts aren't the only bodies that can correct democratic malfunctions at the state level. Congress can do so, too, via legislation instead of litigation. True, congressional action may not be optimally frequent or potent thanks to the country's extended sphere and the Constitution's separation of powers and checks and balances. But when congressional action does occur, it's every bit as good as judicial involvement.[97]

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[92] *See Public Financing of Campaigns: Overview*, NAT'L CONF. STATE LEGIS. (Feb. 8, 2019), https://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx.

[93] For other scholars noting the potential of states to pass pro-democratic policies, see generally JOSHUA A. DOUGLAS, VOTE FOR US: HOW TO TAKE BACK OUR ELECTIONS AND CHANGE THE FUTURE OF VOTING (2019), and Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 118 MICH. L. REV. (forthcoming 2020).

[94] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also supra* note 24 and accompanying text.

[95] ELY, *supra* note 25, at 103.

[96] I'm as guilty as anyone of this traditional way of thinking. *See generally* Stephanopoulos, *supra* note 26.

[97] For other scholars noting the capacity of Congress to regulate elections in pro-democratic ways, thereby avoiding any need for judicial intervention, see Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 15 (2012) ("[C]ourts should exercise special restraint . . . when the political system itself is 'clearing the channels of political change' . . . ."); and Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 WHITTIER L. REV. 143, 147 (2002) ("[N]eo-republicans [should] shift their attention from the justification for judicial action, to the justification for Congress to act in service of republican ends.").

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B. *Congress and the Court*

Actually, congressional action is often better than judicial involvement for the same Madisonian reason that it's usually preferable to state action. Congress is less vulnerable than the Supreme Court to factional takeover. So Congress is less likely than the Court to threaten democratic values (in the relatively rare circumstances when Congress even acts).[98] I explained above why it's so hard for a faction with undemocratic aims to gain control of Congress,[99] and I discuss below why it's easier for such a group to become ascendant in the Court.[100] But first, it's worth considering whether this mode of analysis is even applicable to the judiciary. The Framers, for their part, didn't seem to think so. Madison failed to mention the Court in his famous disquisition on "[a]mbition [being] made to counteract ambition" in *The Federalist No. 51*.[101] Likewise, Hamilton labeled the judiciary the "least dangerous" branch in *The Federalist No. 78*, adding that it would serve as "an essential safeguard against the effects of occasional ill humors in the society."[102]

But this credulous view of the Court isn't tenable. The Court, no less than the House, the Senate, and the presidency, is a governmental institution. Like all such bodies, the Court is staffed not by angels but by people. These people necessarily have all kinds of professional, ideological, and partisan objectives—some good, some bad, some pro-democratic, some anti-democratic—which they don't abandon as soon as they don black robes. Now, it could be that particular characteristics of the judiciary render it relatively (or even wholly) impervious to the "ill humors" of faction. But it could also be that certain qualities make the Court more susceptible to these forces. The point is that the Court has to be carefully examined in the same light as other federal and state institutions. It can't just be exempted from scrutiny—treated as the lone neutral referee on the playing field where all other actors' ambitions are endlessly in contest.[103]

Undertaking this analysis, then, the most striking aspect of the Court's structure is its small size. Under current law, the Court is made up of just nine Justices, of whom just five, a bare majority, can issue rulings backed by the full judicial power of the United States. With its membership this limited, the Court can't reap the anti-factional benefits of Madison's extended sphere. "[A] great[] variety of parties and interests" can't assemble and reassemble into one configuration after another in a collective body with just nine participants.[104] It's

[98] I only address the Supreme Court here, though a good deal of the analysis would also apply to the lower federal courts.

[99] *See supra* notes 54-73 and accompanying text.

[100] *See infra* notes 104-115 and accompanying text.

[101] THE FEDERALIST NO. 51 (Madison); *see also, e.g.*, DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 191 (1984) (also observing that the judiciary "did not appear in Federalist 51's description of ambition counteracting ambition").

[102] THE FEDERALIST NO. 78 (Hamilton).

[103] For a similar perspective on the Court, see Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1753 (2013) ("[T]he judiciary is just another of the branches struggling to encroach upon the others or to aggrandize itself at the expense of the others; judges are just part of the invisible-hand system, not some sort of external regulator of the system.").

[104] THE FEDERALIST NO. 10 (Madison).

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also straightforward for "a majority of the whole" to emerge with "a common motive."[105] In fact, such a majority does emerge in most cases. And when it does, it's not "difficult for all those who feel it to discover their own strength, and to act in unison."[106] All the Justices in the majority have to do to recognize their numerical clout is look around their conference room.

Compounding the problem of the Court's small size is its method of selection. For a faction to enact democratically corrosive laws, it needs the support of half of the House, three-fifths of the Senate, as well as the President. In contrast, appointments to the Court require just the President's nomination and the Senate's confirmation by a simple majority. Approval by the House, the larger and more representative congressional chamber, is unnecessary, as is the assembly of a big enough coalition to overcome the Senate's filibuster.[107] Moreover, Congress's composition changes every two years, and the President's identity every four or eight. But tenures on the Court are indefinite, with contemporary Justices serving for a median of nearly three decades.[108] So when a group secures control of a Court appointment, its influence lasts further into the future than if it had merely dominated the elected branches.

The polarization that has reshaped the rest of American government has fostered factionalism in the Court, too.[109] In earlier periods, the legal elite from which Justices were drawn was more ideologically homogeneous, meaning that fewer lawyers had both impeccable credentials and non-mainstream views on most legal issues.[110] A faction controlling a Court appointment could thus easily misfire, choosing a Justice who wouldn't further the group's fringe agenda. Today, however, there are distinct conservative and liberal legal elites, with separate institutional affiliations, social circles, and stances on the law.[111] Consequently, a controlling faction's risk of error is substantially lower. Odds are, a newly appointed Justice will behave the way the group expects—including casting democratically troublesome votes if that's part of the group's program.[112]

Lastly, there are fewer checks and balances on the Court than on the other branches of the federal government. No Justice has ever been removed from office

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[105] *Id.*

[106] *Id.*

[107] *See* Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES, Apr. 6, 2017.

[108] *See* Russell Wheeler, *Should We Restructure the Supreme Court?*, BROOKINGS (Mar. 2, 2020), https://www.brookings.edu/policy2020/votervital/should-we-restructure-the-supreme-court.

[109] I don't claim that the Court has been *more* affected by polarization than other governmental institutions.

[110] *See, e.g.*, Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 346 (describing "a milieu of people and groups," including "the American Bar Association, legal academics, Supreme Court reporters, and elite social circles in Washington, D.C.," that "influenced the behavior of the Justices" in the past).

[111] *See, e.g.*, *id.* at 304 ("Polarization is reflected in the social networks that are critical to grooming and identifying appointees to the federal courts," and also "pervades the social networks of which the Justices themselves are a part.").

[112] At least, this is so if the faction corresponds to one or another side of the ideological spectrum, and if this side's stances are anti-democratic. *See also* Amelia Thomson-DeVeaux, *What the Supreme Court's Unusually Big Jump to the Right Might Look Like*, FIVETHIRTYEIGHT (Sept. 22, 2020), https://fivethirtyeight.com/features/what-the-supreme-courts-unusually-big-jump-to-the-right-might-look-like/ (showing the impressive ideological consistency over time of recent Supreme Court Justices).

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via impeachment.[113] The Court's constitutional judgments are reversible only through the onerous process of constitutional amendment: an impossibility in most circumstances. Even the Court's statutory rulings can be overturned only through legislation—that is, if a majority of the House, a supermajority of the Senate, and the President stand united against the Court. This degree of agreement is rarely attainable under modern polarized conditions.[114] As a result, when the Court decides cases anti-democratically, there's little that any other actor can do. Effective resistance through constitutional mechanisms is all but off the table. Softer sanctions like criticisms by prominent elected officials are also unlikely to have much impact in today's divided political environment. Such censure is typically offset by praise from the other side of the ideological spectrum.[115]

To be sure, the same features that expose the Court to factional takeover can, on occasion, incline it to act in more benign ways.[116] In particular, when a likeminded President and Senate manage to appoint five Justices whom they hope will advance democratic values, this goal may well be realized, especially with polarization making Justices' records more foreseeable. This pro-democratic majority may then intercede in the political process with few constraints on its freedom to maneuver. In my view, this scenario (except for the polarization) accurately describes the performance of the Warren Court (but no other Court in American history).[117] For a brief, glittering period, the Court did staunchly protect the right to vote,[118] fight racial discrimination in voting,[119] and end the systemic distortion of malapportionment.[120]

I also don't want to suggest that law and politics are one and the same. I agree that most Justices, in most cases, give at least some weight to nonpartisan and nonideological considerations. But I think it's equally plain that partisanship and ideology play a role, too, and that they sometimes cause the Court to make anti-democratic decisions. My claim, then, isn't that the Court *usually* or *always* abridges democratic values. Instead, it's that the Court does so more often *than Congress* because of its greater vulnerability to factional domination. This higher likelihood of anti-democratic action is why I argue that the Court should be relegated from its starring role under *Carolene Products* and political process theory. Congress is less apt to threaten the democratic tenets prized by this school of thought. As I elaborate below, Congress has also launched more pro-democratic

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[113] One Justice, Samuel Chase, was impeached by the House but not convicted by Senate. *See generally* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1999).

[114] *See* Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 101, 110-20 (2012) (documenting the decline in congressional overrides in recent years).

[115] *See generally* Richard H. Pildes, *Is the Supreme Court a Majoritarian Institution*, 2010 SUP. CT. REV. 103 (2010) (discussing the Court's largely unfettered room to maneuver in most cases).

[116] This is the same point I made earlier about the states: that they're more likely than Congress to act in anti- *and* pro-democratic ways. *See supra* notes 89-93 and accompanying text.

[117] And not just in my view. *See generally* ELY, *supra* note 25.

[118] *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (striking down the poll tax).

[119] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the Voting Rights Act).

[120] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (striking down state legislative malapportionment).

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interventions than the Court.[121] So Congress should be the theory's lead and not its understudy.

C. *Federalism Values*

Based on the discussion so far, you might be ready to grant my premises but not my conclusion. Maybe Congress is less likely to imperil American democracy than the states or the courts. But why does it necessarily follow that Congress should have expansive authority over elections? After all, one of our Constitution's core structural principles is federalism, the idea that the states, too, and not just the federal government, are sovereigns worthy of dignity and respect.[122] Wouldn't a sweeping congressional electoral power conflict with our commitment to state sovereignty?

Not if we care about federalism because of the benefits it's said to bring. Obviously, if our commitment to federalism were categorical, then broad congressional authority over elections would be objectionable. Such power would impinge on the states' autonomy to structure their electoral processes as they see fit. But most observers—including the Supreme Court—defend federalism on instrumental rather than absolute grounds, on the basis of the positive consequences that supposedly flow from it. To take the best-known example, in the 1991 case of *Gregory v. Ashcroft*, the Court stated that federalism (1) "assures a decentralized government that [is] more sensitive to the diverse needs of a heterogeneous society," (2) "increases opportunity for citizen involvement in democratic processes," (3) "allows for more innovation and experimentation in government," (4) "makes government more responsive by putting the states in competition for a mobile citizenry," and (5) provides "a check on abuses of government power."[123] These alleged advantages, I contend here, are perfectly consistent with a congressional electoral power that's extensive but not exclusive. In fact, endowing Congress with this kind of authority better serves the ends of federalism than denying Congress this clout.[124]

Start with greater sensitivity to the diverse needs of a heterogeneous society.[125] Also assume that Congress promotes democratic values through legislation like the For the People Act or the landmark statutes I describe in the next Part.[126]

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[121] *See infra* Part II.

[122] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 709 (1999) ("Federalism requires that Congress accord States the respect and dignity due them as residuary sovereigns and joint participants in the Nation's governance.").

[123] 501 U.S. 452, 458 (1991); *see also, e.g.*, FERC v. Mississippi, 456 U.S. 742, 788-90 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part) (endorsing federalism on similar grounds); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552 (2012) ("Federalism theory has long exhibited a healthy pluralism with regard to the *ends* federalism promotes. . . . The Supreme Court reels off these arguments as easily as scholars do."). These pluralistically inclined scholars include Richard H. Jr. Fallon, *The Conservative Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 440-41 (2002) (listing several benefits of federalism); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389, 394, 397, 402 (1997) (same); and Daniel Halberstam, Federalism: A Critical Guide 14-15 (Sept. 2011) (same).

[124] However, I don't contend that *Gregory*'s federalism values support extensive congressional power in other, non-electoral areas. How these values might apply elsewhere is beyond this project's scope.

[125] *See Gregory*, 501 U.S. at 458.

[126] *See infra* Part II.

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Congressional action of this type improves states' electoral processes. More people are able to cast ballots, vulnerable groups' voices are less diluted, elections run more smoothly, and so on. Better-performing electoral processes, in turn, yield more sensitivity to a diverse society's varied needs. These needs are more likely to be heard by elected officials when elections are freer and fairer and more people can participate politically. Elected officials are more apt to respond to these needs, too, when the government is structured to reflect the people's views more accurately. Responsive politicians may boost their reelection odds while unresponsive ones risk lowering theirs.

In contrast, consider the democratically offensive policies that, on a Madisonian account, states are more prone to enacting than Congress.[127] When states deny or dilute the franchise, they reduce the government's sensitivity to society's diverse needs. People who can't vote can't expect their elected officials to listen attentively to their concerns. Similarly, groups whose influence is impaired through electoral mechanisms—at-large elections, cleverly drawn districts, and the like—receive worse representation than other segments of the electorate. In these ways, certain state actions negate the federalism-based rationale for allowing states to act in the first place. This rationale is enhancing the government's responsiveness, which instead is undermined by anti-democratic state laws.

Of course, *other* state actions can heighten governmental sensitivity to varied societal needs. Just as pro-democratic congressional legislation can make elected officials more responsive to their constituents' interests, so can state policies that further democratic values.[128] This is why I referred above to a congressional electoral power that's extensive *but not exclusive*. Congress may need broad authority to regulate elections, especially when states attenuate the link between society's needs and the government's outputs. But Congress doesn't have to be the only player on this stage. In fact, Congress shouldn't occupy the field because, if it did, it would frustrate state efforts that are just as conducive to greater responsiveness as Congress's own exertions.

These same points apply squarely to *Gregory*'s second federalism value: increasing opportunities for citizens to be involved in democratic processes.[129] When Congress makes it easier to vote by banning racial discrimination in voting,[130] ending literacy tests,[131] enabling people to register when getting their driver's licenses,[132] and requiring higher-quality voting machines[133] (to cite some past congressional measures), Congress necessarily facilitates electoral involvement. People are better able to participate in democratic processes thanks

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[127] *See supra* Part I.A (discussing this account).

[128] Moreover, these pro-democratic state policies are enacted more frequently than analogous congressional laws. *See supra* notes 89-93 and accompanying text.

[129] *See Gregory*, 501 U.S. at 458.

[130] *See, e.g.*, An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of This Union, and for Other Purposes, 16 Stat. 140 (1870).

[131] *See, e.g.*, 52 U.S.C. § 10303(e).

[132] *See* 52 U.S.C. § 20504.

[133] *See* 52 U.S.C. § 20902.

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to Congress's interventions. Conversely, when states restrict the franchise, they push in exactly the opposite direction. They make it harder for (some of) their citizens to engage in self-governance. But when states expand and expedite voting, they produce the same participational benefits as congressional action. The possibility of obtaining these benefits through state action, too, is why it shouldn't be precluded in favor of complete federal control.

Turning to *Gregory*'s third objective, more innovation and experimentation in government,[134] it has to be conceded that this goal is compromised by congressional electoral regulation. In particular, when Congress steps in to advance democratic values, it prevents the states from creatively thinking of ways to subvert them. A congressional ban on racial discrimination in voting, for instance, stops the states from pioneering ever more devious tactics to deny or dilute minority votes.[135] However, pro-democratic congressional action *doesn't* impede the states from innovating further in the same vein.[136] The states remain free to adopt more robust safeguards for minority voters, to induce greater participation by all citizens in novel ways, to guard against racial and partisan vote dilution through policies with no federal analogues, and so on. Pro-democratic congressional action is thus asymmetric in its implications for subsequent state experimentation. It bars the states from racing to the anti-democratic bottom while permitting them to vie for the pro-democratic top.

Notably, Madison embraced this sort of asymmetry in *The Federalist No. 43*. "In a confederacy founded on republican principles, and composed of republican members," he wrote, "the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations."[137] These "innovations" both clash with "republican principles"—what I call democratic values—and endanger the cohesion of the nation. "Governments of dissimilar principles and forms have been found less adapted to a federal coalition . . . than those of a kindred nature."[138] But as long as the states refrain from unrepublican experiments, Madison continued, they can regulate their elections however they wish. "The only restriction imposed on them is, that they shall not exchange republican for antirepublican Constitutions."[139]

This response also holds for *Gregory*'s fourth aim, augmenting governmental responsiveness by putting the states in competition for mobile citizens.[140] Again, pro-democratic congressional regulation of elections does deprive the states of one

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[134] *See Gregory*, 501 U.S. at 458.

[135] Though only if Congress means what it says; otherwise certain states wouldn't have engaged in almost a hundred years of continued (and clever) racial discrimination in voting after Congress's dramatic interventions during Reconstruction. *See infra* Part II.B; *see also, e.g.*, Winkler, *supra* note 79, at 183 ("[C]hoice and diversity are not necessarily values that should be encouraged when it comes to fundamental rights.").

[136] At least, it doesn't necessarily do so, as long as the pro-democratic congressional legislation is drafted in the right non-preclusive terms.

[137] THE FEDERALIST NO. 43 (Madison).

[138] *Id.*

[139] *Id.*; *see also, e.g.*, WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 26 (1972) (explaining how Montesquieu, who heavily influenced Madison, "also insisted that in a confederation all governments had to be republican because in a mixed confederacy a monarchy would swallow up its republican neighbors").

[140] *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

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lever they might want to use to attract (certain) people: the denial or dilution of (other) people's votes. But again, the loss of this lever is normatively unproblematic, and the states can still compete to draw mobile people by implementing pro-democratic measures. Moreover, election law is an unlikely driver of people's residential choices. People may plausibly move to or from states because of their tax levels, their welfare benefits, the strength of their economies, and the like. But it's hard to believe many people vote with their feet based on states' periods of early voting,[141] their use (or not) of independent redistricting commissions,[142] or their provision (or not) of public campaign financing,[143] to name some areas where state approaches currently diverge. *Gregory*'s fourth aim thus seems largely inapplicable to the electoral context.

As for *Gregory*'s fifth and final end, checking abuses of governmental power,[144] it's the fundamental reason to prefer congressional to state electoral regulation. To reiterate, Congress is less apt than the states to abridge the right to vote because of its more extended sphere and the Constitution's more rigidly separated powers and stricter checks and balances.[145] So in the electoral domain, abuses of governmental authority are more likely to come at the hands of the states than at Congress's. Further, if congressional control over elections is extensive but not exclusive, then a "balance of power" exists "between the States and the Federal Government."[146] This "balance," the *Gregory* Court argued, "reduce[s] the risk of tyranny and abuse from either front."[147] "In the tension between federal and state power lies the promise of liberty."[148]

II. CONGRESSIONAL HISTORY

The Madisonian theory underpinning the Constitution, then, generates a hypothesis about the relative threat posed to democratic values by different institutions: Congress should be less of a menace to these values than the states or the courts. Or putting this proposition in the terms of *Carolene Products* and political process theory, Congress should be less inclined than the states or the courts to "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[149] What's more, federalism theory presents no objection to the implication of the Madisonian hypothesis: that Congress should have sweeping authority over elections. The tenets of federalism theory actually support expansive congressional power in this area.

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[141] *See State Laws Governing Early Voting*, NAT'L CONF. STATE LEGIS. (Aug. 2, 2019), https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx.

[142] *See Redistricting Commissions: State Legislative Plans*, *supra* note 91.

[143] *See Public Financing of Campaigns: Overview*, *supra* note 92.

[144] *See Gregory*, 501 U.S. at 458.

[145] *See supra* Part I.A.

[146] *Gregory*, 501 U.S. at 458. Of course, this balance is one in which Congress ultimately has the upper hand, at least officially.

[147] *Id.*

[148] *Id.* at 459.

[149] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

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But is the Madisonian hypothesis correct? Now that more than two centuries have gone by since the Framing, has Congress proven to be less hazardous to democratic principles than the states and the courts? I think history confirms that Congress has indeed been the least dangerous branch.[150] In fact, I would push the point further: Not only has Congress imperiled American democracy less often than its institutional competitors, but most congressional electoral regulations have affirmatively promoted democratic values. This performance wasn't anticipated by Madison, who merely hoped to restrain the "impetuous vortex" of the "legislative department."[151] But in a fortuitous development, Congress has compiled a generally pro-democratic record in its forays into the electoral arena.

I can't possibly cover all these forays here. To do justice to the full history of congressional electoral activity would take several volumes. So instead, I focus in this Part on what I consider to be the five most important moments when Congress has regulated the electoral process: (1) the Apportionment Act of 1842, which introduced the requirement of single-member districts for Congress; (2) the cluster of Reconstruction statutes that sought to guarantee the franchise for African Americans; (3) the Voting Rights Act of 1965, which returned to the unfinished business of incorporating blacks into the political community; (4) the 1974 amendments to the Federal Election Campaign Act, the most far-reaching federal restrictions of money in politics; and (5) the National Voter Registration Act of Act of 1993 and the Help America Vote Act of 2002, which involved Congress in the nuts and bolts of election administration for the first time.[152] My thesis is the same for all these laws: that their enactment served *both* abstract democratic *and* practical political ends. In none of these pivotal moments, that is, did Congress sacrifice the wellbeing of American democracy for the sake of factional advantage.

I also don't discuss in any detail the histories of the states' and the courts' electoral actions.[153] Suffice it to say that these histories are, at best, mixed. While there have been pro-democratic highlights, there have been many instances, too, when democratic values were discounted or cast aside entirely. Take the states. In the nation's early years, they frequently barred blacks, women, and men without sufficient property from voting.[154] Over the century-long period between the first and second Reconstructions, southern states inhibited African Americans' political

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[150] *Cf.* THE FEDERALIST NO. 78 (Hamilton) (using this phrase (erroneously in my view) for the judiciary).

[151] THE FEDERALIST NO. 48 (Madison).

[152] While subjective, I doubt that this list of the most significant congressional interventions is too controversial. Perhaps other observers would add post-1842 laws that imposed additional requirements on congressional redistricting, *see, e.g.*, An Act for the Apportionment of Representatives to Congress Among the Several States According to the Ninth Census, § 2, 17 Stat. 28, 28 (1872), the 1982 amendments that turned Section 2 of the Voting Rights Act into a disparate impact provision, *see* 52 U.S.C. § 10301 (2018), or the Bipartisan Campaign Reform Act's prohibition of soft money, *see* 52 U.S.C. § 30125.

[153] The most important reason for this omission is space; it's simply impossible, in a single Article, to summarize adequately congressional *and* state *and* judicial electoral regulation. The states and the courts are also much more numerous than the single institution of Congress, and so more difficult to describe accurately. And for present purposes, the precise details of state and judicial electoral regulation are insignificant. What matters is that a substantial part of this regulation has plainly been undemocratic, while very little of Congress's has been.

[154] *See, e.g.*, ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 3-76 (2000) (describing these abuses); CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860, at 92-300 (1960) (same).

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participation through grandfather clauses, poll taxes, literacy tests, and outright violence.[155] To this day, states across the country restrict voting through photo ID requirements, limits on voter registration, and purges of voter rolls.[156] States also continue to dilute the votes of minority and political groups through the practices of racial and partisan gerrymandering.[157]

The story is similar for the Supreme Court, which has regularly failed to step in when democratic principles were under siege and stymied other actors' efforts to vindicate these principles. In the nineteenth century, the Court held that challenges to unrepublican state policies are nonjusticiable[158] and struck down several statutory provisions, passed by Congress during Reconstruction, that tried to stop racial discrimination in voting.[159] Before the Warren Court, the Justices acquiesced in southern states' violent refusals to enfranchise blacks[160] and allowed rampant malapportionment to make a mockery of representation.[161] And as I have explained elsewhere, our own Roberts Court has never come across a franchise burden it thought was excessive,[162] torn gaping holes in the nation's campaign finance[163] and voting rights[164] laws, and recused itself from the fight against gerrymandering.[165] These are the state and judicial benchmarks, then, to which congressional electoral regulation should be compared. Not perfection, but rather ambiguous records replete with anti-democratic actions.

A. *The 1842 Apportionment Act*

Starting with the Apportionment Act of 1842,[166] it's the most obscure of the laws I address, but it's still a milestone in the history of Congress's regulation of elections.[167] Prior to the Act, Congress imposed no restrictions on the construction of congressional districts. States were thus free not even to use geographically

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[155] *See generally* PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCITON, AND REDEMPTION, 1860-1902 (2017); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

[156] *See, e.g., New Voting Restrictions in America*, BRENNAN CTR. FOR JUSTICE (Nov. 19, 2019), https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america.

[157] For works of mine on these topics, see Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323 (2016) (addressing racial vote dilution), and Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015) (addressing partisan gerrymandering).

[158] *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[159] *See, e.g.*, United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1875); United States v. Reese, 92 U.S. (2 Otto) 214 (1875).

[160] *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903).

[161] *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946).

[162] *See* Stephanopoulos, *supra* note 26, at 160.

[163] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010).

[164] *See, e.g.*, Shelby Cty. v. Holder, 570 U.S. 529 (2013).

[165] *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[166] An Act for the Apportionment of Representatives Among the Several States According to the Sixth Census, 5 Stat. 491 (1842).

[167] *See, e.g.*, JAY K. DOW, ELECTING THE HOUSE: THE ADOPTION AND PERFORMANCE OF THE US SINGLE-MEMBER DISTRICT SYSTEM 110 (2017) ("The Apportionment Act of 1842 is arguably one of the most important pieces of legislation in US history.").

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demarcated districts, and instead to elect their House members through winner-take-all statewide elections. Under this approach, known as the "general ticket," each voter in a state cast ballots for as many candidates as the state had House seats, and that many candidates—the ones receiving the most votes—were elected. The Act banned the general ticket in congressional elections and required the states to elect their House members through geographically bounded single-member districts. Each state's House members "shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State is entitled, no one district electing more than one Representative."[168]

The Apportionment Act furthered (and was advocated precisely because it furthered) the democratic value of a legislature that better reflects the will of the electorate. Under the general ticket, a partisan plurality could generally sweep every House seat in a state.[169] This windfall would lead to massive overrepresentation for the victorious plurality and extreme underrepresentation—no seats at all—for every other group. In contrast, single-member districts don't guarantee proportional representation, and are actually compatible with quite disproportionate outcomes.[170] But they do enable statewide minorities that are concentrated in particular regions to win seats in these areas. By the same token, single-member districts usually prevent mere pluralities from claiming all of a state's seats. Single-member districts are thus a waypoint between winner-take-all elections and full proportionality—and a clear improvement over the former from the perspective of accurate representation.

This was just the argument made by the Apportionment Act's proponents. "The general ticket system destroy[s] the principles of democratic government," declared Representative Thomas Arnold.[171] Under the general ticket, "the voice of the people [is] completely stifled," agreed Representative Garret Davis.[172] On the other hand, according to Representative George Summers, congressional delegations "elected by the people, allotted into districts, come here representing the opinions of the constituency which sends them."[173] So they satisfy "the essential feature of representative democracy," which is that "the representatives shall reflect the will and know the wants of [their] constituents."[174] "[A]nother great benefit which would arise from the district system," in the words of Senator William Huntington, "would be, to give a voice to the minority, that otherwise would be effectually silenced under the general ticket system."[175] Minorities "have

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[168] § 2, 5 Stat. at 491.

[169] *See* ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 25 (2013) (showing that the plurality party won every House seat in 95% of congressional general ticket elections between 1800 and 1840).

[170] The whole point of partisan gerrymandering, of course, is to achieve lopsided outcomes in favor of the line-drawing party through the manipulation of single-member districts' boundaries.

[171] Michele Rosa-Clot, *The Apportionment Act of 1842: 'An Odious Use of Authority'*, 31 PARLIAMENTS, ESTATES & REPRESENTATION 33, 46 (2011) (internal quotation marks omitted).

[172] *Id.* (internal quotation marks omitted).

[173] DOW, *supra* note 167, at 130 (internal quotation marks omitted).

[174] *Id.* (internal quotation marks omitted).

[175] Rosa-Clot, *supra* note 171, at 46 (internal quotation marks omitted).

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rights too, which ought to be protected," and which "cannot and will not be so [protected], except the election be by districts."[176]

But recall that my claim here is that most congressional electoral regulations have *simultaneously* advanced democratic and partisan aims. In addition to enhancing legislative representation, the Apportionment Act's backers, almost all of them Whigs, hoped to boost their own electoral prospects. Many Whigs had been outraged by a stratagem recently executed in Alabama. In 1840, the state's Democratic legislature had switched from single-member districts to the general ticket, thereby eliminating the Whigs' representation when they trailed the Democrats in the election held that year.[177] Examining the electoral landscape that awaited them in 1842 and beyond, many Whigs also noticed that general ticket states with Democratic majorities would be gaining seats in the next round of reapportionment, while Whig-majority general ticket states would be losing representation. By prohibiting the general ticket, then, the Whigs saw an opportunity to staunch their losses in the Democratic states and even to gain some seats in pro-Whig areas.[178] Unsurprisingly, since the Whigs' partisan motivation was known to their opponents, the Act passed on almost a pure party line. Nearly every Whig voted for the bill and nearly every Democrat opposed it.[179]

Do the Whigs' dual objectives tarnish the view of the Apportionment Act as a democratic step forward? I don't think so. While the Act may have electorally benefited the Whigs,[180] it still eradicated a highly objectionable practice, the general ticket, from congressional elections. This democratic boon was real even if it came with a partisan fillip for the Whigs. Members of Congress, moreover, are political animals. So it's unrealistic, in most circumstances, to expect them to incur partisan costs to ameliorate American democracy. When members of Congress find and pass laws that serve both democratic and partisan ends, they're doing all that can reasonably be asked of them. They're also doing more—per my brief survey of the states'[181] and the courts'[182] mixed records—than their institutional competitors have often done.

B. *Reconstruction*

Moving ahead by a generation, in the aftermath of the Civil War, Congress launched its most sustained intervention into the electoral realm. In a series of

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[176] DOW, *supra* note 167, at 131 (internal quotation marks omitted); *see also, e.g.*, *id.* ("To the Whigs, the most important feature of single-member district elections was that this system protects political minorities."); ENGSTROM, *supra* note 169, at 47 ("One explanation [for the Apportionment Act] is that it was a good government reform aimed at creating uniform electoral standards to protect the interests of minority constituencies.").

[177] *See, e.g.*, Rosa-Clot, *supra* note 171, at 45; Johanna Nicol Shields, *Whigs Reform the "Bear Garden": Representation and the Apportionment Act of 1842*, 5 J. EARLY REPUBLIC 362, 362 (1985).

[178] For a detailed discussion of the Whigs' partisan calculations, see ENGSTROM, *supra* note 169, at 43-51.

[179] *See* DOW, *supra* note 167, at 133.

[180] Any benefit the Whigs received was probably quite small, given their crushing defeat in the next congressional election. *See 1842 and 1843 United States House of Representatives Elections*, WIKIPEDIA, https://en.wikipedia.org/wiki/1842_and_1843_United_States_House_of_Representatives_elections (last visited Aug. 1, 2020) (showing that the Whigs lost sixty-nine seats, as well as their House majority, in the 1842 election).

[181] *See supra* notes 154-157 and accompanying text.

[182] *See supra* notes 158-165 and accompanying text.

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landmark statutes—three in 1867-68 reconstructing the former Confederate states, and five more in 1870-71 enforcing the newly ratified Fifteenth Amendment—Congress strived to rid elections of racial discrimination in voting as well as fraud. These laws' provisions are startling in their scope, and so worth summarizing at some length. In the Reconstruction Acts, Congress required the former Confederate states to hold elections for delegates to constitutional conventions without regard to citizens' "race, color, or previous condition [of servitude]."[183] This same nondiscrimination criterion applied to all elections (federal, state, and local) regulated by the states' new constitutions[184] as well as to the elections to ratify the constitutions.[185] Congress further instructed military commanders to register eligible voters,[186] to apportion convention delegates using the one-person, one-vote rule,[187] to announce the results of the delegate elections,[188] and to appoint three-member boards to assist them in these tasks.[189] These boards were empowered to administer the voter registration process, to supervise the delegate elections, and to tabulate the votes and determine the winners.[190]

In the Enforcement Acts, Congress reached beyond the former Confederate states to target racial discrimination in voting and election fraud nationwide.[191] These laws mandated that all citizens, regardless of their race, have "the same and equal opportunity" to satisfy conditions for voting.[192] The laws stipulated that any citizen who offered to satisfy a voting requirement, but was denied this chance by an election official, would be deemed in compliance with it.[193] The laws banned private parties from using "force, bribery, threats, [or] intimidation" to interfere with qualifying to vote or voting.[194] The laws forbade several species of fraud, including voting "in the name of any other person," voting "more than once at the same election," and inducing election officials to violate their duties.[195] The laws converted election officials' breaches of state statutory obligations into federal crimes.[196] And the laws authorized federal judges to appoint supervisors, aided by

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[183] An Act to Provide for the More Efficient Government of the Rebel States, § 5, 14 Stat. 428, 429 (1867).

[184] *See id.* ("[T]he elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates . . . .").

[185] *See id.* ("[P]ersons voting on the question of ratification [shall be] qualified as electors for delegates . . . .").

[186] *See* An Act Supplementary to an Act Entitled "An Act to Provide for the More Efficient Government of the Rebel States," § 1, 15 Stat. 2, 2 (1867).

[187] *See* § 2, 15 Stat. at 3 ("giving to each [district] representation in the ratio of voters registered . . . as nearly as may be").

[188] *See* § 3, 15 Stat. at 3.

[189] *See* § 4, 15 Stat. at 3.

[190] *See id.*

[191] For thorough descriptions of these laws, see RICHARD VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 106-09 (2004), and XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910, at 57-92 (1997).

[192] An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of This Union, and for Other Purposes, § 2, 16 Stat. 140, 140 (1870).

[193] *See* § 3, 16 Stat. at 140.

[194] § 4, 16 Stat. at 141; *see also* § 5, 16 Stat. at 141 (creating similar criminal offenses with respect to African Americans "to whom the right of suffrage is secured . . . by the fifteenth amendment").

[195] § 19, 16 Stat. at 144-45; *see also* § 20, 16 Stat. at 145 (forbidding fraud in the voter registration process).

[196] *See* § 22, 16 Stat. at 145-46.

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federal marshals, for congressional elections.[197] These supervisors monitored voter registration, inspected the voter rolls, observed the voting process, challenged unqualified voters, ensured the security of ballot boxes, and examined and counted ballots.[198]

The democratic values promoted by the Reconstruction Acts and the Enforcement Acts are self-evident. These statutes' overarching goal was to end racial discrimination in voting—to safeguard the franchise for newly liberated African Americans, to welcome them as full members of the political community, and to redeem the promise of the Fifteenth Amendment. As the Supreme Court put it in an 1884 case (during a period when it was no friend of Reconstruction legislation[199]), Congress sought "to provide against these evils," "common in one quarter of the country," of "lawless violence," "violence and outrage," and "brute force" against blacks trying to vote.[200] Or as Senator Carl Schurz stated when Congress debated the first Enforcement Act, Congress wanted to place blacks' voting rights "under the shield of national protection."[201] That way, "the whole people, and not . . . a part of them only," would have "the right and the means to cooperate in the management of their common affairs."[202]

The Enforcement Acts had the additional democratic aim of preventing election fraud. The Court recognized this purpose, too, in its 1884 decision, noting that Congress hoped to stop elections from being "poisoned by corruption" and "at the mercy of . . . unprincipled corruptionists."[203] So did members of Congress like Senator Adam Sherman, who called election fraud a problem "of greater magnitude even than denial of right to vote to colored people."[204] Sherman elaborated that fraud was "a national evil so great, so dangerous, and so alarming in character" that Congress had no choice but to act.[205]

Again, though, my claim isn't that the Reconstruction Acts and the Enforcement Acts were enacted for entirely benevolent reasons. Rather, the radical Republicans who pushed through these laws—over the furious opposition of President Johnson[206] and what remained of the Democratic Party—pursued partisan advantage as well. In the South, the Republicans' calculus was obvious. Most of their supporters were freed slaves, so if the Republican Party was to have a future in this part of the country, African Americans had to be able to vote freely

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[197] *See* An Act to Amend an Act Approved May Thirty-One, Eighteen Hundred and Seventy, § 2, 16 Stat. 433, 433-34 (1871) (authorizing the appointment of supervisors for municipalities with more than twenty thousand residents).

[198] *See* §§ 4-5, 16 Stat. at 434-45 (describing the supervisors' duties).

[199] *See supra* note 159 and accompanying text.

[200] Ex parte Yarbrough, 110 U.S. 651, 667 (1884); *see also, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 254 (1970) (opinion of Brennan, J.) (describing one motive for these laws as "an idealistic determination that the gains of the Civil War not be surrendered").

[201] WANG, *supra* note 191, at 63 (internal quotation marks omitted).

[202] *Id.* (internal quotation marks omitted); *see also, e.g.*, *id.* at 47 ("The idea of equality as pronounced by the Declaration of Independence was the main ideological source for Reconstruction politics . . . .").

[203] *Ex parte Yarbrough*, 110 U.S. at 667; *see also, e.g.*, Ex parte Siebold, 100 U.S. 371, 382 (1879) (observing that "fraud, corruption, and irregularity . . . have frequently prevailed [in recent] elections").

[204] WANG, *supra* note 191, at 64 (internal quotation marks omitted).

[205] *Id.* at 65 (internal quotation marks omitted).

[206] The Reconstruction Acts were passed over President Johnson's vetoes, but he was out of office by the time the Enforcement Acts were enacted.

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and fairly.[207] In the North, rampant fraud by Democratic machines in urban centers was a major threat to Republican electoral fortunes.[208] Curbing ballot box tampering, noncitizen voting, and the like thus bolstered Republicans' political position.[209]

And again, I don't think the democratic appeal of the Reconstruction Acts and the Enforcement Acts is undermined by the laws' concurrent partisan motives. Yes, the radical Republicans "linked principle and expedience together when they [legislated] issues of black suffrage and federal enforcement," as historian Xi Wang has written.[210] But principle remains principle even when it's tied to expedience. Democratic values don't lose their force just because they're intertwined with (and advanced through) self-interested politics.

C. *The Voting Rights Act*

Progressing to modern times, Congress's more recent electoral regulations are more familiar and so can be sketched in broader strokes. The most renowned of these regulations is undoubtedly the Voting Rights Act of 1965 (VRA), the so-called "crown jewel" of the Civil Rights Era.[211] Congress packed the VRA with one measure after another facilitating voting by African Americans. These provisions included the deployment of federal examiners to register eligible voters[212] and federal observers to monitor elections,[213] the suspension of literacy and moral character tests in the deep South,[214] the congressional judgment that poll taxes are unconstitutional,[215] and the criminalization of threatening or intimidating people for voting.[216] Congress also instituted a preclearance regime for certain deep southern jurisdictions, requiring them to prove to federal authorities that changes to their election rules weren't racially discriminatory before they could implement these policies.[217]

The VRA shared its democratic aspiration with its Reconstruction antecedents a century earlier: protecting the franchise for all racial minorities (but especially

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[207] *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 254 (1970) (opinion of Brennan, J.) (noting that Congress's Reconstruction legislation could be seen as "a grasp for partisan political power"); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 944 (1998) (observing that "extending the franchise promised to benefit the Republican Party" since "[n]ew black voters were expected to vote Republican").

[208] *See, e.g.*, WANG, *supra* note 191, at 68 ("[T]he reality that northern fraud could hurt the party as much as southern black disfranchisement, and eventually hurt the whole system of congressional elections, alarmed Republicans.").

[209] *See, e.g., id.* ("One serious fraudulent practice in northern cities . . . was that of recent immigrants casting votes by using false naturalization papers as their certificates of citizenship.").

[210] *Id.* at xxiv.

[211] *See, e.g.*, Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013), https://slate.com/news-and-politics/2013/06/supreme-court-and-the-voting-rights-act-goodbye-to-section-5.html.

[212] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 3, 6, 7, 79 Stat. 437, 437, 439-41 (1965).

[213] *See* § 8, 79 Stat. at 441.

[214] *See* § 4, 79 Stat. at 438-39.

[215] *See* § 10, 79 Stat. at 442-43.

[216] *See* § 11, 79 Stat. at 443.

[217] *See* § 5, 79 Stat. at 439.

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blacks) throughout the country (but especially in the deep South). The impetus for the VRA's enactment was the appalling violence in Selma, Alabama, where protesters marching for African American voting rights were savagely beaten by state troopers on Bloody Sunday. The VRA was Congress's effort to show that the protesters' sacrifices hadn't been in vain.[218] President Johnson also articulated the VRA's high-minded objective in a famous address to Congress. "Every American must have an equal right to vote," he told the chamber.[219] Consistent with this tenet, his administration's bill would "eliminate illegal barriers to the right to vote" and so "[a]llow men and women to register and vote whatever the color of their skin."[220]

Interestingly, the VRA didn't have a clear partisan purpose; in fact, it was expected to cost the Democrats, who then enjoyed unified control of the federal government, support in the South. In the roll call votes in the House and Senate, southern Democrats comprised the bulk of the opposition to the bill.[221] In contrast, more than eighty percent of House Republicans, and more than ninety percent of Republican senators, voted in favor.[222] President Johnson is also rumored to have said to an aide, around the time of the VRA's passage, "we just delivered the South to the Republican Party for a long time to come."[223] His reasoning was that conservative southern whites couldn't tolerate being part of the same party as newly enfranchised (and politically empowered) African Americans. So they would migrate to the Republican Party, making it viable below the Mason-Dixon line for the first time since Reconstruction and eroding, if not eliminating, what had long been the Democrats' Solid South.[224]

President Johnson's prophecy came true almost immediately at the presidential level. In the 1968 election—just three years after the VRA's enactment—the Democratic ticket lost every southern state except Texas.[225] Republican

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[218] For an accessible history of the VRA's enactment, see ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 13-38 (2015).

[219] President Lyndon Johnson, Special Message to Congress: The American Promise (Mar. 15, 1965), *available at* https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise.

[220] *Id.*; *see also, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting . . . ."). Note that racial vote *denial* was the VRA's original target. Concerns about racial vote *dilution* through at-large elections, cleverly drawn districts, and the like didn't emerge until the late 1960s. *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (holding that Section 5 of the VRA extended to racial vote dilution).

[221] *See To Pass H.R. 6400, the 1965 Voting Rights Act*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/h87 (last visited Aug. 1, 2020) (showing that, in the House, sixty-two Democrats voted against the VRA compared to twenty-three Republicans); *To Pass S. 1564, the Voting Rights Act of 1965*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/s78 (last visited Aug. 1, 2020) (seventeen Democrats voted against the VRA in the Senate compared to two Republicans).

[222] *See To Pass H.R. 6400, the 1965 Voting Rights Act*, *supra* note 221 (showing that 112 out of 135 voting House Republicans supported the VRA); *To Pass S. 1564, the Voting Rights Act of 1965*, *supra* note 221 (thirty out of thirty-two Senate Republicans).

[223] BERMAN, *supra* note 218, at 38 (internal quotation marks omitted) (dating the quote a year earlier).

[224] *See generally id.* at 65-99 (describing the Republicans' "southern strategy" in the late 1960s and 1970s). In the long run in a diversifying America, however, it's possible that the VRA could end up benefiting Democrats. As minority voters increase in numbers and clout, it may be preferable for a party to command their support—even at the cost of conservative white backing.

[225] Five of these states were lost to the segregationist George Wallace, not to Richard Nixon. *See 1968 United States Presidential Election*, WIKIPEDIA, https://en.wikipedia.org/wiki/1968_United_States_presidential_election (last visited Aug. 1, 2020).

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presidential candidates have continued to dominate in the South ever since.[226] At lower levels of government, though, the transition from Democratic to Republican control took much longer. Not until 2002, for example, did Republicans win a majority of southern state house seats.[227] But while President Johnson's prediction wasn't instantly validated in all elections, it *was* accurate. The VRA was thus that rarest of congressional electoral interventions: a law that pursued a great democratic goal despite the likelihood of significant harm for the party that passed it. If Congress's Reconstruction legislation fused principle and expedience,[228] the VRA severed them, and embraced the former over the latter.

D. *The Federal Election Campaign Act*

Jumping forward another decade, while the Watergate scandal consumed American politics, Congress enacted its most aggressive ever regulations of electoral funding. The Federal Election Campaign Act Amendments of 1974 (FECA) limited campaign contributions to federal candidates by private persons and political committees.[229] FECA also capped campaign expenditures by federal candidates, political parties, and all other groups and individuals.[230] FECA further mandated the disclosure of contributions and expenditures exceeding certain thresholds.[231] FECA offered voluntary public financing to presidential (but not congressional) candidates as well.[232] And FECA created an independent agency, the Federal Election Commission, to administer and enforce the new rules.[233]

Because FECA's passage was followed by litigation over almost all its provisions, the law's democratic aims were recounted in unusual detail in judicial opinions. The "primary interest" served by the statute, according to the Supreme Court, was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[234] An "ancillary interest underlying" FECA was "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections."[235] Another secondary objective was to "act as a

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[226] *See generally* DAVID LUBLIN, THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE (2007).

[227] *See* Stephanopoulos, *supra* note 157, at 1387.

[228] *See* WANG, *supra* note 191, at xxiv.

[229] *See* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(b), 88 Stat. 1263, 1263-64 (1974).

[230] *See* § 101(c), (e), (f), 88 Stat. at 1264-66

[231] *See* § 201, 88 Stat. at 1272-75

[232] *See* § 408, 88 Stat. at 1297-1303

[233] *See* §§ 310-14, 88 Stat. at 1280-85

[234] Buckley v. Valeo, 424 U.S. 1, 25 (1976). In the decision below, the court of appeals had referred to this interest more generally as "preserving the integrity of the system of elections." Buckley v. Valeo, 519 F.2d 821, 835 (D.C. Cir. 1975), *rev'd*, 424 U.S. 1 (1976).

[235] *Buckley*, 424 U.S. at 25-26. The Court famously deemed this interest "wholly foreign to the First Amendment." *Id.* at 49. In contrast, the court below (more persuasively, in my view) thought that "equaliz[ing] the relative ability of all voters to affect electoral outcomes" "affirmatively enhances First Amendment values" by "broaden[ing] the choice of candidates and the opportunity to hear a variety of views." *Buckley*, 519 F.2d at 841.

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brake on the skyrocketing cost of political campaigns and thereby . . . to open the political system more widely to candidates without access to sources of large amounts of money."[236] Lastly, Congress sought to "provide[] the electorate with information . . . in order to aid the voters in evaluating those who seek federal office."[237]

These democratic ends—stopping corruption, promoting equality, increasing access, and educating the electorate—are consistent with the history of FECA's enactment. As historian Julian Zelizer has observed, by the late 1960s and early 1970s, a loose coalition had emerged, "composed of legislators, experts, philanthropists, foundations, and public interest groups," who "believed that representative government could be improved."[238] Prior to Watergate, this coalition had enough clout to put sweeping campaign finance reform on the congressional agenda, but not actually to pass it. With the eruption of a massive scandal that involved (among other things) illegal donations to the 1972 Nixon campaign, though, the coalition's moment arrived. Public opinion focused like never before on governmental corruption.[239] Politicians previously averse to change found themselves unable to oppose (at least publicly) restrictions on electoral funding.[240] Watergate thus triggered a popular "groundswell," in the words of political scientist Robert Mutch, which in turn brought "partisanship and principle together, merge[d] the principled arguments made in floor debate with the concerns about short-term partisan advantage expressed in cloakroom conversations."[241]

But note Mutch's references to "partisanship" and "short-term partisan advantage." While the Democrats who controlled Congress in 1974 had genuine democratic rationales for enacting FECA, they had political justifications, too. One of these was highlighting an issue, campaign finance reform, that reminded the public of Watergate and divided the Republican Party, which had mostly resisted curbs on electoral funding in the past.[242] More importantly, Democrats had been massively outspent in recent elections, especially 1972. FECA promised to move them closer to parity by capping both the contributions that could be made to campaigns and the amounts that campaigns themselves could spend.[243] On the

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[236] *Buckley*, 424 U.S. at 26.

[237] *Id.* at 66-67.

[238] Julian E. Zelizer, *Seeds of Cynicism: The Struggle Over Campaign Finance, 1956-1974*, 14 J. POL'Y HIST. 73, 74 (2002).

[239] *See id.* at 100 ("Public-opinion polls confirmed that Watergate had heightened public interest in taking action against campaign corruption."); *see also, e.g.*, ROBERT E. MUTCH, BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM 137 (2014) ("[M]ore than 25 percent of all mail in the post-Watergate period was on campaign finance— far more than on any other issue.").

[240] *See, e.g.*, MUTCH, *supra* note 239, at 187 (noting that "members of Congress" were "attentive to public opinion after Watergate," and so "knew that open opposition to reform would be a short-term political liability").

[241] *Id.* at 138; *see also, e.g.*, Zelizer, *supra* note 238, at 99 ("Watergate offered a 'focusing event' for the coalition to push their proposals that had incubated over many years.").

[242] *See, e.g.*, Zelizer, *supra* note 238, at 97 ("Watergate turned campaign finance into a political liability for Republicans as many Democrats were preparing to use it as a campaign issue.").

[243] *See, e.g.*, Richard L. Hasen, *The Nine Lives of* Buckley v. Valeo, *in* FIRST AMENDMENT STORIES 345, 350 (Richard W. Garnett & Andrew Koppelman eds., 2010) (observing that "Democrats became more interested in campaign finance reform as large donor money shifted from Democrats to Republicans following Nixon's

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Republican side, the new and unelected president, Gerald Ford, had a practical motive of his own for signing FECA into law. Although he had "opposed the legislation," "[a] veto was now politically dangerous and Congress might override it."[244]

The story of FECA's passage, then, is the usual one of Congress regulating elections: a confluence of democratic and partisan factors, all pushing in the same direction. This isn't a wholly altruistic account, but it still rebuts the common criticism that when Congress legislates about money in politics, it does so for *anti*-democratic reasons—to entrench incumbents in office against the will of the electorate. Justice Scalia expressed this view best, in a 2003 opinion more in line with his antigovernment ideology. "The first instinct of power is the retention of power," he wrote.[245] Campaign finance restrictions supposedly serve this end by "prohibit[ing] the criticism of Members of Congress" and thus providing "incumbents [with] an enormous advantage."[246] Supposedly. In fact, most members of Congress had little interest in limiting electoral funding until the reform coalition's lobbying and the shock of Watergate forced their hand.[247] Empirical evidence also shows that most campaign finance regulations benefit challengers, not incumbents.[248] So the legislators who enacted FECA weren't the schemers imagined by Justice Scalia. Instead, they were regular politicians operating within the Madisonian system, yoking together democratic and partisan goals, not pitting them against each other.

E. *Modern Election Administration*

Turning finally to a pair of recent congressional interventions, the National Voter Registration Act of 1993 (NVRA)[249] and the Help America Vote Act of 2002 (HAVA)[250] involved Congress in the details (some would say the minutiae) of election administration. The NVRA required states to allow voters to register for federal elections (1) when they apply for driver's licenses; (2) when they interact with state welfare agencies; and (3) by mail rather than in person.[251] The statute also provided rules for the upkeep of state voter rolls.[252] HAVA discouraged the use of obsolete punch card and lever voting machines and subsidized their replacement by newer technologies.[253] It also authorized voters whose names are missing from the voter rolls to cast provisional ballots, whose validity is

1968 election"); Zelizer, *supra* note 238, at 88-89 (noting that Democrats "faced a large deficit" relative to Republicans and "were very aware of how this legislation could change their electoral fortunes").

[244] *Id.* at 103.

[245] McConnell v. FEC, 540 U.S. 93, 263 (2003) (opinion of Scalia, J.).

[246] *Id.* at 248-49.

[247] *See, e.g.*, MUTCH, *supra* note 239, at 138 ("'[T]hese people who were quite recalcitrant initially, they got taken over by public events . . . .'" (quoting prominent activist Susan King)).

[248] *See, e.g.*, Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 1047-52 (2018) (surveying this evidence).

[249] 52 U.S.C. §§ 20501-11 (2018).

[250] 52 U.S.C. §§ 20901-21145 (2018).

[251] *See* 52 U.S.C. §§ 20503-06.

[252] *See id.* § 20507.

[253] *See* 52 U.S.C. §§ 20901-06.

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determined after the election.[254] HAVA further directed each state to create a computerized statewide voter registration list.[255] And the law stipulated that first-time registrants by mail must provide identification when they go to the polls.[256]

The NVRA had a straightforward democratic objective: boosting voter turnout. The statute aimed to "increase registration of eligible citizens in elections for Federal office," stated its Senate report, and thus to "enhance[] the participation of eligible citizens as voters in [these] elections."[257] Consequently, "[t]he declining numbers of voters who participate in Federal elections" might be reversed.[258] The primary purpose of HAVA, in turn, was making elections more efficient and less prone to errors, especially in the tabulation of votes and the registration of voters. Both of these had emerged as problems in Florida's disputed 2000 election; as the law's House report elaborated, "[t]he circumstances surrounding [that] election . . . brought an increased focus on the process of election administration, and highlighted the need for improvements."[259] Secondarily, HAVA sought to prevent voter fraud through its identification requirement.[260]

It should come as no surprise, by now, that partisanship also played a role in the passage of the NVRA and HAVA. A bill similar to the NVRA had been approved by both houses of Congress in 1992, only to be vetoed by President Bush.[261] After the Democrats took unified control of the federal government in the 1992 election, they quickly enacted an analogous statute on a mostly party line basis.[262] The Democrats' (potentially flawed[263]) calculation was that higher turnout would help them electorally because it would mean that more of their lower-propensity voters (young, poor, and minority citizens) had gone to the polls.[264] Most Republicans opposed the bill for the same (maybe inaccurate) reason, believing that their candidates did better when fewer voters turned out.[265]

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[254] *See id.* § 21082.

[255] *See id.* § 21083(a).

[256] *See id.* § 21083(b).

[257] S. REP. NO. 103-6, at *1 (1993).

[258] *Id.* at *2; *see also, e.g.*, Royce Crocker, *The National Voter Registration Act of 1993: History, Implementation, and Effects*, *in* NATIONAL VOTER REGISTRATION ACT: ELEMENTS, ANALYSIS, AND IMPACT 1, 9 (Aaliyah Gamer ed., 2014) ("Many proponents of [the NVRA] argued that by making it easier to register eligible citizens, the law would not only increase the number of persons who were registered to vote but also would encourage more voter turnout."). The NVRA also achieved its goal by modestly increasing voter registration and turnout. *See, e.g.*, Benjamin Highton & Raymond E. Wolfinger, *Estimating the Effects of the National Voter Registration Act of 1993*, 20 POL. BEHAVIOR 79 (1998).

[259] H.R. REP. NO. 107-329, at *31 (2001); *see also, e.g.*, Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1207 (2005) ("The legislation was intended to improve not only the equipment used to cast and count votes, but also the way that registration lists are maintained and polling place operations conducted.").

[260] *See, e.g.*, Tokaji, *supra* note 259, at 1214 ("[M]uch of HAVA is designed to make it harder to cheat, by preventing fraud in the voting process.").

[261] *See* Crocker, *supra* note 258, at 5.

[262] *See id.* at 29 (noting that "[t]he NVRA was not supported by most Republicans").

[263] A long line of political science scholarship, starting with RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? (1980), finds that higher turnout doesn't consistently or necessarily benefit either party.

[264] *See, e.g.*, Marshall Ganz, *Motor Voter or Motivated Voter?*, AM. PROSPECT (Dec. 19, 2001) ("Many conservatives feared—just as many liberals hoped—that Motor Voter would produce a Democratic bonanza at the polls.").

[265] *See, e.g.*. *id.*

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HAVA, in contrast, wasn't pushed through by a single party. It was passed, rather, by a divided Congress, with "[c]hanges thought to be beneficial to one party . . . balanced by provisions backed by, and assumed to aid, the other."[266] In particular, the Democrats favored the aspects of HAVA that would modernize voting machines and enable voters to cast provisional ballots. The Democrats thought that outdated technologies and voter registration errors had cost them Florida's 2000 election (and with it the presidency), and were eager to avoid these issues going forward.[267] The Republicans, on the other hand, insisted on HAVA's identification requirement for first-time registrants by mail. This provision was intended to deter voter fraud, which the Republicans (wrongly) maintained was a widespread phenomenon that usually advantaged Democratic candidates.[268]

Notably, a *strict* identification requirement could reduce voter turnout and so undermine the democratic value of political participation. But HAVA's ID requirement wasn't very onerous at all. It applied to only the small population of people who hadn't previously voted in a jurisdiction and registered to vote by mail.[269] It could also be satisfied by a photo *or* nonphoto ID, including "a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter."[270] Accordingly, HAVA's ID requirement is consistent with my claim here that most congressional electoral regulations simultaneously advance democratic and partisan ends. The provision tried to stop fraud (a democratic goal) and to aid Republicans (a partisan one), and it did so without curtailing participation (another element of a vibrant democracy).

* * * *

Lest this discussion seem overly pollyannish, I want to concede that Congress *has*, on a few occasions, compromised democratic values for the sake of partisan gain. In the 1892 elections, the Democrats won full control of the federal government for the first time since before the Civil War.[271] They promptly repealed every statutory provision enacted by Congress during Reconstruction that related directly to elections.[272] The Democrats thus opened the door to the disenfranchisement of African Americans in the South and to widespread fraud in the North. And they did so for the nakedly partisan reason that excluding southern

[266] Martin J. Siegel, *Congressional Power over Presidential Elections: The Constitutionality of the Help America Vote Act under Article II, Section 1*, 28 VT. L. REV. 373, 418 (2004).

[267] *See, e.g.*, ELECTIONLINE.ORG, ELECTION REFORM: WHAT'S CHANGED, WHAT HASN'T, AND WHY, 2000-2006, at 13 (2006) (noting the Democrats' support for "significant financial investment by the federal government in state election administration and rules mandating provisional voting").

[268] *See, e.g.*, *id.* (observing that the Republicans "sought universal nationwide voter ID requirements" and settled for HAVA's "limited voter ID requirement").

[269] *See* 52 U.S.C. § 21083(b)(1).

[270] *Id.* § 21083(b)(2).

[271] *See 1892 United States Elections*, WIKIPEDIA, https://en.wikipedia.org/wiki/1892_United_States_elections (last visited Aug. 1, 2020).

[272] *See* An Act to Repeal All Statutes Relating to Supervisors of Elections and Special Deputy Marshals, and for Other Purposes, 28 Stat. 36 (1894).

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blacks and corrupting northern elections would lift their electoral prospects.[273] In 1929, likewise, members of both parties came together to eliminate almost every requirement that had previously applied to the design of congressional districts: contiguity, compactness, and equal population.[274] Had these criteria been followed in the next round of redistricting, in the face of rapid demographic shifts, many incumbents' districts would have changed in unfavorable ways. But by discarding the criteria—and the value of fair representation they promoted—the law's backers hoped to maintain their hold on office.[275]

One could try to excuse these statutes, perhaps, on the ground that they merely repealed earlier congressional acts. Congress didn't, say, affirmatively bar African Americans from voting or mandate that congressional districts be unequally populated. But this argument is weak tea. Compared to the law on the books, these measures plainly subverted democratic values for partisan purposes. Incidents like these are why I have been careful to present a non-maximalist thesis in this Part. My position hasn't been that Congress *always* furthers democratic ends when it regulates elections. Instead, it has been that Congress *usually* does so, and that Congress *threatens* democratic values less often than the states and the courts. This more circumspect claim, I believe, would hold even after scrutinizing these actors' electoral records at greater length than is possible here.

III. CURRENT DOCTRINE

The history of congressional electoral regulation, then, confirms what the theory of congressional electoral regulation suggests: that Congress is less likely to imperil American democracy than the states or the courts. Given this history and theory, it would be prudent for the law to endow Congress with sweeping authority over elections. Congress would be less apt to abuse this power than its institutional competitors, and if past performance is any guide, most of its efforts would serve democratic ends. In fact, that's exactly what current constitutional doctrine does. As I explain in this Part, the law grants Congress expansive authority over most aspects of elections—the franchise itself, party primaries, election administration, redistricting, campaign finance, and so on—at both the federal and state levels.

This doctrinal discussion is complicated by the sheer number of constitutional provisions that relate to Congress's electoral power: almost a dozen, in total. Because of this unusual efflorescence of constitutional text, parsing any single clause in isolation is unproductive. Each clause must always be understood as a piece of a larger jigsaw puzzle, a thread in a broader tapestry. It's the assembled puzzle, the woven tapestry, that defines the full scope of congressional electoral

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[273] *See, e.g.*, WANG, *supra* note 191, at 254 (describing the Democrats' argument that the laws they repealed "were partisan by nature and used for partisan purposes").

[274] *See* An Act to Provide for the Fifteenth and Subsequent Decennial Censuses and to Provide for Apportionment of Representatives in Congress, 46 Stat. 21 (1929); *see also* Wood v. Broom, 287 U.S. 1, 6 (1932) (noting that this law "did not carry forward those requirements as previous apportionment acts had done").

[275] *See, e.g.*, DOW, *supra* note 167, at 168 ("The removal of the compact, contiguous, and equal population requirements from the apportionment act furthered the interests of both urban and rural legislators.").

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authority.[276] The volume of relevant provisions also makes redundancy and reinforcement the touchstones of the legal analysis in this area. Very often, when Congress legislates about elections, its power to do so stems from multiple clauses simultaneously. Together, these clauses form a sturdier basis for congressional intervention than any provision standing alone. They fill in one another's gaps, offer distinct but overlapping rationales for intervention, and make clear that congressional action is a feature (not a breach) of the constitutional design.[277]

The sheer number of electoral clauses, further, means that my commentary on each provision is necessarily abbreviated. I capture the state of current doctrine on each clause. But I don't trace the evolution of this doctrine. Nor do I address its consistency with the original meaning at the time of each provision's enactment.[278] And nor do I speculate how the law might continue to change under the supervision of the Roberts Court, no friend of sweeping congressional electoral authority.[279] To avoid a dry recitation of precedents, I also focus less on what the cases say and more on how they fit together. I argue that they create a sort of lattice—extending horizontally to give Congress power over most electoral matters, and reaching vertically to provide it with multiple bases for most actions it takes.

One last preliminary point: As I noted earlier,[280] I'm only interested here in the Constitution's power-conferring clauses. Its power-limiting elements, which include the First Amendment, the Equal Protection Clause,[281] and various nontextual federalism principles, are outside the lines of this particular project. Accordingly, it could well be that a law Congress has the authority to pass is nevertheless unconstitutional. A campaign finance regulation might impermissibly restrict electoral spending, which the current Court thinks is core political speech.[282] A voting rights statute might be deemed overly race-conscious and so in

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[276] *Cf.* Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 110 (2014) (criticizing the Supreme Court because "it addresses each source of federal power seriatim" and thus overlooks "the larger ends they serve together").

[277] Justice Ginsburg made a similar argument in her *Shelby County* dissent. She discussed six constitutional provisions empowering Congress to regulate elections, concluding, "The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens." Shelby Cty. v. Holder, 570 U.S. 529, 567 n.2 (2013) (Ginsburg, J., dissenting). In the academy, Franita Tolson has repeatedly argued that courts should be more deferential toward congressional electoral regulations because of the multiple sources of power from which Congress draws when it legislates about elections. *See, e.g.*, Franita Tolson, *Reinventing Sovereignty? Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1207 (2012) (maintaining that the combination of the Elections Clause with the Fourteenth and Fifteenth Amendments "should inform the level of deference that the Court uses to analyze congressional acts"); Tolson, *supra* note 21, at 326-27 ("[T]he presence of multiple sources of authority justifies increased deference towards the legislative record.").

[278] Hamilton, for example, didn't think the original Constitution authorized Congress to regulate state elections. If it had, he wondered, "would any man have hesitated to condemn it, both as an unwarrantable transposition of power and as a premeditated engine for the destruction of the State governments?" THE FEDERALIST NO. 59 (Hamilton).

[279] I'm aware of the irony of relying on decisions of the Court—an institution I argue is less trustworthy than Congress—to define Congress's electoral power. Unfortunately, this is an unavoidable irony in a system, like ours, that gives the Court the final word about the Constitution's meaning.

[280] *See supra* notes 48-52 and accompanying text.

[281] The Equal Protection Clause is also power-conferring to the extent that Congress prevents and remedies violations of the provision through its Fourteenth Amendment enforcement power. *See infra* Part III.D.

[282] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010).

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conflict with the Constitution's supposed commitment to colorblindness.[283] Any electoral law might offend the states' ineffable dignity by commandeering them[284] or differentiating among them in violation of their equal sovereignty.[285] My claim, then, is just that Congress is constitutionally empowered to enact all these (and many more) measures. They may be unlawful because they infringe some other constitutional provision. But they *aren't* ultra vires.[286]

A. *The Elections Clause*

The logical place to begin this survey is the Elections Clause of Article I: the Constitution's clearest articulation of (a part of) Congress's electoral authority. The Clause authorizes Congress to "make or alter . . . Regulations" of "[t]he Times, Places and Manner of . . . Elections for Senators and Representatives."[287] The provision thus applies to congressional elections but not to presidential, state, or local races. The provision also doesn't define its key terms—the times, places, and manner of elections—leaving it to the courts to supply their content. Stepping into the breach, the courts have construed this language exceptionally broadly.[288] Under the Clause, "Congress has plenary and paramount jurisdiction over the whole subject" of congressional elections, declared the Supreme Court in an 1879 case.[289] This power "may be exercised as and when Congress sees fit," and "so far as it extends and conflicts with the regulations of the State, necessarily supersedes them."[290] The Court added in a 1932 case that the Clause's "comprehensive words embrace authority to provide a complete code for congressional elections"—"to enact the numerous requirements . . . which experience shows are necessary."[291] Even the Roberts Court agreed, in a 2013 case, that "[t]he Clause's substantive scope is broad."[292] Moreover, "the federalism concerns" that arise elsewhere "are somewhat weaker here," since whenever Congress regulates congressional races, "it *necessarily* displaces some element of a pre-existing legal regime erected by the States."[293]

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[283] *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993).

[284] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997).

[285] *See, e.g.*, Shelby Cty. v. Holder, 570 U.S. 529 (2013).

[286] Although I don't defend the claim further, my sense is that many (probably most) electoral regulations that Congress might plausibly enact wouldn't run afoul of any of the Constitution's power-limiting elements (at least as those elements are currently construed).

[287] U.S. CONST. art. I, § 4. Unless and until Congress acts, the times, places, and manner of congressional elections "shall be prescribed in each State by the Legislature thereof." *Id.*

[288] For scholars agreeing with this characterization, see Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 111 (2013) (explaining how the Court has "put the Elections Clause on a higher rung of full federal power than even the Commerce Clause"), and Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 16 (2007) (noting that the Court's decisions "have confirmed the longstanding interpretation of the clause as a grant of essentially plenary authority").

[289] Ex parte Siebold, 100 U.S. (10 Otto) 371, 388 (1879).

[290] *Id.* at 384.

[291] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[292] Arizona v. Inter Tribal Council, 570 U.S. 1, 8 (2013).

[293] *Id.* at 14. However, the Elections Clause doesn't authorize Congress (or the states) "to dictate electoral outcomes" or "to favor or disfavor a class of candidates." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833-34 (1995).

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Consistent with these pronouncements, the Court has held that Congress can legislate about almost every conceivable aspect of congressional elections. Congress can make it a crime for private, nongovernmental actors to interfere with voting in congressional races.[294] Congress can regulate congressional general as well as primary elections.[295] Congress can make rules for elections in which congressional and non-congressional candidates are on the ballot—and that apply to both types of races.[296] Congress can order states to administer congressional elections in certain ways, notwithstanding the usual ban on commandeering.[297] As the Court put it in 1932, in its best-known summary of the Election Clause's scope, Congress can reach "not only [the] times and places" of congressional races, but also their "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[298]

Maybe most controversially,[299] Congress can even regulate *who* votes (not just *how* voting is conducted) in congressional elections. In 1970, Congress passed a law that, among other things, lowered the minimum voting age in congressional elections from twenty-one to eighteen.[300] In the Court's subsequent decision in *Oregon v. Mitchell*,[301] four Justices would have struck down this provision and another four would have upheld it on a broader equal protection theory.[302] But in his controlling opinion for the Court, Justice Black sustained it squarely on Elections Clause grounds. "[T]he powers of Congress to regulate congressional elections[] includ[e] the age and other qualifications of the voters," he wrote.[303] "Congress has ultimate supervisory power over congressional elections."[304] Since *Mitchell*, Congress has both required states to allow former residents of theirs who

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[294] *See, e.g.* Ex parte Yarbrough, 110 U.S. 651, 666 (1884) (holding that "acts [that] have no sanction in the statutes of a state, or which are not committed by any one exercising its authority" can be criminalized under the Elections Clause).

[295] *See, e.g.*, United States v. Classic, 313 U.S. 299, 317 (1941) (holding that Congress's Elections Clause power "includes the authority to regulate primary elections when . . . they are a step in the exercise by the people of their choice of representatives in Congress").

[296] *See, e.g.*, *Ex parte Yarbrough*, 110 U.S. at 662 (asking rhetorically, "are [Congress's Elections Clause] powers annulled because an election for state officers is held at the same time and place?").

[297] *See, e.g.*, Branch v. Smith, 538 U.S. 254, 280 (2003) (plurality opinion) (holding that when Congress issued certain directives under the Elections Clause, it "was not placing a statutory obligation on the state legislatures as it was in [the anti-commandeering cases]; rather, it was regulating (as the Constitution specifically permits) the manner in which a State is to fulfill its pre-existing constitutional obligations").

[298] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[299] The controversy stems from Article I's statement that voters in U.S. House elections "shall have the Qualifications requisite" for voters in state house elections. U.S. CONST. art. I, § 2. Arguably, this clause's more specific language means that the Elections Clause's more general reference to the "manner" of elections can't encompass the setting of qualifications for voting in congressional races. In dicta in *Arizona v. Inter Tribal Council*, 570 U.S. 1 (2013), a majority of the Court embraced this view, opining that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Id.* at 16. But this was merely dicta, and as Richard Hasen has noted, *Mitchell* "remains good law unless overruled by the Court." Richard L. Hasen, *Too Plain for Argument: The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees through Direct and Equal Primaries*, 102 NW. U. L. REV. 2009, 2018 (2008).

[300] *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 301-05, 84 Stat. 314, 318-19 (1970).

[301] 400 U.S. 112 (1970).

[302] *See id.* at 117-18 (opinion of Black, J.) (describing the Justices' votes).

[303] *Id.* at 122.

[304] *Id.* at 124.

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have moved abroad to vote in congressional elections[305] and made American citizenship a prerequisite for voting for Congress.[306] Thanks to *Mitchell*, neither of these congressionally imposed voting qualifications has ever been challenged.[307]

Stepping back from these cases, we can start to see the structure of Congress's electoral authority emerging. Imagine a horizontal plane encompassing every possible electoral topic and level. The Elections Clause *doesn't* fill this plane. It doesn't give Congress plenary power over every electoral issue. But it *does* demarcate a portion of the plane—that involving congressional elections—in which Congress enjoys essentially complete control. The Clause also provides Congress with some electoral power outside this portion. As noted above, Congress can regulate non-congressional elections, too, to the extent they're held concurrently with (and can't be disentangled from) congressional elections.[308]

Think of a vertical dimension as well, registering different legal rationales for congressional electoral activity. The Elections Clause doesn't occupy all of this dimension either. In fact, it supplies just a single basis for Congress to regulate elections: that under a particular constitutional provision, Congress explicitly has the authority to set or change the times, places, and manner of congressional elections.[309] As we'll see below, this justification for congressional intervention is usually undergirded by several more, each corresponding to a different legal theory. The sources of congressional power thus often stack up, forming a pillar stronger than the sum of its parts.

B. *The Electors Clause*

You may have noticed that, in my discussion of the Elections Clause, I carefully referred to *congressional* rather than *federal* elections. I did so because presidential elections are federal elections, too, but are outside the heartland of Congress's Elections Clause authority.[310] Congress's power to regulate presidential elections derives, instead, from the Electors Clause of Article II.[311] This provision states that "Congress may determine the Time of ch[oo]sing the

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[305] *See* 52 U.S.C. §§ 20301-11 (2018).

[306] *See* 18 U.S.C. § 611 (2018).

[307] Scholars, though, have complained about them. *See generally, e.g.*, Brian C. Kalt, *Unconstitutional but Entrenched Putting UOCAVA and Voting Rights for Permanent Expatriates on A Sound Constitutional Footing*, 81 BROOK. L. REV. 441 (2016); Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447 (2017).

[308] *See supra* note 296 and accompanying text; *see also, e.g.*, Karlan, *supra* note 288, at 17 ("[T]he Elections Clause has long been interpreted to give Congress power over so-called 'mixed elections'—that is, to permit Congress to regulate all aspects of an election (or an electoral process) used even in part to select members of Congress.").

[309] This is just a paraphrase of the Election Clause's text. The deeper rationale for the provision's allocation of electoral power to Congress is that *some* institution must be able to regulate congressional elections, and Congress is a more trustworthy grantee for this power than are the states. *See, e.g.*, THE FEDERALIST NO. 59 (Hamilton) ("[A]n exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.").

[310] Congress can still regulate presidential elections to some degree, under the Elections Clause, because they're held concurrently with congressional elections. *See supra* notes 296, 308 and accompanying text.

[311] This power also derives from the Necessary and Proper Clause. *See infra* Part III.F.

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Electors" (presidential electors, of course, being the group that officially selects the President under the Constitution's complicated Electoral College system).[312]

As a textual matter, the Electors Clause is plainly narrower than the Elections Clause. It only authorizes Congress to set the time of presidential elections. It's silent about the places, and more importantly the manner, of these races. Nevertheless, the courts have construed the Electors Clause coextensively with the Elections Clause, holding that the former endows Congress with the same authority over presidential elections that the latter grants it over congressional races.[313] In a 1934 case, for instance, the Supreme Court ruled that Congress has the "power to pass appropriate legislation to safeguard [a presidential] election . . . . from impairment or destruction."[314] "[T]he choice of means to that end presents a question primarily addressed to the judgment of Congress."[315] In *Mitchell*, similarly, Justice Black's controlling opinion announced that "it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections."[316] This prerogative is identical in the presidential and congressional contexts: "It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."[317]

Unsurprisingly, given these views, the Court has held that Congress can mandate the disclosure of campaign contributions and expenditures,[318] restrict campaign donations, and institute a system of public financing for presidential elections.[319] As at the congressional level, the Court has also ruled that Congress can change the qualifications for voting in presidential elections. The 1970 law that lowered the congressional voting age to eighteen did the same for the presidential voting age.[320] The statute further abrogated state residency requirements for voting for President, directed states to allow voters to register for presidential elections until thirty days before election day, and established that voters can vote absentee for President as long as they request their ballots at least seven days before the election.[321] All these measures were upheld in *Mitchell*—the ones unrelated to age by an eight-to-one vote.[322] As Justice Black explained, "[e]ssential to the survival and to the growth of our national government is its

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[312] U.S. CONST. art. II, § 1.

[313] For scholars echoing this view, see Dan T. Coenen & Edward J. Larson, *Congressional Power Over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 892 (2002) ("[T]he [presidential electoral] power is fully coextensive with Congress's sweeping authority to regulate in any way the 'Manner' of House and Senate elections.").

[314] Burroughs v. United States, 290 U.S. 534, 545 (1934).

[315] *Id.* at 547.

[316] Oregon v. Mitchell, 400 U.S. 112, 124 (1970) (opinion of Black, J.).

[317] *Id.*; *see also, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 894 (1995) (Thomas, J., dissenting) ("[T]he treatment of congressional elections in Article I parallels the treatment of Presidential elections in Article II.").

[318] *See, e.g.*, *Burroughs*, 290 U.S. at 548 (respecting Congress's "conclusion that public disclosure of political contributions . . . would tend to prevent the corrupt use of money to affect elections").

[319] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 90 (1976) ("[P]ublic financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power.").

[320] *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 301-05, 84 Stat. 314, 318-19 (1970).

[321] § 202, 84 Stat. at 316-17.

[322] *See Mitchell*, 400 U.S. at 118-19 (opinion of Black, J.) (describing the Justices' votes).

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power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent."[323]

Returning to the dimensions of congressional electoral authority, the Electors Clause delimits an additional region in the horizontal plane: that involving presidential elections. Within this region, Congress possesses the same power as in the zone for congressional elections, which is to say almost complete control. On the vertical axis of rationales for congressional electoral activity, the Clause also provides another justification: that a specific constitutional provision authorizes Congress to fix certain aspects of presidential elections.[324] But this basis is best understood as paralleling, not supplementing, the reason for congressional intervention supplied by the Elections Clause. In other words, a given electoral regulation can be grounded in *either* the Elections Clause (if it relates to congressional elections) *or* the Electors Clause (if it addresses presidential elections) but not *both* provisions.[325]

C. *The Guarantee Clause*

What about a regulation of state or local elections? Congress can't impose one under the Elections Clause or the Electors Clause (except to the extent the rule is necessarily intertwined with regulations of federal elections). Rather, Congress's broadest source of power to legislate about nonfederal elections is the Republican Guarantee Clause of Article IV. "The United States shall guarantee to every State in this Union a Republican Form of Government," the Clause reads.[326] States' elections (indeed, their entire systems of government) must thus be republican. If and when they become unrepublican, the federal government is authorized to step in and restore democracy at the state or local level.

Why just at the state or local (and not at any) electoral level? One could argue, perhaps, that if a state poorly administers its federal elections, then the state's form of government isn't republican. But that seems implausible. A state's federal elections determine its representatives (congressional members and presidential electors) in the government of a *different* sovereign: the United States. These elections *don't* select the officials who actually govern the state itself. No matter how deficient a state's federal elections, then, it's hard to say the state has fallen below the threshold of republicanism if its nonfederal elections still top this bar. As long as these state and local elections are suitably republican, the people of the state continue to be able to govern themselves democratically. They may not be

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[323] *Id.* at 134.

[324] As with the Elections Clause, *see supra* note 309, the deeper nontextual rationale for authorizing Congress to legislate about presidential elections is that the federal government must ultimately be able to regulate the elections that constitute it. To quote Justice Black again, "under its broad authority to create and maintain a national government," Congress must have "power under the Constitution to regulate federal elections." *Mitchell*, 400 U.S. at 134 (opinion of Black, J.).

[325] With the caveat that a presidential electoral regulation could be based on both the Electors Clause and Congress's Elections Clause power to reach mixed elections. *See supra* notes 296, 308, 310 and accompanying text.

[326] U.S. CONST. art. IV, § 4.

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able to elect their federal representatives democratically, but their own form of government remains intact.[327]

Republicanism, of course, is a hotly contested concept.[328] It could mean quite little: just the absence of authoritarian rule.[329] Or it could mean rather a lot: free and fair elections, various civil, social, and political rights for the people, maybe even minimum levels of health, education, or welfare.[330] The Supreme Court has never defined a republican form of government, so none of these options commands judicial support. Scholars, however, have arrived at a rough consensus that, at least as an originalist matter, the essence of republicanism is popular sovereignty. "The central pillar of Republican Government . . . is popular sovereignty," Akhil Amar concluded in one well-known study.[331] "[T]he people's right to alter or abolish [laws], and popular majority rule in making and changing [laws]"—these "were bedrock principles in the Founding, Antebellum, and Civil War eras."[332] Echoing Amar, Fred Smith reviewed Framing-era materials and summarized that "[t]he 'republican principle' is the cardinal and indispensable axiom that the ultimate sovereignty . . . rests in the hands of the governed, not persons who happen to govern."[333]

Under this conception of republicanism, Congress can regulate nonfederal elections to prevent and remedy infringements of popular sovereignty. States can violate this principle in many ways: by restricting the franchise and so stopping certain people from having a say in their own governance, by diluting the influence of targeted racial or partisan groups, by failing to curb the corruption of the electoral process, and so on. All these practices (or absences of practices) can impede a popular majority from electing its preferred candidates and ultimately from enacting its preferred laws. All these policy choices, that is, can undermine the value of popular sovereignty that's at the heart of the Guarantee Clause. And

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[327] For a scholar agreeing with this view, see Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1586 (2014) ("The Guarantee Clause benefits the states, not the federal government, so some other rationale will have to be found to the extent that [congressional legislation] applies to purely federal elections."). For a scholar disagreeing, see Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 876 (1994) ("[Unrepublican] [e]lection practices in the state might relate not only to state government offices, but to elections of representatives and senators as well.").

[328] This is precisely why some scholars argue that suits alleging unrepublican practices should remain nonjusticiable. *See, e.g.*, Richard L. Hasen, Leaving the Empty Vessel of 'Republicanism' Unfilled: An Argument for the Continued Non-Justiciability of Guarantee Clause Cases 10-19 (Mar. 7, 2003).

[329] Another limited definition could be a government no less democratic than that of states when they joined the Union. *See, e.g.*, Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874) ("All the States had [republican] governments when the Constitution was adopted. In all the people participated to some extent . . . .").

[330] For a relatively expansive conception of republicanism, see Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 516 (1961) (arguing that it extends to "the protection and advancement of all citizens' political and civil rights").

[331] Amar, *supra* note 35, at 749.

[332] *Id.*

[333] Fred O. Smith Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1949 (2012); *see also, e.g.*, David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 736 (2020) ("A broad consensus seems to be that at minimum, the will of the majority must be reflected in the selection of legislators and government representatives."). It's ironic, of course, that republicanism was originally understood to mean popular sovereignty when so many of the people—women, slaves, the poor—weren't enfranchised and so weren't truly sovereign at the Framing.

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when this tenet is threatened, it's clear from the Clause's text that Congress is empowered to act. Congress is the legislative arm of the government of the United States. Under the Clause, it's the United States that's the guarantor of republicanism in every state.[334]

Crucially, any congressional judgment that intervention is necessary to safeguard popular sovereignty can't be second-guessed by the courts. The Supreme Court hasn't said much about the Guarantee Clause. But the one holding it *has* reiterated for almost two centuries is that issues arising under the Clause are nonjusticiable, incapable of judicial resolution. This is the case when a plaintiff invokes the Clause to argue that some state law is unrepublican and thus unconstitutional.[335] More relevant here, it's also the case when Congress legislates pursuant to the Clause: No litigant can allege that the statute exceeds Congress's authority to guarantee a republican form of government. As the Court put it in a foundational 1849 decision, "Congress must necessarily decide . . . whether [a state government] is republican or not."[336] "And its decision is binding, on every other department of the government, and could not be questioned in a judicial tribunal."[337] Or as the Court affirmed in an 1871 case, "[t]he action of Congress upon the subject cannot be inquired into."[338] "[T]he judicial is bound to follow the action of the political department of the government, and is concluded by it."[339]

This 1871 case involved the Reconstruction Acts, which, as described earlier, barred the former Confederate states from disenfranchising citizens on the basis of race and prescribed detailed rules for these states' elections for their constitutional conventions.[340] Notably, the Reconstruction Acts *weren't* passed under the Fourteenth or Fifteenth Amendments (which hadn't yet been ratified). Instead, Congress enacted these statutes pursuant to its Guarantee Clause power. The first of the laws explained that "peace and good order" had to be congressionally enforced until "republican State government can be legally established."[341] The Court also recognized that Congress's "authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government."[342] Consequently, the Guarantee Clause isn't some obsolete constitutional oddity, a "sleeping giant" (in Senator Charles Sumner's words[343])

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[334] For a different view, arguing that Congress can act under the Guarantee Clause only when it has been asked to do so by a state, see generally Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602 (2018).

[335] *See, e.g.*, Pac. States Tel. & Telegraph Co. v. Oregon, 223 U.S. 118 (1912) (involving a Guarantee Clause challenge to Oregon's use of direct democracy); Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (involving a Guarantee Clause challenge to actions taken by an allegedly illegitimate Rhode Island government).

[336] *Luther*, 48 U.S. at 42.

[337] *Id.*

[338] White v. Hart, 80 U.S. (13 Wall.) 646, 649 (1871).

[339] *Id.*; *see also, e.g.*, Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (noting that it's Congress "upon whom the Constitution has conferred the exclusive authority to uphold the guaranty of a republican form of government"). *But see* New York v. United States, 505 U.S. 144, 186 (1992) (hinting that the Guarantee Clause *could* "provide[] a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute").

[340] *See supra* notes 183-190 and accompanying text.

[341] An Act to Provide for the More Efficient Government of the Rebel States, § 1, 14 Stat. 428, 428 (1867).

[342] Texas v. White, 74 U.S. (7 Wall.) 700, 727 (1869).

[343] WIECEK, *supra* note 139, at 214.

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that has never awoken. To the contrary, in one of the most fateful periods in American history, Congress based several of its most controversial actions squarely on the Clause. At least during Reconstruction, as Sumner observed, the Clause "c[a]m[e] forward with a giant's power."[344]

Revisiting the dimensions of congressional electoral authority, the Guarantee Clause occupies the rest of the horizontal plane: the area corresponding to state and local elections. However, the boundaries between the Guarantee Clause's territory (nonfederal elections) and the zones of the Elections Clause (congressional elections) and the Electors Clause (presidential elections) aren't entirely fixed. While the best reading of the Guarantee Clause may be that it empowers Congress only with respect to nonfederal elections, if Congress nevertheless sought to regulate federal elections on this ground, its decision to do so would be judicially unreviewable. On the vertical axis of rationales for congressional electoral activity, the Guarantee Clause supplies one more parallel justification for legislation: the need to prevent or remedy states' lapses into unrepublicanism. Again, Congress can generally cite this reason *instead of*, but not *in addition to*, the Elections Clause or the Electors Clause when it tackles electoral matters.

D. *The Fourteenth Amendment*

I turn next to a series of constitutional amendments (starting with the Fourteenth) that bear some resemblance to the Guarantee Clause. Like the Clause, these amendments authorize Congress to avoid or cure certain evils. These evils, though, are distinct from the unrepublican rule that's the Clause's concern. Whether congressional action is consistent with the amendments is also a justiciable issue. And the amendments aren't limited to certain types of elections but rather enable Congress to reach federal, state, and local races alike.

The provisions of the Fourteenth Amendment that are relevant here are the Equal Protection Clause of Section 1 and the Enforcement Clause of Section 5. The former prohibits each state from "deny[ing] to any person within its jurisdiction the equal protection of the laws,"[345] while the latter states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[346] Historically, the courts were highly deferential toward Congress's exercises of its Fourteenth Amendment enforcement authority. As long as the courts could "perceive a basis upon which the Congress might resolve the conflict as it did," they would uphold the challenged legislation.[347] In a 1997 case,

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[344] *Id.*; *see also, e.g.*, Louk, *supra* note 333, at 705-22 (describing the use of the Guarantee Clause during Reconstruction). Outside of Reconstruction, Congress also frequently invoked the Clause in the context of the admission of new states. *See generally* Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578 (1949).

[345] U.S. CONST. amend. XIV, § 1.

[346] *Id.*, § 2.

[347] Katzenbach v. Morgan, 384 U.S. 641, 653 (1966); *see also, e.g.*, Ex parte Virginia, 100 U.S. (10 Otto) 339, 345-46 (1879) ("Whatever legislation is appropriate . . . is brought within the domain of congressional power.").

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however, the Supreme Court changed the operative standard to require "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[348] So there must now be a closer fit between the policy chosen by Congress and the underlying constitutional harm.

It's well-understood that "congruence and proportionality" is a more demanding test—one more likely to result in the invalidation of a congressional statute—than rational basis review.[349] But scholars haven't fully grasped just how many "injur[ies] to be prevented or remedied" there are in the electoral context.[350] In fact, much of election law revolves around causes of action that stem from different kinds of violations of the Equal Protection Clause. All these transgressions are evils that Congress can try to avoid or cure through its Fourteenth Amendment enforcement power.

Consider burdens on the right to vote ranging from mere inconvenience to outright disenfranchisement. It's under the Equal Protection Clause that the courts have established a system of sliding-scale scrutiny that adjusts the rigor of judicial review based on the severity of the burden.[351] Or take the principle, announced in *Bush v. Gore*, that ballots can't be treated differently in one part of a state than in another. This is also an equal protection doctrine.[352] The Equal Protection Clause is the source, too, of the theories of racial vote dilution[353] (intentionally reducing the electoral influence of minority voters) and racial gerrymandering[354] (drawing districts with a predominant racial motive). While it has now been deemed nonjusticiable,[355] extreme partisan gerrymandering is unconstitutional, as well, because it offends the equal protection norm of treating each party's voters symmetrically.[356]

That the congruence-and-proportionality standard is relatively more restrictive, then, matters less in the electoral domain than in most other areas. There

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[348] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[349] This is precisely why many scholars have criticized the congruence-and-proportionality standard. *See generally, e.g.*, Michael W. McConnell, *Institutions and Interpretation: A Critique of City of* Boerne v. Flores, 111 HARV. L. REV. 153 (1997); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

[350] *Cf.* Karlan & Ortiz, *supra* note 21, at 19 (considering "how far may Congress legislate to 'enforce' the equal protection principle announced in *Bush v. Gore*," but not addressing any other equal protection doctrines); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 759 (2006) (same).

[351] *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (citing "the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"). Sliding-scale scrutiny also applies to burdens on candidates' access to the ballot, *see, e.g., id.*, and on parties' ability to manage their internal affairs, *see, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 451-52 (2008).

[352] *See* Bush v. Gore, 531 U.S. 98, 104 (2000) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.").

[353] *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 617 (1983) ("[M]ultimember districts violate the Fourteenth Amendment . . . by [intentionally] minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." (internal quotation marks omitted)).

[354] *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 649 (1993) ("[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation . . . rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race . . . .").

[355] *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[356] *See* Davis v. Bandemer, 478 U.S. 109, 143 (1986) (plurality opinion) ("[W]e hold that political gerrymandering cases are properly justiciable under the Equal Protection Clause.").

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are simply so many potential violations of the Equal Protection Clause—spanning franchise burdens, unequal ballot treatment, racial vote dilution, racial gerrymandering, partisan gerrymandering, and more—that Congress can seek to prevent or remedy. Put another way, the sphere of arguably unconstitutional conduct is unusually large in the electoral realm. So even if the congruence-and-proportionality standard doesn't allow Congress to venture far beyond this sphere, what Congress *can* lawfully regulate is still quite a lot.

The saga of the literacy test nicely illustrates the point. The Supreme Court first held that requirements that voters be literate don't necessarily contravene the Equal Protection Clause since they sometimes have legitimate, non-invidious purposes.[357] Congress then passed a law banning any citizen who has completed the sixth grade from being denied the franchise due to an inability to read or write.[358] The Court subsequently *sustained* this provision, though it diverged from the Court's earlier decision, because there was a sufficient link between Congress's chosen policy and an underlying constitutional problem. Congress knew that "prejudice played a prominent role in the enactment of [literacy] requirement[s]."[359] The tests also weren't very effective in "furthering the goal of an intelligent exercise of the franchise."[360] So Congress could validly conclude that the tests "constituted an invidious discrimination in violation of the Equal Protection Clause."[361]

Updating the matrix of congressional electoral authority, the Fourteenth Amendment doesn't fill any more space in the horizontal plane. That is, it doesn't empower Congress with respect to any particular category of electoral topics or levels. But on the vertical axis of rationales for congressional electoral activity, the Fourteenth Amendment does provide the first justification that can supplement, not just parallel, the reasons I have covered so far. When Congress legislates to avoid or cure breaches of the Equal Protection Clause, it can do so while *also* invoking its authority under the Elections Clause, the Electors Clause, or the Guarantee Clause. The same statute can be grounded in *both* Congress's power over a certain class of elections *and* its ability to enforce the Fourteenth Amendment.

E. *The Voting Amendments*

The next group of relevant amendments (the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth) can be considered as a group thanks to their shared structure. They all stipulate, using nearly identical language, that the right of

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[357] *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[358] *See* Voting Rights Act of 1965, Pub. L. 89-110, § 4(e), 79 Stat. 437, 439 (1965).

[359] Katzenbach v. Morgan, 384 U.S. 641, 655 (1966).

[360] *Id.*

[361] *Id.* at 656; *see also* Oregon v. Mitchell, 400 U.S. 112, 133 (1970) (opinion of Black, J.) (holding that, based on "evidence that literacy tests reduce voter participation in a discriminatory manner," "Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War amendments"). To be sure, *Morgan* and *Mitchell* significantly predated the Court's adoption of the congruence-and-proportionality standard. To date, that standard hasn't been applied by the Court in any case involving a congressional electoral regulation.

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citizens of the United States to vote shall not be denied or abridged on a certain basis. This forbidden basis is "race, color, or previous condition of servitude" in the Fifteenth Amendment,[362] "sex" in the Nineteenth Amendment,[363] "failure to pay any poll tax or other tax" in the Twenty-Fourth Amendment (for federal elections only),[364] and "age" in the Twenty-Sixth Amendment (for citizens eighteen or older).[365] All four amendments also describe Congress's enforcement authority in almost the same terms (which themselves are almost the same as the Fourteenth Amendment's Enforcement Clause). Under each provision, "Congress shall have power to enforce this article by appropriate legislation."[366]

The Supreme Court has only commented on Congress's enforcement authority under the Fifteenth Amendment. According to the Court, for a measure to be lawful, Congress must reasonably think the step will serve the goal of stopping racial discrimination in voting. "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," the Court held in an important 1966 case.[367] Notably, the Roberts Court implicitly affirmed this view in the 2013 case of *Shelby County v. Holder*,[368] which otherwise marked the nadir of the Court's understanding of Congress's Fifteenth Amendment enforcement power. Over and over, the Court called it "irrational" for Congress to subject certain states to a preclearance requirement before they could change their election laws, based on a formula that relied on data from the 1960s and 1970s.[369] Not once in *Shelby County* did the Court hint that the formula's flaw was its lack of congruence and proportionality with the underlying evil of racial discrimination in voting.[370]

Presumably, highly deferential rational basis review would also apply to exercises of Congress's enforcement authority under the Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. It would certainly be odd if Congress had less power under these strikingly similar provisions than under the Fifteenth Amendment.[371] This is speculation, though, since the Court has never addressed Congress's ability to fight voting discrimination on the basis of sex, wealth, or age. Another note of caution is that the Court has sometimes suggested (albeit without

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[362] U.S. CONST. amend. XV, § 1.

[363] *Id.* amend. XIX, § 1.

[364] *Id.* amend. XXIV, § 1.

[365] *Id.* amend. XXVI, § 1.

[366] *Id.* amend. XV, § 2; *id.* amend. XIX, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

[367] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[368] 570 U.S. 529 (2013).

[369] *See, e.g.*, *id.* at 554 (noting "the irrationality of continued reliance on the § 4 coverage formula"); *id.* at 556 (deeming it "irrational for Congress to distinguish between States in such a fundamental way based on 40–year–old data").

[370] In dissent, Justice Ginsburg also observed that the majority "does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed 'rational means.'" *Id.* at 569 (Ginsburg, J., dissenting).

[371] *See, e.g.*, Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109, 119 (2013) ("[E]very one of these amendments has contained express language suggesting that Congress should have a considerable choice of means in discharging its powers . . . ."). *But see* Richard L. Hasen & Leah Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. 27, 65-68 (2020) (taking more seriously the possibility that the congruence-and-proportionality standard might apply to laws enacted under the Nineteenth Amendment).

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ever holding) that only *intentional* racial discrimination in voting violates the Fifteenth Amendment.[372] If this dismissal of disparate impact liability became law, it, too, would presumably extend to the Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. In that case, the standard of review might remain highly deferential, but the sphere of arguably unconstitutional conduct that Congress could target would contract. Congress would then need a rational basis for thinking that a given policy would reduce *purposeful* voting discrimination on account of race, sex, wealth, or age.

But this rational basis might be available surprisingly often. In one of the cases where the Court intimated that the Fifteenth Amendment only bars intentional racial discrimination in voting, the Court evaluated a provision that prevented states from revising their election laws in ways that diminished the influence of minority voters.[373] Although this was a disparate impact provision, the Court upheld it, reasoning that it was "an appropriate method of promoting the purposes of the Fifteenth Amendment."[374] "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact."[375] Under this logic, Congress could also attack state electoral practices that differentially burden women compared to men, the poor compared to the rich, and the young compared to the old. Again, Congress could reasonably believe that these practices' disparate impacts indicate the presence of at least some deliberate voting discrimination, which Congress is unquestionably authorized to thwart.[376]

Like the Fourteenth Amendment, the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments don't claim any more ground in the horizontal plane of congressional electoral power. They don't empower Congress to legislate about specific electoral topics or levels. But also like the Fourteenth Amendment, the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments add to the vertical axis of rationales for congressional electoral activity. They supply another justification (actually, four more justifications) for Congress to regulate elections: that Congress is trying to stop voting discrimination on the basis of race, sex, wealth, or age. These reasons can be cited alongside all the ones discussed already. So Congress can root its electoral interventions not just in the Elections Clause, the Electors Clause, or the Guarantee Clause, and not just in its effort to prevent or remedy equal protection violations, but also in its resolve to end discrimination in voting.

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[372] A plurality would have held that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation" in *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion). Subsequently, in *City of Rome v. United States*, 446 U.S. 156 (1980), the Court "assumed" (but didn't hold) that the Fifteenth Amendment "prohibits only intentional discrimination in voting," *id.* at 177.

[373] *See id.* at 172-73.

[374] *Id.* at 177.

[375] *Id.*

[376] *See, e.g.*, Hasen & Litman, *supra* note 371, at 55-63 (discussing an array of measures that Congress could enact under the Nineteenth Amendment to reduce differential voting burdens on women, such as a ban on photo ID requirements for voting).

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F. *Other Provisions*

This leaves a number of provisions—the Commerce Clause, the Spending Clause, and the Necessary and Proper Clause—that aren't primarily about elections but still have significant applications in the electoral context. Beginning with the Commerce Clause, it has been construed to authorize Congress to regulate activities that have "substantial effects" on interstate commerce.[377] In an earlier time, this formulation could have endowed Congress with essentially plenary power over elections. After all, elections, well, elect candidates to office, who then implement policies about taxation, health care, immigration, and a host of other issues. These policies plainly have substantial effects on the national economy.[378] But this line of argument is now foreclosed. In more recent cases, the Supreme Court has clarified that Congress can only address *commercial* activities under the Commerce Clause.[379] Many aspects of elections, however, are quintessentially noncommercial. In particular, casting a ballot isn't just a noneconomic act on its face; it's forbidden from being made an economic transaction by the federal ban on vote buying.[380]

Other parts of the electoral process, though, are commercial in nature and so regulable under the Commerce Clause. For example, jurisdictions purchase voting machines that voters then use to cast their ballots. These machines are conventional items of commerce that cross state lines and comprise a national market. So Congress can pass laws about them, say, requiring them to be accessible to disabled people or secure against hacking.[381] Similarly, campaign finance is, as its name confirms, financial. When donors make contributions to candidates, or people or organizations spend independently to express their own electoral views, they necessarily engage in economic transactions with substantial interstate effects. Congress can thus legislate about all money in politics, at all electoral levels, pursuant to its Commerce Clause authority.[382]

Speaking of money, the Spending Clause enables Congress to offer funds to the states with strings attached: conditions the states must satisfy to receive the federal dollars. These conditions can be any measures that aren't themselves unconstitutional—even measures that Congress wouldn't have the right to impose

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[377] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that activity can be "reached by Congress if it exerts a substantial economic effect on interstate commerce").

[378] *See, e.g.*, Coenen & Larson, *supra* note 313, at 879 (agreeing that, "[i]n an earlier era, proponents of [electoral] reform . . . would have raced to embrace the Commerce Clause").

[379] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 611 (2000) (holding that, for "federal regulation of intrastate activity" to be valid, "the activity in question" must be "some sort of economic endeavor").

[380] *See* 18 U.S.C. § 597 (2018) (criminalizing "mak[ing] an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate").

[381] *See, e.g.*, Stephanie Philips, *The Risks of Computerized Election Fraud: When Will Congress Rectify a 38-Year-Old Problem?*, 57 ALA. L. REV. 1123, 1159 (2006) (agreeing that, "even under the recent, restrictive interpretations of Congress's Commerce Clause power . . . Congress does have the authority to regulate voting systems sold to states").

[382] *See, e.g.*, Marlene Arnold Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 824 (1974) ("Should Congress decide to reform state campaign financing practice, the commerce clause is probably the safest grant of authority upon which to rely.").

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directly.[383] But the conditions must be related to the purpose of the funds; Congress can't require the states to do *X* to receive money earmarked for *Y*.[384] The overall terms of Congress's proposals to the states also can't be unduly coercive. The states, that is, must be genuinely free to turn down the federal dollars, along with the obligations that come with them.[385]

Under its Spending Clause power, then, Congress could affix all kinds of electoral conditions to funds offered to the states to administer their elections. These funds would have the aim of making elections freer and fairer—a better instrument for accurately registering the will of the people. So any requirement that also served this goal would be related to the funds' purpose. Moreover, it's unlikely that electoral legislation could run afoul of the prohibition on overly coercive federal programs. At present, the states manage to run their elections without any consistent federal subsidization. So if Congress did suddenly make federal money available, it would hardly be implausible for the states to say no, if they didn't like the attached strings. By rejecting the congressional proposal, the states would simply be opting to maintain the status quo.[386]

Lastly, the Necessary and Proper Clause allows Congress to adopt policies that aren't explicitly authorized by its enumerated powers but that advance these powers' ends. Congress's chosen measures must merely be "convenient" or "useful" or "conducive" to accomplishing goals recognized by other constitutional clauses.[387] "[T]he statute [need only] constitute[] a means that is rationally related to the implementation of a constitutionally enumerated power."[388] However, the steps taken by Congress can't "undermine the structure of government established by the Constitution" or amount to a new "great substantive and independent power."[389] If they do, no matter how necessary the congressional policies may be, they aren't *proper* ways of achieving constitutional objectives.

In the electoral domain, the Necessary and Proper Clause has often been invoked to justify congressional regulations of presidential elections, including the Enforcement Acts,[390] the VRA,[391] and campaign finance restrictions.[392] Recall that

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[383] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("[O]bjectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power . . . ." (internal citations and quotation marks omitted)).

[384] *See, e.g., id.* ("[C]onditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." (internal quotation marks omitted)).

[385] *See, e.g.*, Nat'l Fed. Indep. Business v. Sebelius (*NFIB*), 567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.) (invalidating terms for Medicaid expansion that allegedly amounted to "a gun to the head" of the states).

[386] *Cf., e.g., id.* (explaining that, under Congress's terms for Medicaid expansion, a declining state would "lose not merely a relatively small percentage of its existing Medicaid funding, but *all* of it" (internal quotation marks omitted)). Unsurprisingly, given how hard it is for electoral conditions attached to electoral funds to be unduly coercive, no litigant ever thought to challenge the money that HAVA made available to the states on this basis. *Cf., e.g.*, Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 350 (2008) (discussing how HAVA was passed, in part, pursuant to Congress's Spending Clause power).

[387] United States v. Comstock, 560 U.S. 126, 133-34 (2010) (internal quotation marks omitted).

[388] *Id.* at 134.

[389] *NFIB*, 567 U.S. at 559 (opinion of Roberts, C.J.) (internal quotation marks omitted).

[390] *See, e.g.*, Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses* 25.

[391] *See, e.g., id.* at 25 n.101.

[392] *See, e.g.*, Burroughs v. United States, 290 U.S. 534, 545-48 (1934).

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the only constitutional provision that mentions presidential elections, the Electors Clause, is textually quite meager.[393] The Necessary and Proper Clause has compensated for this sparse language in three different ways. Most obviously, congressional regulations of presidential elections are "convenient" or "useful" or "conducive" to the exercise of Congress's Electors Clause authority to set the time for choosing electors.[394] Second, congressional legislation about presidential elections is rationally related to Congress's expansive power over *congressional* elections. In particular, Congress's efforts to safeguard the integrity of congressional elections would be frustrated if fraudsters could claim they were only trying to subvert concurrently held presidential elections.[395] And third, the Supreme Court has held that Congress implicitly has the authority to "preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption."[396] Congressional rules for presidential elections further this unenumerated end, rendering them "a question primarily addressed to the judgment of Congress."[397]

In the matrix of congressional electoral power, the Commerce Clause and the Spending Clause function just like the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. They don't occupy any more of the horizontal plane since they don't empower Congress to regulate any particular electoral topics or levels. But they do add notches to the vertical axis since they provide further rationales for congressional electoral activity: namely, that Congress is legislating about economic aspects of elections that have substantial effects on interstate commerce, or that Congress is linking electoral conditions to electoral funds that it's offering to the states.

In contrast, the Necessary and Proper Clause doesn't have a distinct place of its own in either the horizontal or the vertical dimension. Instead, it operates as a sort of supplement for all the other provisions, expanding their coverage to include not just explicitly authorized means but also all other measures that relate to the provisions' purposes. This enhancement applies in the horizontal plane to the Elections Clause, the Electors Clause, and the Guarantee Clause, allowing each provision to spread beyond its apparent boundaries. The boost applies to the clauses that comprise the vertical axis, too, widening and deepening each justification for congressional electoral regulation.

* * * *

I realize that this discussion of planes, axes, and other spatial concepts may be confusing. For visually oriented readers, I therefore present the below figure, which shows graphically how all the pieces of Congress's electoral authority fit

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[393] *See supra* Part III.B.

[394] United States v. Comstock, 560 U.S. 126, 133-34 (2010) (internal quotation marks omitted).

[395] *See, e.g.*, Primus & Kistler, *supra* note 390, at 25 n.101 ("[S]ome legislation regulating presidential elections can be warranted as necessary and proper for carrying into execution the powers that Congress has over congressional elections under the Elections Clause.").

[396] *Burroughs*, 290 U.S. at 545.

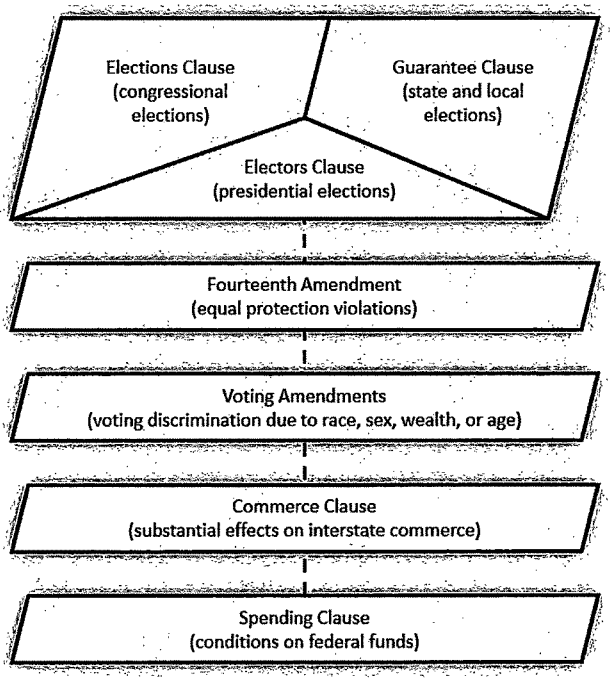
[397] *Id.* at 547.

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together. The horizontal plane on top represents the universe of American elections and indicates which provision enables Congress to regulate which category of elections. Again, this universe is divided among the Elections Clause for congressional elections, the Electors Clause for presidential elections, and the Guarantee Clause for state and local elections. All the levels below that top plane then correspond to complementary legal reasons—capable of being asserted concurrently—for congressional electoral activity. Once more, these are preventing or remedying equal protection violations under the Fourteenth Amendment; fighting voting discrimination due to race, sex, wealth, and age under the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments; addressing economic aspects of elections with substantial effects on interstate commerce under the Commerce Clause; and tying electoral conditions to electoral funds under the Spending Clause. Finally, all the borders in the diagram are somewhat indistinct because of the Necessary and Proper Clause. As just explained, it extends the reach of each enumerated power to additional means related to the power's function. Like cement, the Clause thus fills the spaces between the other provisions, bonding them into an even firmer foundation for congressional action.

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FIGURE 1: THE DIMENSIONS OF CONGRESSIONAL ELECTORAL AUTHORITY



IV. POLICY EXAMPLES

At this point, having explored the theory, the history, and the doctrine of congressional electoral regulation, we can revisit the For the People Act: the far-reaching electoral reform bill passed in 2019 by the House of Representatives.[398] The Act included so many provisions that a blow-by-blow account of each element's constitutionality would be impractical here.[399] In my view, the Act also didn't push the limits of Congress's electoral authority, making it less interesting whether each of its components was actually lawful. So instead, in this Part, I consider a series of proposals that are partly derived from the Act but that exceed its ambition: (1) enfranchising ex-felons in federal and state elections; (2) requiring

[398] *See supra* notes 1-6 and accompanying text.

[399] For a diligent effort to analyze the Act in its entirety, see *Annotated Guide to H.R. 1, the For the People Act of 2019*, BRENNAN CTR. FOR JUSTICE (Apr. 13, 2020).

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independent redistricting commissions for congressional and state legislative districts; (3) regulating money in politics at the state level; and (4) requiring the states to use the same proportional system to allocate their presidential electors.[400] I argue that, under the law as it currently stands, Congress has the power to enact all these policies. In fact, consistent with the previous section's emphasis on the redundancy of Congress's electoral tools,[401] Congress could assert multiple, mutually reinforcing justifications for each regulation.

A. *Ex-Felon Enfranchisement*

The For the People Act stated that a citizen's right to vote in federal elections "shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election."[402] The Act would thus have barred the states from disenfranchising ex-felons—individuals who have completed their prison sentences—in federal elections. Suppose the Act extended this prohibition to state elections, too. Would Congress be authorized to adopt these measures? Or to broaden the question somewhat, state exclusions of ex-felons from the electorate are classic voting qualifications. So would Congress have the power to revise the qualifications that certain states have chosen, for voting in both federal and state elections?

It should be clear from the earlier discussion that the answer is yes. At the federal level, *Mitchell* involved a pair of congressionally mandated changes to certain states' voting qualifications: setting the minimum voting age at eighteen for congressional and presidential elections, and eliminating residency requirements for voting for President.[403] Again, both these changes were upheld by the Supreme Court. According to Justice Black's controlling opinion, Congress has the authority under the Elections Clause to amend the states' voting qualifications for congressional elections.[404] And pursuant to the Electors Clause (supplemented by the Necessary and Proper Clause), Congress has the same power with respect to voting in presidential elections.[405] These rulings logically extend to the enfranchisement of ex-felons in federal elections. This expansion of the electorate would be materially identical to the enfranchisement of individuals aged eighteen to twenty-one, or of people who moved to a state less than a month before an election. If Congress could enable young adults and recent movers to vote, it could also secure the federal franchise for ex-felons.

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[400] These proposals are meant to be controversial in their reach (especially to state elections) and representative of ideas across the whole field of election law.

[401] *See supra* Part III.

[402] For the People Act of 2019, H.R. 1, 116th Cong. § 1402 (2019).

[403] *See* Oregon v. Mitchell, 400 U.S. 112, 117 (1970) (opinion of Black, J.) (summarizing these and other provisions). As noted above, though, *Mitchell* is a controversial decision disfavored by the current Court. *See supra* note 299.

[404] *See id.* at 119-24.

[405] *See id.* at 134.

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At the state level, likewise, Congress could reasonably conclude that the disenfranchisement of ex-felons is an unrepublican practice that requires congressional reversal. Congress made exactly this kind of determination in the Reconstruction Acts when it used its Guarantee Clause authority to stop the ex-Confederate states from disenfranchising their African American citizens in state elections.[406] Because of the black citizens' exclusion, the people—all the people—were not truly sovereign in the ex-Confederate states, meaning that the core value of the Guarantee Clause was undermined. So, too, with the rejection of ex-felons from the electorate: Popular sovereignty can't be realized when a substantial slice of the citizenry is unable to participate in the political process. Or at least Congress could rationally make that judgment, which would then (like the Reconstruction Acts' enfranchisement of black citizens) be judicially unreviewable.[407]

With respect to any voting qualification *other* than the disenfranchisement of ex-felons, Congress's power to annul the restriction would be bolstered by the Fourteenth Amendment. As noted above, one of the many equal protection doctrines pertaining to election law creates a system of sliding-scale scrutiny for burdens on voting.[408] State voting qualifications often levy substantial burdens on the franchise without advancing legitimate state interests. So Congress could invoke its Fourteenth Amendment enforcement authority to attack these qualifications, arguing that its intervention is congruent and proportional to the restrictions' violations of the Equal Protection Clause. However, this approach is inapplicable to the disenfranchisement of ex-felons. In a 1974 case, the Supreme Court held that, because Section 2 of the Fourteenth Amendment bars any state's congressional representation from being reduced on the ground that the state has disenfranchised citizens "for participation in rebellion, *or other crime*," such disenfranchisement can't contravene the Equal Protection Clause of Section 1.[409] If the exclusion of ex-felons can't breach the Equal Protection Clause, then Congress also can't try to prevent or remedy this exclusion through its enforcement power. There simply isn't an underlying equal protection problem for Congress to avoid or cure.

But this unique textual limitation has no bearing on Congress's enforcement power under the *Fifteenth* Amendment. To exercise that power, Congress merely needs a rational basis to think that its chosen policy will fight racial discrimination in voting.[410] It would certainly be reasonable for Congress to believe that the enfranchisement of ex-felons would make American elections less racially discriminatory. In numerous states, ex-felons were disenfranchised in the late nineteenth and early twentieth centuries as elements of larger efforts to

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[406] *See supra* notes 183-185 and accompanying text.

[407] *See supra* notes 335-339 and accompanying text.

[408] *See supra* note 351 and accompanying text.

[409] U.S. CONST. amend. XIV, § 2 (emphasis added); *see* Richardson v. Ramirez, 418 U.S. 24, 54 (1974) ("[T]he exclusion of felons from the vote has an affirmative sanction in s. 2 of the Fourteenth Amendment," which "distinguish[es] such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.").

[410] *See supra* notes 367-370 and accompanying text.

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intentionally prevent African Americans from voting.[411] Even in states without Jim Crow histories of voter suppression, the disenfranchisement of ex-felons disproportionately excludes minority members from the electorate.[412] So the rational basis for the congressional enfranchisement of ex-felons is either obvious (that these individuals were barred from voting for invidious reasons) or the same as in prior cases (that the disparate impact of ex-felons' disenfranchisement suggests a racially discriminatory motive).[413] Either way, the predicate for the use of Congress's Fifteenth Amendment enforcement authority is satisfied.

Lastly, to the extent there are holes in these arguments under other constitutional provisions, the Necessary and Proper Clause helps to fill them. For instance, say that voting qualifications aren't part of the "Manner" of congressional elections that Congress is entitled to regulate under the Elections Clause (a view probably held by the current Court[414]). The enfranchisement of ex-felons could still be rationally related to the Elections Clause's purpose: uniformly administering congressional elections in the ways specified by Congress. Or assume (also plausibly for the current Court[415]) that the disparate impact of ex-felons' exclusion isn't highly probative of racially discriminatory intent. Again, including these individuals in the electorate might still be "convenient" or "useful" or "conducive" to achieving the Fifteenth Amendment's aspiration of elections untainted by racial prejudice.[416]

B. *Redistricting Commissions*

Turning from the franchise itself to the districts in which people vote, the For the People Act would have required the states to redraw their congressional districts using independent commissions. These commissions would have been comprised of fifteen members (five Democrats, five Republicans, and five independents) selected through a complex process.[417] The commissions would then have designed districts based on the criteria of equal population, compliance with the VRA, further protections for minority voting rights, respect for communities of interest, and partisan fairness.[418] Imagine that these provisions applied to state legislative districts, too. Would Congress have the power to enact them?

This is an easy call at the federal level. Congressional redistricting is in the heartland of Congress's Elections Clause authority—a subject about which Congress has legislated many times before. Just as Congress has previously

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[411] *See, e.g.*, George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 101, 104-09 (2005).

[412] *See, e.g.*, *State-by-State Data*, SENTENCING PROJECT, https://www.sentencingproject.org/the-facts/#map (last visited Aug. 1, 2020) (showing the black-white and Hispanic-white disparities in incarceration in each state).

[413] *See supra* notes 373-375 and accompanying text.

[414] *See supra* note 299 and accompanying text.

[415] *See, e.g.*, Dep't of Homeland Security v. Regents of Univ. of Cal., 140 S. Ct. 1891, 1916 (2020) (inferring no anti-Latino animus from the fact that Latinos "ma[d]e up an outsized share of recipients of [a] cross-cutting immigration relief program" rescinded by the Trump administration).

[416] United States v. Comstock, 560 U.S. 126, 133-34 (2010) (internal quotation marks omitted).

[417] *See* For the People Act of 2019, H.R. 1, 116th Cong. § 2411 (2019).

[418] *See* H.R. 1 § 2413.

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required congressional districts to elect a single member and to be contiguous, equipopulous, and compact,[419] it could specify additional criteria for these districts and insist they be crafted by commissions instead of politicians. The only twist is that, as drafted, the For the People Act would have compelled the states to create commissions themselves (rather than having the federal government establish them for unwilling states).[420] This could be seen as commandeering the states, which is generally a constitutional problem—but which *isn't* proscribed when Congress acts pursuant to the Elections Clause. As observed earlier, Congress *can* dictate "the manner in which a State is to fulfill its pre-existing constitutional obligations" to administer federal elections.[421]

At the state level, the Guarantee Clause is the natural basis for congressionally mandated redistricting commissions. When politicians are free to carve their own districts, using the criteria of their choice, unrepublican abuses often ensue. Politicians insulate themselves from competition, gerrymander against the opposing party, dilute the votes of racial minorities, and so on. Independent commissions following fixed redistricting criteria help to prevent these evils from arising. They ensure that redistricting is impartial instead of self-interested, that its parameters are transparent rather than opaque—that the sovereignty of the people isn't subverted by cleverly drawn districts.[422] Nor would it be unprecedented for Congress to regulate nonfederal redistricting under the Guarantee Clause. As pointed out above, in the Reconstruction Acts, Congress apportioned delegates to the ex-Confederate states' constitutional conventions based on the one-person, one-vote rule.[423] Congress thus avoided the representational distortion caused by malapportionment: a skew very much like that caused by gerrymandering.

On the topic of gerrymandering, its deterrence is another justification for congressionally mandated redistricting commissions, at both the federal and state levels, under the Fourteenth Amendment. In a recent case, the Supreme Court held that partisan gerrymandering is nonjusticiable.[424] But even if the practice can't be policed by the federal courts, the Court confirmed that "unconstitutional partisan gerrymandering" does exist—that district maps can be so tilted against a targeted party as to infringe the Equal Protection Clause.[425] This constitutional offense, like all equal protection violations, is one that Congress can try to prevent or remedy

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[419] *See supra* Part II.A (discussing the Apportionment Act of 1842); *see also* An Act for the Apportionment of Representatives to Congress Among the Several States According to the Ninth Census, § 2, 17 Stat. 28, 28 (1872) (imposing an equal population requirement for congressional districts for the first time); An Act Making an Apportionment of Representatives in Congress Among the Several States Under the Twelfth Census, § 3, 31 Stat. 733, 734 (1901) (same for a compactness requirement).

[420] *See* H.R. 1 § 2411(a)(1) (stating that a particular state agency "*shall* establish an independent redistricting commission for the State" (emphasis added)).

[421] Branch v. Smith, 538 U.S. 254, 280 (2003) (plurality opinion); *see also, e.g.*, Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 782 (2016) ("Congress may enact election legislation that forces a state to take action it might not otherwise take, without violating the anticommandeering doctrine.").

[422] For a longer version of this normative argument for commissions, see Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. CHI. LEGAL. F. 477, 487-91.

[423] *See supra* note 187 and accompanying text.

[424] *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[425] *Id.* at 2504; *see also, e.g.*, *id.* at 2512 (Kagan, J., dissenting) (noting that "[t]he majority disputes none" of the ways in which "gerrymanders undermine democracy" and the Constitution).

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through its Fourteenth Amendment enforcement power. And independent commissions following fixed redistricting criteria indeed make gerrymandering less likely. They replace self-interested politicians with mapmakers more apt to pursue the public good. They also exclude partisan advantage as an aim, or even, like the For the People Act, affirmatively require that district plans not "unduly favor or disfavor any political party."[426] Congressionally mandated redistricting commissions are thus a congruent and proportional response to an activity, gerrymandering, that can be unconstitutional even if it can't be judicially curbed.

Analogous reasoning applies to Congress's enforcement power under the Fifteenth Amendment. Left to their own devices, politicians commonly dilute the influence of racial groups by cracking or packing their members. But commissions like those prescribed by the For the People Act transfer redistricting authority to neutral mapmakers less inclined to engage in racial vote dilution. These commissions are also directed "not [to] dilute or diminish [minority members'] ability to elect candidates of choice."[427] The commissions are therefore a rational way for Congress to combat racial discrimination in voting. And again, this (and each other) argument for the commissions' validity is reinforced by the Necessary and Proper Clause. At the very least, the commissions are conducive to the achievement of goals recognized by other constitutional provisions: uniformly administered federal elections (the Elections Clause), republican state elections (the Guarantee Clause), elections without partisan gerrymandering (the Fourteenth Amendment), and elections without racial vote dilution (the Fifteenth Amendment).[428]

C. State Campaign Finance Regulation

Next, the For the People Act included several new regulations of federal campaign finance. It would have strengthened disclosure requirements,[429] instituted a system of public financing for congressional elections,[430] and restructured the Federal Election Commission, the agency responsible for enforcing these rules.[431] No one doubts Congress's power to legislate about federal campaign finance (even though this legislation's compliance with the First Amendment is often controversial). But what if Congress sought to regulate money in politics at the *state* level? That is, what if Congress replaced the hodgepodge of existing state rules with a single national regime of disclosure requirements, contribution limits, and public financing?[432] Would this be a constitutionally authorized intervention?

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[426] For the People Act of 2019, H.R. 1, 116th Cong. § 2413(a)(2) (2019).

[427] H.R. 1 § 2413(a)(1)(C).

[428] Note that racial vote dilution is also unconstitutional under the Fourteenth Amendment, *see, e.g.*, White v. Regester, 412 U.S. 755, 765-67 (1973), and that its illegality under the Fifteenth Amendment hasn't been explicitly confirmed, *see, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 159 (1993).

[429] *See* H.R. 1 §§ 4001-4801.

[430] *See* H.R. 1 §§ 5101-5501.

[431] *See* H.R. 1 §§ 6001-6401.

[432] Note that these potential policies don't include campaign *expenditure* limits, which so clearly violate the First Amendment (as currently construed) that it's irrelevant that Congress may have the authority to enact them.

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Since it would be an intervention aimed at state elections, the Guarantee Clause is the logical place to start. Congress could reasonably think that, left unchecked, money in state politics threatens republican rule. It breeds corruption, it distorts election outcomes, and it induces officeholders to do the bidding of their funders (not their voters). Congress could also rationally believe that its policies would advance the Guarantee Clause's fundamental value of popular sovereignty. When donations to candidates are disclosed and restricted, and when candidates don't even need to solicit private contributions thanks to the availability of public financing, candidates have less incentive to prioritize their funders' interests over those of their constituents.[433] In any event, any congressional determination to this effect would be judicially unreviewable. No court could conclude, contrary to Congress, that unregulated campaign finance doesn't imperil republicanism or that limits on electoral funds don't vindicate this principle.

Even given its constriction over the last generation, the Commerce Clause would further empower Congress to legislate about state campaign finance. As explained earlier, contributions to candidates and independent expenditures about elections are indisputably commercial transactions.[434] They inevitably involve the transfer of funds from one party to another. When aggregated, money in politics also plainly has substantial effects on interstate commerce. Billions of dollars are raised and spent in every American election.[435] These sums often flow into a given race from out of state, and then stream back out into the accounts of consultants, ad makers, and other nonresident campaign professionals.[436] State campaign finance is therefore at the center of Congress's Commerce Clause authority. It's an inherently economic activity that typically occurs at a national level.

Depending on how the legislation was structured, the Spending Clause could provide another basis for Congress to regulate state campaign finance. In particular, suppose that Congress offered the money for public financing not directly to candidates but instead to the states, which could then distribute the funds in a number of ways. In that case, Congress could attach conditions to the money like the imposition of disclosure requirements and contribution limits. These conditions would be lawful since they would serve the same purpose as the funds themselves, namely, a less corrupt government that better reflects the will of the people. And once more, the Necessary and Proper Clause would augment both this and each other rationale for the congressional regulation of state campaign finance. Congress's new rules would only need a rational link to the other constitutional

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[433] In this vein, I have previously argued that unchecked money in politics can cause a misalignment between voters' preferences and governmental outputs, and that campaign finance regulations can reduce this noncongruence. *See generally* Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425 (2015).

[434] *See supra* note 382 and accompanying text.

[435] *See, e.g.*, Niv M. Sultan, *Election 2016: Trump's Free Media Helped Keep Cost Down, but Fewer Donors Provided More of the Cash*, OPENSECRETS.ORG (Apr. 13, 2017), https://www.opensecrets.org/news/2017/04/election-2016-trump-fewer-donors-provided-more-of-the-cash/ (reporting a total cost of $6.5 billion for the 2016 federal election).

[436] *See generally, e.g.*, David Fontana, *The Geography of Campaign Finance Law*, 90 S. CAL. L. REV. 1247 (2017) (discussing the interstate flows that characterize modern campaign finance).

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provisions' objectives of republican rule, national control of the national economy, and governmental outlays that mirror congressional priorities.

D. *Proportional Allocation of Electors*

Finally, the For the People Act contained a grab bag of provisions about presidential elections. The Act would have strengthened disclosure requirements for presidential inaugural committees,[437] revised the existing system of public financing for presidential elections,[438] and instituted various ethics reforms for the President and other executive branch officials.[439] However, the Act didn't address the actual mechanisms by which the states allocate their presidential electors: winner-take-all elections everywhere except Maine and Nebraska.[440] But imagine that Congress legislated about this topic, too. Specifically, say that Congress required the states to allocate their presidential electors *proportionately* based on the share of the statewide vote received by each candidate. Would Congress have the power to take this step?

The argument that it would begins with the Electors Clause (fortified by the Necessary and Proper Clause). Recall that these provisions have been construed to endow Congress with the same broad authority over presidential elections that it enjoys over congressional elections under the Elections Clause.[441] Under the Elections Clause, Congress can compel the states to elect their House members in certain ways (like through single-member districts) but not in others (like using the general ticket).[442] So if Congress's powers over presidential and congressional elections are in fact the same, then Congress can also dictate how the states allocate their presidential electors. The general ticket, in particular, is simply a congressional analogue of the winner-take-all system that almost all states have adopted for assigning their electors. If Congress can forbid the general ticket, then it can also ban winner-take-all presidential elections.

This claim, though, runs into a textual retort. Before it authorizes Congress to fix the time of choosing electors, Article II, Section 1 stipulates that each state may appoint its electors "in such Manner as the Legislature thereof may direct."[443] The discretion conferred to the states by this provision would allegedly be infringed by congressional legislation telling the states how to allocate their electors.[444] But this rejoinder has no more force than the view that Congress can't regulate the qualifications for voting in congressional elections because Article I, Section 2

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[437] *See* For the People Act of 2019, H.R. 1, 116th Cong. §§ 4701-02 (2019).

[438] *See* H.R. 1 §§ 5200-21.

[439] *See* H.R. 1 §§ 8001-81, 10001.

[440] *See, e.g.*, *Maine & Nebraska*, FAIRVOTE, https://www.fairvote.org/maine_nebraska (last visited Aug. 1, 2020) (positively describing the Maine and Nebraska systems of allocating electors by congressional district).

[441] *See supra* notes 313-323 and accompanying text.

[442] *See supra* Part II.A (discussing the 1842 Apportionment Act).

[443] U.S. CONST. art. II, § 1.

[444] *Cf.* McPherson v. Blacker, 146 U.S. 1, 25 (1892) (holding that "the [state] legislature possesses plenary authority to direct the manner of [presidential electors'] appointment," but not considering any potentially conflicting congressional regulation).

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empowers the states to set these qualifications in the first instance.[445] As discussed above, Justice Black's controlling opinion in *Mitchell* rejected this position, holding that while the states can adopt congressional voting qualifications, Congress can supersede these criteria if it wishes.[446] If Congress's presidential and congressional electoral powers are indeed identical, then the same result should follow here. The states should be able to select their preferred mechanisms for assigning their electors—but Congress should be free to displace these choices as it sees fit. Any other outcome would disrupt the parallelism between Congress's presidential and congressional electoral powers.

Both other bases for Congress to prohibit winner-take-all presidential elections involve their potential constitutional violations. First, several ongoing suits assert that these elections contravene the Equal Protection Clause by flouting the one-person, one-vote rule and diluting the influence of political minorities.[447] According to these suits, the ballots of voters who support candidates failing to earn a plurality of the vote end up carrying no weight, and groups of voters backing these less popular candidates are entirely unrepresented among states' electors.[448] These arguments may or may not ultimately succeed,[449] but they're at least colorable. Under its Fourteenth Amendment enforcement authority, Congress could therefore try to prevent and remedy these potential equal protection problems. Replacing winner-take-all presidential elections with the proportional allocation of electors would do just that. If electors were assigned proportionately, then each citizen's vote for President would count no more and no less than any other citizen's vote. The sway of each group of voters would also rise and fall in tandem with the group's size—not toggle between complete control and none whatsoever based on whether the group constituted a statewide plurality or not.

Second, winner-take-all presidential elections dilute the votes of *racial* minorities in certain states. Virtually everywhere in America, most minority members vote for Democratic presidential candidates.[450] But if these individuals happen to live in states where Republican candidates generally win a plurality of the vote, then their ballots earn them no representation among the states' electors. Instead, all these electors espouse candidates opposed by the minority community.[451] Under its Fifteenth Amendment enforcement power, then, Congress could rationally target this disparate racial impact, which could be indicative of intentional racial discrimination. Congress could also reasonably conclude that the

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[445] *See* U.S. CONST. art. I, § 2 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

[446] *See supra* notes 299-307 and accompanying text.

[447] *See, e.g.*, Lyman v. Baker, 954 F.3d 351, 357 (1st Cir. 2020) (discussing these and other claims).

[448] *See, e.g.*, *id.*

[449] They have failed to date. Of course, if the courts were to definitively hold that winner-take-all presidential elections don't violate the Equal Protection Clause under any circumstances, then there would be no underlying constitutional violations to which congressional action could be congruent and proportional.

[450] *See, e.g.*, Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 YALE L.J. (forthcoming 2021) (manuscript at 27-29) (calculating voters' preferences by racial group in the 2012 presidential election).

[451] *Cf.* Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 962-1010 (1996) (making the related argument that winner-take-all presidential elections dilute the votes of racial minorities in violation of the VRA).

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proportional allocation of electors would eliminate the racial vote dilution caused by winner-take-all presidential elections. If electors were assigned proportionately, then some electors—not none—would share the preferences of most minority voters, even in Republican-dominated states. Moreover, this fraction of politically aligned electors wouldn't be arbitrary; it would be precisely the share of the vote received by the minority community's favored candidate.

* * * *

I want to emphasize that all the analysis in this Part is based on current law—constitutional doctrine as it presently stands. Of course, current law is just that: current. It could change in the future. And it likely *will* change since the Roberts Court has a dimmer view of Congress's electoral authority than that manifested in the existing case law. My claim, then, isn't that this Court would necessarily uphold Congress's enfranchisement of ex-felons, institution of redistricting commissions, regulation of state campaign finance, or proscription of winner-take-all presidential elections. In fact, this Court would likely amend the applicable doctrine to cast doubt on the validity of these measures. My argument, rather, is that Congress has the power to enact these policies under the best reading of current law; and equally importantly that Congress *should* have this power because it's a more trustworthy electoral regulator than the states or the courts. Put differently, it's a happy coincidence that current law grants Congress the expansive authority over elections that, in my view, it ought to possess as a normative matter. This fortuity might fade in the future, especially as the Roberts Court decides more election law cases, but for now it still holds.

CONCLUSION

American democracy is at the brink of a profound—and profoundly positive—transformation. For the first time, a chamber of Congress has passed a bill that would address the most glaring flaws of the American electoral process: voter suppression, racial discrimination, gerrymandering, the undue influence of the wealthy, and so on. Depending on political developments, this bill could become law in the near future. In this Article, I have provided a multilayered foundation for such sweeping congressional legislation. Specifically, I have advanced four propositions: (1) that, from a theoretical perspective, Congress is less apt to threaten democratic values than are the states or the courts; (2) that, historically, most congressional electoral regulation has actually promoted democratic values; (3) that current law endows Congress with broad power over most electoral levels and topics; and (4) that, under this doctrine, Congress could venture even further than the For the People Act tries to go. Together, these points should hearten legislators when they next turn to the project of electoral reform. Not only is aggressive federal action permissible in the American political system—it may be the only way to save it.

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The Elections Clause Obligates Congress to Enact a Federal Plan to Secure U.S. Elections Against Foreign Cyberattacks

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THE ELECTIONS CLAUSE OBLIGATES CONGRESS TO ENACT A FEDERAL PLAN TO SECURE U.S. ELECTIONS AGAINST FOREIGN CYBERATTACKS

ABSTRACT

While foreign adversaries continue to launch cyberattacks aimed at disrupting elections in the United States, Congress has been reluctant to take action. After Russia interfered in the 2016 election, cybersecurity experts articulated clear measures that must be taken to secure U.S. election systems against foreign interference. Yet the federal government has failed to act. Congress's reticence is based on a misguided notion that greater federal involvement in the conduct of elections unconstitutionally infringes on states' rights. Both state election officials and certain congressional leaders operate under the assumption that federalism principles grant states primacy in conducting federal elections.

This Comment dispels the myth that Congress must defer to states to regulate federal elections. The text of the Elections Clause in Article I, Section 4 of the U.S. Constitution confers to Congress final authority in determining the "Times, Places and Manner" of federal elections. Therefore, the system of administering federal elections is based on decentralization rather than federalism.

The risk of foreign interference in U.S. elections was a precise reason the founders bestowed on Congress ultimate control over federal elections. States and municipalities lack the capacity to effectively combat foreign cyber invasion. This Comment makes the case that Congress has a responsibility to exercise its power under the Elections Clause to create a federal plan to secure voter registration databases and voting mechanisms against cyberattacks in order to protect the integrity of American democracy.

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INTRODUCTION

Does federalism prevent Congress from taking action to secure U.S. elections against foreign cyberattacks? Since its founding, the United States has grappled with how to balance the authority of state governments against that of the federal government in managing elections.[1] Article I, Section 4 of the U.S. Constitution, often called the "Elections Clause," grants each state the power to designate the "Times, Places and Manner" of federal elections, but it also states that "Congress *may at any time* by Law make or alter such Regulations."[2] Despite the seemingly sweeping power designated to Congress by the Elections Clause, scholars and the Supreme Court have traditionally viewed the regulation of elections and the voting process through the lens of state sovereignty.[3] Currently, U.S. election infrastructure consists of a heterogeneous array of voter registration procedures, registered voter databases, pollbooks, voting machines, and vote counting mechanisms that vary from state to state.[4] States are also inconsistent in the degree to which they delegate election management to counties and municipalities.[5]

Two hundred and thirty years ago in the Federalist Papers, Alexander Hamilton explained the rationale for embedding Congress's power to regulate elections into the Constitution.[6] Hamilton explained that leaving control of federal elections solely in the hands of state governments could create an existential risk to the nation.[7] With the Elections Clause, the drafters of the Constitution "reserved to the national authority a right to interpose, whenever *extraordinary circumstances* might render that interposition necessary to its safety."[8] Hamilton presciently recognized that the threat of foreign interference

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[1] Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 514 (2014) ("This struggle between the states and the national government with respect to the apportionment of powers over elections has waxed and waned throughout American history.").

[2] U.S. CONST. art. I, § 4 (emphasis added).

[3] *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 535 (2013) (stating the Voting Rights Act of 1965 which granted federal oversight over the voting laws of certain states was "a drastic departure from the principle of federalism"); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 753 (2016) (describing "election law federalism" as consisting of "multiple sovereigns" at the federal, state, and local government levels).

[4] Weinstein-Tull, *supra* note 3, at 754 (listing the differences in voting hours, funding schemes, absentee voting rules, and voter registration, or the "nuts and bolts of the election").

[5] *Id.*

[6] THE FEDERALIST NO. 59 (Alexander Hamilton).

[7] *Id.* ("With so effectual a weapon in [state legislators'] hands as the exclusive power of regulating elections for the national government, a combination of few such men, in a few of the most considerable States, where the temptation will always be the strongest, might accomplish the destruction of the union.").

[8] *Id.* (emphasis added).

in U.S. elections would be such an extraordinary circumstance.[9] He wrote in *Federalist 59* that "a firm union of this country, under an efficient government, will probably be an increasing object of jealousy to more than one nation of Europe; and that enterprises to subvert it will sometimes originate in the intrigues of foreign powers."[10]

In 2016, for the first time in the history of this nation, Hamilton's prediction of foreign interference came true when Russia attempted to interfere with and influence the U.S. presidential election.[11] Along with a campaign of misinformation, Russia directly attacked U.S. election systems.[12] Beginning as early as 2014, the Russian government directed extensive activity against U.S. election infrastructure at the state and local levels.[13] A 2018 report by the Senate Intelligence Committee revealed that Russian operatives attempted to hack into the election systems of each of the fifty states.[14] Russia attacked a point of vulnerability in U.S. election infrastructure—states' supposed primacy in conducting federal elections.[15] According to the Senate Intelligence Report, "[s]tate elections officials, who have primacy in running elections, were not sufficiently warned or prepared to handle an attack from a hostile nation-state actor."[16] Hamilton's interpretation of the Elections Clause suggests that Russian aggression is a clear reason for Congress to exert its constitutional authority to protect U.S. election infrastructure.[17]

Despite the obvious risk that our democracy may be undermined by foreign interference, some members of Congress have expressed reluctance to take a greater role in protecting federal elections.[18] State officials have also pushed back and even rejected federal help in securing their state and local election

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[9] *Id.*

[10] *Id.*

[11] NAT'L ACAD. OF SCIS., ENG'G & MED., SECURING THE VOTE: PROTECTING AMERICAN DEMOCRACY 13 (2018) [hereinafter NAS REPORT].

[12] *Id.* at 14.

[13] S. SELECT COMM. ON INTEL., S. REP. NO. 116-XX, REPORT ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION 3 (2019) (partially redacted) [hereinafter SENATE INTELLIGENCE REPORT].

[14] *Id.* at 12.

[15] *Id.* at 4 ("Russian efforts exploited the seams between federal authorities and capabilities, and protections for the states.").

[16] *Id.*

[17] *See infra* Part III.

[18] *See, e.g.*, Dean Dechiaro, *Election Officials Want Security Money, Flexible Standards*, ROLL CALL (Aug. 15, 2019), https://www.rollcall.com/news/congress/election-officials-want-security-money-flexible-standards (describing Senate Majority Leader Mitch McConnell's reluctance to bring House-passed election security bills up for votes in the Senate).

systems out of concern for maintaining state sovereignty.[19] Although Congress has previously overridden the right of states to conduct elections by passing the Voting Rights Act of 1965 (VRA) under the Fifteenth Amendment, it has yet to invoke its full Elections Clause powers.[20] With its holding in *Shelby County v. Holder* in 2013, the Supreme Court gutted the VRA, tilting the balance toward state autonomy in conducting elections.[21] Therefore, Congress can no longer rely solely on its power to enforce the Reconstruction Amendments to supersede state authority over elections.[22]

This Comment argues that the threat of foreign attacks against U.S. election infrastructure requires Congress to exercise its power under the Elections Clause to enact legislation establishing a uniform system for federal elections.[23] This Comment takes the position that foreign cyber intrusion is the type of existential threat for which the Elections Clause gives Congress the authority to act. Because the Constitution grants Congress the ultimate authority to regulate federal elections, the creation of a federal system for elections does not intrude on state sovereignty.

Part I describes the current cybersecurity threat to U.S. election infrastructure. A paucity of federal regulations poses significant risks in the face of such twenty-first century threats. This Part describes the scope of Russia's attacks on state and local election systems during the 2016 election and catalogs the recommendations of cybersecurity experts in how best to secure election infrastructure against future attacks. By detailing how state and local election officials responded ineffectively to cyberattacks in 2016 and leading up to the 2018 election, this Comment predicts that without a comprehensive federal plan, Russia and other foreign actors may successfully disrupt future federal elections.

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[19] *See infra* Part III.B.

[20] Voting Rights Act of 1965, 52 U.S.C. § 10301; *see* South Carolina v. Katzenbach, 303 U.S. 301, 308 (1966) (upholding the invalidation of state laws restricting voter access to the polls as an appropriate means for carrying out Congress's constitutional responsibilities under the Fifteenth Amendment).

[21] 570 U.S. 529, 557 (2013).

[22] The Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution are often called the "Reconstruction Amendments." The Thirteenth Amendment prohibited slavery. U.S. CONST. amend. XIII. The Fourteenth Amendment established birthright citizenship and created due process and equal protection rights against state action. U.S. CONST. amend. XIV. The Fifteenth Amendment guaranteed the right to vote regardless of color or condition of previous servitude. U.S. CONST. amend. XV.

[23] This Comment does not address one aspect of Russia's interference in the 2016 election—a social media campaign of disinformation aimed at influencing voters. For a summary of that issue and recommendations for confronting Russia's efforts, see Alex Stamos, Sergey Sanovich, Andrew Grotto & Allison Berke, *Combatting State-Sponsored Disinformation Campaigns from State-aligned Actors*, *in* SECURING AMERICAN ELECTIONS: PRESCRIPTIONS FOR ENHANCING THE INTEGRITY AND INDEPENDENCE OF THE 2020 U.S. PRESIDENTIAL ELECTION AND BEYOND 43 (Michael McFaul ed., 2019).

Next, Part II explores the history of the Supreme Court's interpretation of constitutional provisions that confer differential authority to states and the federal government to regulate federal elections. This Part describes how the Court's recognition of congressional authority to control federal elections has waxed and waned over the past 150 years. The Court has previously granted relatively broad powers to Congress to invalidate state legislation that infringed on citizens' right to vote under the enforcement provisions of the Fourteenth and Fifteenth Amendments.[24] The expansion of congressional authority under the Reconstruction Amendments was followed by a reversion to greater state sovereignty over elections with the Court's holding in *Shelby County*.[25] This Part explains that *Shelby County* represents a shift in the Court's view towards greater state autonomy in conducting elections. Therefore, Congress must find another source of authority to enact federal election legislation. Part II argues that such authority can be found in the Elections Clause, which provides an underrecognized source of power for Congress to regulate federal elections. Despite the Supreme Court's reluctance to infringe on states' purported sovereignty in conducting elections, the Elections Clause gives Congress the power to supersede any state action regarding elections. The text and purpose of the Elections Clause provide a system for U.S. elections based on decentralization rather than federalism.

Part III contends that, for three main reasons, Congress has an obligation to use its Election Clause authority to enact a federal election plan. First, foreign attacks on U.S. election infrastructure fall within the category of "extraordinary circumstances" as described by Hamilton, which provides the impetus for Congress to regulate the "Times, Places and Manner" of federal elections.[26] Cyber invasion by Russia and potentially other nation-states is a matter of national security that requires a federal response. Second, state and local officials lacked the capacity to manage the attacks during the 2016 U.S. election. Cyberattacks will continue to intensify without a coordinated national response, and states cannot be left to defend election infrastructure from such attacks. Third, insecure voting systems in several states violate the rights of voters under the Fourteenth Amendment by preventing voters from confidently knowing that their votes will count.[27] Therefore, despite the Supreme Court's holding in *Shelby County*, Congress also has a responsibility to step in where states have

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[24] U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

[25] *Shelby County*, 570 U.S. at 544; Charles & Fuentes-Rohwer, *supra* note 1, at 514–15, 518.

[26] U.S. CONST. Article I, § 4; THE FEDERALIST NO. 59 (Alexander Hamilton).

[27] *See* Curling v. Kemp, 334 F. Supp. 3d 1303, 1328 (N.D. Ga. 2018) ("A wound or reasonably threatened wound to the integrity of a state's election system carries grave consequences beyond the results in any specific election, as it pierces citizens' confidence in the electoral system and the value of voting.").

failed in securing their election systems pursuant to the Fourteenth Amendment's enforcement provision.

Lastly, Part IV provides a prescriptive solution and suggests legislation that Congress may enact. Namely, Congress should enact a federal election plan that provides for federal oversight of uniform procedures and standards that each state must follow while maintaining the decentralized conduct of elections.[28] The plan should include federally mandated standards for maintaining registration databases and electronic pollbooks. The federal plan should also require that all states use the same mechanism to generate voter-verified paper ballots, which are read by federally certified optical scanners. Finally, a federal election plan should mandate that all states submit to federal post-election audits.

I. THE CURRENT CYBERSECURITY THREAT TO U.S. ELECTION INFRASTRUCTURE

Securing U.S. elections and citizens' confidence in the election process is of paramount importance to maintain this nation's republican form of government. After the 2016 presidential election, evidence is clear that foreign powers are capable of interfering with U.S. election systems to, at minimum, erode voter confidence and at worst, suppress voter turnout, manipulate vote tallies, and sway election results.[29] Along with hacking into the Democratic National Committee's servers and launching a disinformation campaign on social media, Russia directly targeted U.S. election infrastructure and continues to do so.[30] Cybersecurity experts are fully aware of the vulnerability of U.S. election systems and have developed clear, consensus recommendations on how best to secure elections against cyberattacks.[31] The onus is now on the federal government to create a national plan that will implement these recommendations.

While decentralization provides some protection from a single crippling attack, it also creates a barrier to generating a cohesive and uniform response to foreign cyberattacks.[32] Although states and municipalities play a critical administrative role in conducting elections, they are generally ill-prepared to

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[28] *See* NAS REPORT, *supra* note 11, at 16 n.11 (noting decentralization of U.S. elections is one aspect of the current U.S. election system that protects against cyberattacks).

[29] Kim Zetter, *The Crisis of Election Security*, N.Y. TIMES MAG. (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/magazine/election-security-crisis-midterms.html.

[30] *See generally* SENATE INTELLIGENCE REPORT, *supra* note 13; NAS REPORT, *supra* note 11.

[31] *See infra* Part I.B.

[32] Lawrence Norden, *How to Secure Elections for 2020 and Beyond*, BRENNAN CTR. FOR JUST. (Oct. 23, 2019), https://www.brennancenter.org/our-work/research-reports/how-secure-elections-2020-and-beyond.

confront a threat from a foreign nation-state.[33] States and municipalities have demonstrated an inability to handle attacks from a foreign nation-state and have still not taken adequate steps to secure election infrastructure at the local level.[34] Therefore, a foreign threat to U.S. elections requires a uniform federal response, and Congress must pass legislation to preserve the integrity of federal elections.

A. Russian Interference in the 2016 U.S. Election

The 2016 U.S. election presented challenges that states, municipalities, and the nation had not previously faced. Russia made a concerted to effort to interfere with and disrupt many aspects of the election.[35] One line of attack was to launch cyberattacks against electronic components of state election systems.[36] Actors sponsored by the Russian government "obtained and maintained access to multiple U.S. state or local electoral boards."[37] Although the Senate Intelligence Committee found no evidence that vote tallies were changed or that voter registration records were altered, the committee's insight is limited in this regard because a full forensic analysis has not been done.[38] What is certain is that Russian government-affiliated actors "conducted an unprecedented level of activity" that targeted state election systems leading up to the 2016 election.[39]

Russian hacking into U.S. election infrastructure was a "watershed moment" in the history of U.S. elections.[40] Protecting election infrastructure became a national security issue when Russia targeted cyberattacks against U.S. voter databases and election systems.[41] The Intelligence Community first detected evidence of hacking into state election systems in the summer of 2016.[42] In July

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[33] *Id.* ("[I]t is not reasonable to expect each of these state and local election officials to independently defend against hostile nation-state actors.") (statement of Bob Brehm, co-executive director of the New York State Board of Elections) (internal quotation marks omitted); *see infra* Part III.B.

[34] *See infra* Part III.B.

[35] SENATE INTELLIGENCE REPORT, *supra* note 13, at 3.

[36] NAS REPORT, *supra* note 11, at 1.

[37] *Id.* (quoting OFF. OF THE DIR. OF NAT'L INTEL., ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS iii (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.)

[38] NAS REPORT, *supra* note 11, at 2 n.3. The NAS committee was not aware of any ongoing investigation into the possibility that vote tallies were changed. Deficiencies in "intelligence gathering, information sharing, and reporting" leave some uncertainty about the exact consequences of Russia's attacks. *Id.*; SENATE INTELLIGENCE REPORT, *supra* note 13, at 5; Zetter, *supra* note 29.

[39] SENATE INTELLIGENCE REPORT, *supra* note 13, at 5.

[40] NAS REPORT, *supra* note 11, at xii.

[41] *Id.* at 117.

[42] SENATE INTELLIGENCE REPORT, *supra* note 13, at 6. The U.S. Intelligence Community consists of sixteen agencies working under the coordination of the Office of the Director of National Intelligence. The sixteen agencies are: Central Intelligence Agency, Defense Intelligence Agency, Federal Bureau of Investigation, National Geospatial-Intelligence Agency, National Reconnaissance Office, National Security

2016, Illinois noticed unusual activity on the state's Board of Elections voter registry website.[43] An FBI investigation discovered that the activity resulted in data being exfiltrated from the voter registration database.[44] Ultimately, the FBI determined that Russian actors successfully penetrated Illinois's voter registration database, viewed multiple database tables, and eventually accessed up to 200,000 voter registration records.[45] Russian cyber actors were in a position to delete or change voter data, although there is no evidence that they did so.[46]

Further, evidence shows that Russian operatives targeted several small jurisdictions around the country. In the summer of 2016, General Staff of the Russian Army (GRU) officers sought "access to state and local election computer networks by exploiting known software vulnerabilities" on state and local government websites.[47] By mid-August 2016, federal cybersecurity personnel became confident that Russian cyber actors were probing the election infrastructures and voter registration databases of several states.[48] By late September of that year, U.S. intelligence agencies identified twenty-one states that were targeted by Russian government cyber actors.[49] Eventually, intelligence officials concluded that Russia had attempted to invade the election systems of all fifty states.[50]

In one line of attack, GRU officers sent spear-phishing emails to over 120 Florida county election officials.[51] The emails contained an attached Word document carrying a virus that would permit the GRU to access an infected computer.[52] The FBI believes, through this operation, the GRU was able to gain access to the network of at least one county government in Florida.[53] Eventually,

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Agency/Central Security Service, U.S. Department of Energy, U.S. Department of Homeland Security, U.S. Department of State, U.S. Department of the Treasury, Drug Enforcement Administration, U.S. Air Force, U.S. Army, U.S. Coast Guard, U.S. Marine Corps, and U.S. Navy. NAS REPORT, *supra* note 11, at 1 n.2. Russian activity began as early as 2014. SENATE INTELLIGENCE REPORT, *supra* note 13, at 3.

43 SENATE INTELLIGENCE REPORT, *supra* note 13, at 6.

44 *Id.*

45 *Id.* at 22.

46 *Id.*

47 Michael McFaul & Bronte Kass, *Understanding Putin's Intentions and Actions in the 2016 U.S. Presidential Election*, *in* SECURING AMERICAN ELECTIONS, *supra* note 23, at 5, 14.

48 SENATE INTELLIGENCE REPORT, *supra* note 13, at 7.

49 *Id.*

50 *Id.* at 12.

51 Herbert Lin, Alex Stamos, Nate Persily & Andrew Grotto, *Increasing the Security of U.S. Election Infrastructure*, *in* SECURING AMERICAN ELECTIONS, *supra* note 23, at 17, 18.

52 ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 51 (2019).

53 *Id.*

a Russian operative was indicted by Special Counsel Robert Mueller for probing election websites of certain rural counties in Georgia, Florida, and Iowa in October 2016.[54]

Russia also targeted electronic pollbook systems in several states.[55] In one example of an attack on Election Day in 2016, registered voters in North Carolina were denied the right to vote when the local electronic pollbook systems could not locate their records.[56] Although hacking was never proven to be the cause of the electronic pollbook discrepancy, a forensic analysis was not conducted as county election officials in North Carolina declined the FBI's offer to investigate.[57]

The Intelligence Community understood the seriousness of the foreign attacks.[58] In October 2016, the Department of Homeland Security (DHS) and the Office of the Director on National Intelligence issued a joint statement on election security, which revealed that the probing of state election systems had originated from "servers operated by a Russian company."[59] The statement also warned state and local governments about the cybersecurity threats and asked them to seek assistance from DHS.[60] In January 2017, then-DHS Secretary Jeh Johnson issued a statement designating U.S. election infrastructure as a part of the nation's critical infrastructure, which made election systems an ongoing "priority for cybersecurity assistance and protections" from DHS.[61] Members of the Intelligence Community generally agreed that some of Russia's motives for the cyberattack were to sow discord and undermine voters' confidence in the

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[54] Indictment at 26, U.S. v. Netyksho, No. 18-cr-00215 (D.D.C. Jul. 13, 2018).

[55] Benjamin Wofford, *The Hacking Threat to the Midterms Is Huge. And Technology Won't Protect Us*, VOX (Oct. 25, 2018, 5:00 AM), https://www.vox.com/2018/10/25/18001684/2018-midterms-hacked-russia-election-security-voting.

[56] *Id.* Electronic pollbooks are electronic voter check-in databases that are increasingly being used in place of paper voter rolls in precincts around the U.S. *See infra* Part I.B.

[57] Wofford, *supra* note 55.

[58] SENATE INTELLIGENCE REPORT, *supra* note 13, at 7–8.

[59] Press Release, DHS & ODNI Election Sec., Joint Statement on Election Security (Oct. 7, 2016), https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2016/item/1635-joint-dhs-and-odni-election-security ("We believe, based on the scope and sensitivity of these efforts, that only Russia's senior-most officials could have authorized these activities.").

[60] *Id.*

[61] Press Release, Jeh Johnson, DHS Sec'y, Statement on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical. Election infrastructure is comprised of "storage facilities, polling places, and centralized vote tabulations locations used to support the election process, and information and communications technology to include voter registration databases, voting machines, and other systems to manage the election process and report and display results on behalf of state and local governments." *Id.*

U.S. election system.[62] However, intelligence officials believed that the general public did not fully comprehend the threat and had a dim understanding of the vastness of Russia's attack during the 2016 election.[63]

The attacks did not subside after the 2016 election. Russia continued to attack U.S. election infrastructure for the purpose of interfering with the 2018 midterm elections.[64] The Intelligence Community was clearly aware of the ongoing threat from Russia.[65] As one U.S. cybersecurity expert noted before the 2018 midterm elections, "The Russians will attempt, with cyberattacks and with information operations, to go after us again. They're doing it right now."[66] An October 11, 2018, DHS Report stated, "We judge that numerous actors are regularly targeting election infrastructure, likely for different purposes, including to cause disruptive effects, steal sensitive data, and undermine confidence in the election. We are aware of a growing volume of malicious activity targeting election infrastructure in 2018[.]"[67] There is now abundant evidence that Russia targeted the campaigns of at least a dozen House and Senate candidates in the 2018 midterm elections.[68] The Intelligence Community also believes that Russia continued its activity against state and local election systems.[69] The extent to which Russia succeeded in its endeavors in 2018 is still not known.[70]

Russia has demonstrated it has sufficient sophistication and knowledge of U.S. voting patterns to understand that cyberattacks on local election systems could cause significant disruption.[71] Although it may be difficult to change vote tallies across the country in national elections, cyber actors can access databases in particular districts, manipulate voter files, and cause enough voter suppression to impact the outcome.[72] Therefore, an attack on a few key battleground states

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62 SENATE INTELLIGENCE REPORT, *supra* note 13, at 35–36.

63 Wofford, *supra* note 55.

64 *Id.*

65 *Id.*

66 *Id.* (quoting Eric Rosenbach, former Pentagon Chief of Staff).

67 SENATE INTELLIGENCE REPORT, *supra* note 13, at 21.

68 Wofford, *supra* note 55.

69 *See* SENATE INTELLIGENCE REPORT, *supra* note 13, at 10 (stating that prior to the 2018 midterm election, DHS determined "numerous actors are regularly targeting election infrastructure, likely for different purposes, including to cause disruptive effects, steal sensitive data, and undermine confidence in the election").

70 *See* Lin et al., *supra* note 51, at 18–19 ("[T]here is no evidence that votes were actually changed and that no lasting damage was done to voter registration databases. Nonetheless, these incidents should be viewed as precursors or dress rehearsals for similar attacks against the 2020 U.S. presidential election.").

71 Eric Manpearl, *Securing U.S. Election Systems: Designating U.S. Election Systems as Critical Infrastructure and Instituting Election Security Reforms*, 24 B.U. J. SCI. & TECH. L. 168, 175 (2018).

72 *Id.* at 173–74; Zetter, *supra* note 29.

during a presidential race could swing the election.[73] Because small manipulations are easier to perpetrate without detection, the risk that cyberattacks may affect the result of an election is "greatest when the electorate is evenly divided and vote counts are close, as has been the case recently in a number of Presidential elections."[74] Attacks on specific competitive districts during congressional elections could also substantially change the composition of the federal legislature.[75] No proof exists that such attacks have occurred, but they are certainly a risk for the future.[76] The consensus opinion among the Intelligence Community is that the threat of foreign cyberattacks on U.S. election systems persists.[77] And the risk is not just from Russia. Evidence shows that China, Iran, North Korea, and ISIS have all conducted cyber intrusions against U.S. election infrastructure.[78]

B. Recommendations of Cybersecurity Experts to Strengthen U.S. Election Infrastructure

Election cybersecurity experts generally agree that certain remedies would create a more secure U.S. election system. Because of long-standing concerns about insecure voting systems and the recent recognition of foreign cyberattacks, the National Academy of Sciences, Engineering, and Medicine ("NAS") appointed an ad hoc committee to consider the future of voting in the United States.[79] The NAS committee determined that, due to the events of the 2016 election and the ongoing threat of cyberattacks, the current U.S. system of voting must evolve.[80] In its report, the NAS committee noted that because of the new

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[73] Manpearl, *supra* note 71, at 175; NAS REPORT, *supra* note 11, at 16 n.11; *see* Zetter, *supra* note 29 (describing how a few thousand missing votes and a 537-vote victory for George W. Bush in Florida determined the result of the 2000 presidential election).

[74] Lin et al., *supra* note 51, at 19.

[75] Manpearl, *supra* note 71, at 175; NAS REPORT, *supra* note 11, at 16 n.11.

[76] Zetter, *supra* note 29.

[77] SENATE INTELLIGENCE REPORT, *supra* note 13, at 43 (quoting *Russian Interference in the 2016 U.S. Elections: Open Hearing Before the S. Comm. on Intelligence*, 115th Cong. 117 (2017) (statement of Alex Halderman, Professor of Computer Science and Engineering, University of Michigan)); *see* Jeremy Herb, Brian Fung, Jennifer Hansler & Zachary Cohen, *Russian Hackers Targeting State and Local Governments Have Stolen Data, US Officials Say*, CNN, https://www.cnn.com/2020/10/22/politics/russian-hackers-election-data/index.html (Oct. 23, 2020, 11:39 AM) (reporting that "Russian state-sponsored hackers" targeted state and local government and stole voter registration information in the weeks leading up to the 2020 election).

[78] William Roberts, *Election Security: The Fight to Secure the Vote*, 33 WASH. LAW. 12, 14 (2018).

[79] The committee was charged with: (1) documenting the current state of technology, standards, and resources for voting technologies; (2) examining the challenges arising out of the 2016 federal election; (3) evaluating advances in current and upcoming technology that can improve voting; and, (4) providing recommendations to make voting "easier, accessible, reliable, and verifiable." NAS REPORT, *supra* note 11, at 3–4.

[80] *Id.* at 121.

foreign threat, "[w]e must think strategically and creatively about the administration of U.S. elections" and must "seriously reexamine . . . the role of federal and state governments in securing our elections."[81] While cybersecurity experts are not in a position to opine on the constitutionality of federal authority to regulate states in conducting federal elections, they have a strong, coherent, consensus opinion on how best to secure election infrastructure against cybersecurity threats. Experts recommend measures to secure two critical aspects of elections: voter registration databases and vote-casting mechanisms.[82]

First, voter registration lists must be complete and accurate.[83] The Help America Vote Act of 2002 (HAVA) required each state to create a statewide voter database, rather than leave the maintenance of voter registration to counties and municipalities.[84] The administration of voter registration databases requires two main large scale tasks.[85] Election administrators must (1) maintain the correct status and relevant information of citizens who are properly registered to vote; and (2) deliver precinct-specific lists of registered voters to each precinct.[86]

Because of the complexity and flexibility needed to maintain accurate, up-to-date lists of registered voters, lists are by necessity kept electronically.[87] Electronic voter registration databases are easier than paper counterparts to manage and maintain but are vulnerable to cyberattacks.[88] And in many states, "databases containing voter registration lists are connected, directly or indirectly, to the Internet or to state computer networks."[89] This connectivity creates a significant risk of cyber invasion and manipulation.[90] Manipulation of voter registration data would cause chaos when voters arrive at the polls and find their names have been removed from the rolls.[91] Removing or changing data for a small number of voters in contentious congressional races or in swing states

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81 *Id.*

82 Lin et al., *supra* note 51, at 17.

83 NAS REPORT, supra note 11, at 59.

84 Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301–15545) (requiring "a single, uniform, official, centralized, interactive, computerized statewide voter registration list defined, maintained, and administered at the state level").

85 Lin et al., *supra* note 51, at 17.

86 *Id.*

87 NAS REPORT, *supra* note 11, at 57–61.

88 *Id.* at 61.

89 *Id.* at 57.

90 *See infra* Part I.C. Russia breached online voter databases in Illinois and Arizona, obtaining personal information on tens of thousands of registered voters. SENATE INTELLIGENCE REPORT, *supra* note 13, at 22–24; NAS REPORT, *supra* note 11, at 25.

91 SENATE INTELLIGENCE REPORT, *supra* note 13, at 2.

for a presidential race could change the results of an election.[92] The NAS recommends that election administrators routinely assess the integrity of voter registration databases and put in place systems that detect evidence of probing or tampering with the system.[93] The Senate Intelligence Committee recommends updating software in state voter registration systems and maintaining paper backup copies of registration databases.[94]

Managing statewide voter registration databases requires states to deliver precinct-specific lists, also known as pollbooks, to each precinct.[95] Pollbooks, which can either be paper-based or electronic, are used to verify voter eligibility and check-in voters.[96] Over 80% of jurisdictions use preprinted paper pollbooks to check-in voters, but the use of electronic pollbooks (e-pollbooks) is increasing.[97] Between 2012 and 2016, there was a 75% increase in use of e-pollbooks, and now almost half of voters are checked in electronically.[98]

E-pollbooks, which may or may not be networked or connected to the internet, provide some advantages over paper pollbooks. E-pollbooks generally speed up the check-in process and can better track which voters have already cast ballots.[99] When networked, e-pollbooks allow polling places to send and receive real-time updates to voter registration data, which is critical for states that use same-day registration.[100] However, e-pollbooks are vulnerable to cyberattacks that could change voter data, disrupt check-in procedures, and manipulate information on who has and has not voted.[101] Alternatively, a "denial of service" attack could simply shut down operation of an e-pollbook, which would altogether disrupt voting at a particular precinct.[102]

Currently no national security standards exist for e-pollbooks, and security practices vary by state.[103] The NAS recommends jurisdictions that use e-pollbooks have paper backup lists available to be used in the event of any

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92 Manpearl, *supra* note 71, at 175.

93 NAS REPORT, *supra* note 11, at 63.

94 SENATE INTELLIGENCE REPORT, *supra* note 13, at 57 (noting that one state's voter registration system is more than ten years old).

95 NAS REPORT, *supra* note 11, at 69.

96 *Id.* at 69–70.

97 *Id.* at 70.

98 *Id.*

99 *Id.*

100 *Id.* at 71.

101 *Id.*

102 *Id.* at 72.

103 *Id.* at 71.

disruption or compromise to the electronic version.[104] The NAS also recommends that Congress provide funds for the U.S. Election Assistance Commission to develop national security standards for the use of e-pollbooks.[105]

Second, cybersecurity experts generally agree that cybersecurity risks are inherent when states rely entirely on computers for voters to cast ballots.[106] Currently, jurisdictions use a variety of types of ballots, including paper, card, and machine-only, and votes are cast by a variety of mechanisms.[107] In the majority of jurisdictions, voters mark their choices on paper ballots, either by hand or by using a ballot-marking device (BMD).[108] Paper ballots are either hand-counted or machine-counted, most commonly by optical scanners.[109]

Several states use direct recording electronic (DRE) voting machines in at least some jurisdictions.[110] DREs are free-standing computer units that record selections voters make using a touchscreen.[111]

States purchased DREs with funding from HAVA, which was passed as a response to the problems with lever machines and punch card ballots in the 2000 presidential election.[112] The advent of DREs introduced "new technical challenges," such as touchscreen miscalibration, which causes a voter's intended selection of one candidate to be misinterpreted as a vote for another candidate.[113] Almost immediately, several security risks with DREs were identified, leading some states to decertify and stop using the machines as early as 2007.[114]

Cybersecurity experts now recognize the full extent of the cybersecurity risks with DREs. In its report on election security, the NAS noted that because they are completely paperless, DREs create a risk that a cyberattack on the

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104 *Id.* at 72.

105 *Id.*

106 *Id.* at 78.

107 *Id.* at 37, 39.

108 When voting with a BMD, a voter uses a touchscreen or keypad to mark his or her choices, after which the BMD prints a paper copy of the selections. The paper printout is human-readable. The paper is then scanned and tabulated by a separate device. With some BMD printouts, an optical scanner records and tallies the human-readable ballot. With other BMDs, the actual selections are recorded on a barcode, which is then read by the tabulating machine. *Id.* at 39.

109 *Id.* at 80.

110 Lawrence Norden & Andrea Cordova, *Voting Machines at Risk: Where We Stand Today*, BRENNAN CTR. FOR JUST. (Mar. 5, 2019), https://www.brennancenter.org/our-work/research-reports/voting-machines-risk-where-we-stand-today.

111 NAS REPORT, *supra* note 11, at 78.

112 Zetter, *supra* note 29.

113 NAS REPORT, *supra* note 11, at 78.

114 Zetter, *supra* note 29.

machines will be undetectable.[115] A computer virus could steal votes from one candidate and assign them to another or could stop a machine from accepting votes altogether.[116] According to the Senate Intelligence Report, DRE voting machines "can be programmed to show one result to the voter while recording a different result in the tabulation."[117] Therefore, the report called for states to discontinue using DREs, which "are now out of date."[118] A cybersecurity expert actually demonstrated in a courtroom how a DRE machine could be infected with malware that could alter vote counts on the machine.[119] The same expert showed that malware could be introduced remotely and be spread from machine to machine.[120]

The Senate Intelligence Report concluded that "[p]aper ballots and optical scanners are the least vulnerable to cyberattack."[121] Secure voting systems must allow a voter to verify that the recorded ballot reflects his or her intent, which is not possible with paperless DRE machines.[122] Therefore, the NAS recommends that "[w]ell designed, voter-marked paper ballots" be the standard way for voters to cast their votes.[123] The consensus opinion from national cybersecurity experts is that an independent record of the voter's physical ballot is essential as a reliable audit tool.[124] An auditable record can be achieved by using hand-marked paper ballots.[125] When voting machines are used to mark ballots, the machine must provide a physical, human-readable record of the voter's selections.[126]

National security experts also agree that the threat of foreign interference in U.S. elections persists.[127] In his testimony before Senate Intelligence Committee, former Assistant Attorney General for National Security John Carlin stated,

> I'm very concerned about . . . our actual voting apparatus, and the attendant structures around it . . . . We've literally seen it already, so

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115 NAS REPORT, *supra* note 11, at 78.

116 SENATE INTELLIGENCE REPORT, *supra* note 13, at 42.

117 *Id.*

118 *Id.* at 59; *see also* Zetter, *supra* note 29 (noting that as early as 2007, some states have decertified electronic voting machines after finding them to be susceptible to viruses and malicious software).

119 Curling v. Kemp, 334 F. Supp. 3d 1303, 1308 (N.D. Ga. 2018).

120 *Id.* at 1309. Accordingly, a federal judge in Georgia ordered a permanent injunction against the use of DRE machines in the state after 2019. *See infra* Part III.C.

121 SENATE INTELLIGENCE REPORT, *supra* note 13, at 59.

122 NAS REPORT, *supra* note 11, at 79.

123 *Id.*

124 *Id.* at 79–80.

125 *Id.* at 42.

126 *Id.* at 78.

127 SENATE INTELLIGENCE REPORT, *supra* note 13, at 43.

> shame on us if we can't fix it heading into the next election cycles. And it's the assessment of every key intel professional, which I share, that Russia's going to do it again because they think it was successful. So we're in a bit of a race against time heading up to the two-year election. Some of the election machinery that's in place should not be.[128]

Consequently, "[g]iven Russian intentions to undermine the credibility of the election process, states should take urgent steps to replace outdated and vulnerable voting systems."[129]

C. States Responded Inadequately and Ineffectively to Russian Cyberattacks

In the summer of 2016, after it became clear to the Intelligence Community that foreign actors were attacking state election infrastructure, intelligence officials began the process of reaching out to states to offer cybersecurity support.[130] During a call with state election officials on August 15, 2016, DHS Secretary Jeh Johnson offered to provide help to states by inspecting voting systems for viruses and other signs of cyber invasion.[131] DHS proposed conducting on-site risk and vulnerability assessments as well as remote "cyber hygiene scans" on internet-connected election management systems such as voter registration databases.[132] Several states rejected the offer for help. According to Secretary Johnson, the general response from state officials was "[t]his is our responsibility and there should not be a federal takeover of the election system."[133] Then-Georgia Secretary of State Brian Kemp cited concerns about "federal overreach" and claimed that help from federal intelligence agencies would "subvert the [C]onstitution to achieve the goal of federalizing elections under the guise of security."[134] Similarly, Louisiana Secretary of State Tom Schedler chided Congress for overemphasizing the extent of the risk and stated that election administration should be left to the states because "[t]hat's

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[128] *Id.* (quoting Interview by Senate Select Comm. on Intel. with John Carlin, Former Assistant Att'y Gen. for Nat'l Sec. (Sept. 25, 2017)).

[129] *Id.* at 58.

[130] *Id.* at 46–47.

[131] *Id.* at 47–48; Aliya Sternstein, *At Least One State Declines Offer for DHS Voting Security*, NEXTGOV (Aug. 25, 2016), https://www.nextgov.com/cybersecurity/2016/08/some-swing-states-decline-dhs-voting-security-offer/131037/.

[132] SENATE INTELLIGENCE REPORT, *supra* note 13, at 52.

[133] *Id.* at 47.

[134] Sternstein, *supra* note 131.

what the Constitution says."[135] Republican legislators also blocked funds for election security in Minnesota and Arizona.[136]

Even more concerning, many states failed to recognize the extent or seriousness of the threat and chose not to heed warnings from the Intelligence Community.[137] Several states also opposed the decision of Secretary Johnson to designate U.S. election systems as critical infrastructure.[138] DHS initially intended to make the designation in August 2016 but held off until January 2017 because of pushback from state election officials.[139] Again rejecting federal support, the National Association of Secretaries of State (NASS) expressed opposition to DHS's critical infrastructure designation, mistakenly citing states' primacy in regulating elections.[140] The NASS stated that DHS "has no authority to interfere with elections, even in the name of national security."[141] Secretary Kemp declared that "[d]esignating voting systems or any other election system as critical infrastructure would be a vast federal overreach."[142]

Despite the dire warnings and offers to help from the Intelligence Community, states did little to respond to the ongoing threat of cyberattacks on election systems. Even after the breaches to databases in Illinois and Arizona were known, states continued to struggle to respond to security risks.[143] States have displayed widely varying degrees of concern about election security and efforts to address the security risks. For the most part, states relied on the same insecure infrastructure to conduct elections in 2018 as they did in 2016, despite the known risks.[144] But the attacks on local elections systems did not subside

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[135] Aliya Sternstein, *9 States Accept DHS's Election Security Support*, NEXTGOV (Sept. 21, 2016), https://www.nextgov.com/cybersecurity/2016/09/9-states-accept-dhss-election-security-support/131741/.

[136] Gopal Ratnam, *Democrats Target State Elections with Focus on Election Security*, ROLL CALL (Aug. 22, 2019), https://www.rollcall.com/news/congress/democrats-target-state-elections-focus-election-security.

[137] *See infra* Part III.B.

[138] Manpearl, *supra* note 71, at 186. The purpose of a critical infrastructure designation is to allow the Federal Government to partner with and provide support to the identified sectors. The designation added U.S. election systems to the other critical infrastructure sectors: chemical; commercial facilities; communications; critical manufacturing; dams; defense industrial base; emergency services; energy; financial services; food and agriculture; government facilities; health care and public health; information technology; nuclear reactors, materials, and waste; transportation systems; and water and wastewater systems. Press Release, Off. of the Press Sec'y, Presidential Policy Directive—Critical Infrastructure Security and Resilience (Feb. 12, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil.

[139] SENATE INTELLIGENCE REPORT, *supra* note 13, at 48–49.

[140] Manpearl, *supra* note 71, at 187.

[141] Nat'l Ass'n of Sec'ys of State, *NASS Resolution Opposing the Designation of Elections as Critical Infrastructure*, at 21–22 (Feb. 18, 2017).

[142] Sternstein, *supra* note 131.

[143] SENATE INTELLIGENCE REPORT, *supra* note 13, at 39; Norden & Cordova, *supra* note 110.

[144] Wofford, *supra* note 55.

after the 2016 election, and states continue to be ill-equipped to handle the attacks.[145]

Georgia, for example, exhibited a grossly inadequate response to the cybersecurity challenges that came to light in the 2016 election. The Georgia Secretary of State's Office left its registration database completely open to hackers with 6.5 million voter records exposed during a six-month period in 2016–17.[146] U.S. cybersecurity experts were able to access the database and even plant files during that time.[147] Malicious actors could have manipulated the data, including dropping voters from the database or changing their data.[148] But Georgia election officials claimed they saw no evidence that any election related data was compromised.[149] However, a forensic evaluation was not done initially because Georgia officials wiped the server that housed the data after the breach was discovered.[150] Evidence from an FBI image taken of the server before it was wiped shows that there may have been signs of tampering.[151]

Georgia also knew of the substantial evidence that Russia was targeting election systems and that its paperless, internet-connected voting system was ripe for hacking.[152] Yet, it made no significant changes, and in the 2018 federal election, voters cast ballots on the same outdated, insecure system used in 2016.[153] Georgia election officials were reluctant to acknowledge the full extent of the vulnerability of Georgia's electronic voting equipment even though security flaws in DRE machines had been known for over a decade and Georgia had not updated the software on its machines since 2005.[154] Therefore, Georgia voters used the same hackable and non-auditable voting machines in the 2018

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145 *Id.*

146 NAS REPORT, *supra* note 11, at 58.

147 Frank Bajak, *Georgia Election Server Wiped After Suit Filed*, PBS NEWSHOUR (Oct. 26, 2017, 9:34 AM), https://www.pbs.org/newshour/politics/georgia-election-server-wiped-after-suit-filed.

148 NAS REPORT, *supra* note 11, at 57.

149 Frank Bajak, *Georgia Election Server Showed Signs of Tampering*, AP (Jan. 16, 2020), https://apnews.com/39dad9d39a7533efe06e0774615a6d05.

150 Kim Zetter, *Georgia Election Systems Could Have Been Hacked Before 2016 Vote*, POLITICO (Jan. 16, 2020, 11:07 PM), https://www.politico.com/news/2020/01/16/georgia-election-systems-could-have-been-hacked-before-2016-vote-100334.

151 *Id.*

152 *See* Curling v. Kemp, 334 F. Supp. 3d 1303, 1327 (N.D. Ga. 2018) ("[Georgia] stood by for far too long, given the mounting tide of evidence of the inadequacy and security risks of Georgia's DRE voting system and software.").

153 *See* Curling v. Raffensperger, 397 F. Supp. 3d 1334, 1382–92 (N.D. Ga. 2019) (summarizing the affidavits of 137 Georgia voters, 2 county pollworkers, and 15 pollwatchers, and concluding that the "same pattern of problems with Georgia's voting systems and registration databases has persisted across multiple elections cycles").

154 *Id.* at 1339, 1348.

midterm elections.[155] As a result, voters in Georgia experienced significant difficulty voting in 2018.[156] Problems reported by voters included long lines due to malfunctioning machines being taken out of service, machines selecting the wrong candidates when voters marked their choices on touchscreens, and check-in problems with e-pollbooks, including incorrect polling places or incorrect addresses listed for voters.[157] A federal court noted that Georgia state election officials had "stood by for far too long" and "buried their heads in the sand" rather than address the inadequacy and insecurity of Georgia's voting system.[158]

Similarly, North Carolina refused an offer from the FBI to investigate election irregularities in 2016.[159] A forensic analysis was never conducted after registered voters could not be located in local e-pollbook systems.[160] Although hacking was never proven as the cause of the e-pollbook discrepancy, it was discovered that Russia targeted e-pollbook systems in several states, including North Carolina.[161] Despite knowing that information, county election officials in North Carolina declined the FBI's offer to investigate.[162]

Given that some states and municipalities have demonstrated they are incapable and, in some instances, even unwilling to secure election infrastructure, the United States needs a national election infrastructure plan. Such a plan should follow the recommendations of national cybersecurity experts to provide uniformity and address vulnerabilities in many state and local election systems.

II. THE LANDSCAPE OF CONGRESSIONAL AUTHORITY OVER FEDERAL ELECTIONS

Many state election officials, scholars, and federal legislators consider primary authority over the conduct of federal elections to belong to the states. For example, the first recommendation in the Senate Intelligence Report on

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155 *Id.* at 1392; *see* Adam Levin & Beau Friedlander, *Georgia's Shaky Voting System*, N.Y. TIMES (Nov. 13, 2018), https://www.nytimes.com/2018/11/13/opinion/voting-machines-georgia-security.html (describing how Georgia, for its 2018 gubernatorial election, relied on the same voting system it used in 2016 despite the cybersecurity vulnerabilities that had been identified).

156 Mark Niesse, *Long Lines and Equipment Problems Plague Election Day in Georgia*, AJC (Nov. 6, 2018), https://www.ajc.com/news/state--regional-govt--politics/long-lines-and-equipment-problems-plague-election-day-georgia/l7NUidWbMetr5OFdGcb5ZM/.

157 *Curling*, 397 F. Supp. 3d at 1383.

158 *Curling*, 334 F. Supp. 3d at 1327.

159 Wofford, *supra* note 55.

160 *Id.*

161 *Id.*

162 *Id.*

Russian interference in the 2016 election is to "reinforce states' primacy in running elections."[163] The Supreme Court's view on whether the federal government or states have the ultimate right to prescribe the manner in which federal elections are conducted has been unclear. The pendulum of the Court's interpretation of the differential authority between Congress and the states over federal elections has swung back and forth for two centuries. From the antebellum era to the Reconstruction Amendments to the VRA to the Court's decision in *Shelby County*, the Court has expanded and contracted congressional authority relative to state sovereignty. But even this pendulum swing has remained in a somewhat narrow range because Congress has never attempted to exercise the full breadth of its authority under the Elections Clause.

The vast majority of congressional action to regulate elections since the Civil War has been pursuant to the Reconstruction Amendments rather than the Elections Clause.[164] Even when congressional authority was at its peak under the VRA, Congress approached election legislation from a deferential framework. Congress only passed the VRA after the Civil Rights Movement's expansive and concerted fight for voting rights in the South brought national attention and shifted public opinion on this issue.[165] The Supreme Court upheld this action by Congress under the Enforcement Clause of the Fifteenth Amendment because of the long-standing and pernicious evil of racial discrimination in voting.[166] But Congress has yet to exercise and the Court has yet to uphold the full extent of Congress's power to enact federal election legislation under the Elections Clause, which extends beyond anti-discrimination.

A. Congressional Authority Under the Reconstruction Amendments and the Voting Rights Act

The end of the Civil War and the Reconstruction era brought a new paradigm to the balance of federal authority versus state autonomy. The Fourteenth Amendment provided an avenue for Congress to ensure that each state did not abridge or deny certain rights to its own citizens.[167] The Fifteenth Amendment

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[163] SENATE INTELLIGENCE REPORT, *supra* note 13, at 54.

[164] Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 341 (2019).

[165] CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 21–22 (2018); *see* South Carolina v. Katzenbach, 303 U.S. 301, 315 (1966) ("The burden is too heavy—the wrong to citizens is too serious—the damage to our national conscience too great not to adopt more effective measures than exist today.").

[166] *Id.* at 303–04.

[167] U.S. CONST. amend. XIV.

prohibited states from denying the right to vote "on account of race, color, or previous condition of servitude."[168] Despite the Fifteenth Amendment guarantee, many former Confederate states still prevented African American citizens from exercising their new constitutional right to vote.[169] But embedded in the Reconstruction Amendments were enforcement provisions that established a role for Congress to protect the rights of all citizens against state action.[170] The constitutional enfranchisement of African American voters created a new framework for Congress to play a greater role in elections in order to protect the right to vote.

While Congress had the power to enforce the Reconstruction Amendments to prevent states from infringing on their citizens' right to vote, the Reconstruction-era framework preserved a concept of federalism and state sovereignty over the conduct of elections.[171] Congress attempted to exert broad authority to regulate elections through the Enforcement Acts of 1870 and 1871, which instituted a system of federal oversight for congressional elections.[172] However, despite Congress's greater power to protect voters under the Reconstruction Amendments, the Supreme Court did not allow Congress full license to regulate elections. In *United States v. Reese*, the Court struck down provisions of the Enforcement Act of 1870 because they exceeded the scope of Congress's mandate under the Fifteenth Amendment.[173] The Court held that section 4 of the statute was invalid because it created criminal penalties for state officials who denied citizens the right to vote.[174] According to the Court, the Fifteenth Amendment did not confer upon Congress expansive power to regulate elections and protect voters, but simply prevented states from discriminating based on race.[175]

Similarly, the Court restrained Congress from using the Enforcement Act of 1870 to assert broad authority over states pursuant to the Fourteenth Amendment in *United States v. Cruikshank*.[176] In that case, election inspectors in Louisiana were criminally charged with conspiring to prevent two African American

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168 U.S. CONST. amend. XV, § 1.

169 ANDERSON, *supra* note 165, at 2.

170 U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

171 Tolson, *supra* note 164, at 354.

172 Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement Act of 1871, ch. 99, 16 Stat. 433; Tolson, *supra* note 164, at 358.

173 United States v. Reese, 92 U.S. 214, 220 (1875).

174 *Id.* at 217–18, 220.

175 *Id.* at 217.

176 United States v. Cruikshank, 92 U.S. 542, 555 (1875).

citizens from exercising their right to vote.[177] The Court dismissed the indictments, holding that the Louisiana officials did not intentionally discriminate based on race.[178] Importantly, the Court noted that the federal government had authority to prohibit discrimination under the Fourteenth Amendment, but the right to vote itself came from the states.[179] The Court, however, did not address Congress's power to regulate elections and ensure the right to vote under the Elections Clause.

The post-Reconstruction era, beginning with the federal government's withdrawal of military troops in 1876, allowed Southern states to construct significant structural barriers to African American suffrage.[180] Discriminatory devices to prevent African Americans from voting were enacted into state laws and even embedded into the constitutions of several former Confederate states.[181] In addition to literacy tests, poll taxes, and good-morals requirements, the small percentage of African Americans who were able to cast ballots in the South often had to overcome outright violence.[182]

During the Jim Crow era of renewed disenfranchisement, the Supreme Court invalidated several state laws designed to prevent African Americans from voting as violations of the Fourteenth and Fifteenth Amendment.[183] However, case-by-case litigation was essentially a game of whack-a-mole. Each time federal courts struck down a discriminatory state law that restricted the right of its citizens to vote, states found insidious, creative alternative ways to disenfranchise African American voters.[184] For example, after two Supreme Court decisions invalidated all-white primary elections, states such as South Carolina and Texas found ways to unofficially hold "pre-primaries" without such laws being on their books.[185] The Civil Rights Movement forced Congress

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177 *Id.* at 544–45.

178 *Id.* at 556–57.

179 *Id.* at 554–56 (holding that the Fourteenth Amendment only confers on Congress the power to ensure that states do not deny the equality of rights of their citizens, but states still assume the primary duty to guarantee these rights: "The power of the national government is limited to the enforcement of this guaranty.").

180 ANDERSON, *supra* note 165, at 2–3.

181 Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 733–43 (1998).

182 ANDERSON, *supra* note 165, at 14–18.

183 *See, e.g.*, Schnell v. Davis, 336 U.S. 933, 933 (1949) (striking down, as a violation of the Equal Protection Clause, a provision of the Alabama state constitution that required citizens to understand and explain an article of the U.S. Constitution in order to exercise the right to vote).

184 ANDERSON, *supra* note 165, at 13.

185 Smith v. Allwright, 321 U.S. 649, 656–57 (1944); ANDERSON, *supra* note 165, at 13.

to enact a comprehensive plan to "banish the blight of racial discrimination in voting."[186]

Nearly a century after the Fourteenth and Fifteenth Amendments were ratified, Congress responded to the grassroots efforts of the Civil Rights Movement by passing the Voting Rights Act of 1965.[187] The VRA prescribed remedies for voting discrimination that it imposed on particular states that were known to have constructed the greatest barriers for African American voters.[188] By exercising its power under the Enforcement Clause of the Fifteenth Amendment, Congress supplanted the right of states to enact particular discriminatory voter qualification laws.[189] The VRA placed significant constraints on states' autonomy in determining voter qualifications.[190] Section 5 of the VRA required states or counties that had a history of discriminating against African American voters, as defined in section 4(b), to submit to preclearance by the U.S. Attorney General of any new law that impacted voter qualifications or registration.[191] The Act also authorized federal examiners to directly place and remove voters from the registration lists of states and localities who fell under the VRA's coverage formula.[192]

When the Supreme Court upheld the VRA as "an appropriate means for carrying out Congress' constitutional responsibility," federal authority to regulate elections under the Reconstruction Amendments was at its zenith.[193] South Carolina challenged the VRA on the grounds it exceeded Congress's powers and infringed on a function that had traditionally been left to states.[194] But the Court dismissed these concerns.[195] The Court held that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[196] The Court in

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186 South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); ANDERSON, *supra* note 165, at 21–22.

187 The Voting Rights Act was signed into law by President Lyndon Johnson on August 6, 1965. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 1–19, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); *see* Eric S. Lynch, *Trusting the Federalism Process Under Unique Circumstances: United States Election Administration and Cybersecurity*, 60 WM. & MARY L. REV. 1979, 1991–92 (2019) (noting that President Johnson introduced the voting rights bill to Congress three days after the "Bloody Sunday" Selma-to-Montgomery march).

188 §§ 1–7, 79 Stat. at 437–41.

189 U.S. CONST. amend. XV, § 2 ("Congress shall have the power to enforce this provision through appropriate legislation."); §§ 1–2, 79 Stat. at 437.

190 §§ 1–6, 79 Stat. at 437–40.

191 §§ 4(b)–5, 79 Stat. at 438–39.

192 § 7, 79 Stat. at 440–41.

193 South Carolina v. Katzenbach, 303 U.S. 301, 308 (1966).

194 *Id.* at 323.

195 *Id.*

196 *Id.* at 324.

South Carolina v. Katzenbach stated that Congress's authority relative to states' rights under the Enforcement Clause of the Fifteenth Amendment is just as broad as Congress's power under the Necessary and Proper Clause.[197] Therefore, to prevent racial discrimination, the Supreme Court established that Congress had paramount authority to supersede state autonomy in determining who was eligible to cast a ballot.

According to the Court, "[t]he Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process."[198] The Court emphasized the "unique circumstances" that permitted Congress to exert such expansive powers to violate state sovereignty under the Fifteenth Amendment.[199] The unique circumstances to which the Court referred were the overt discriminatory actions of several former slave states that violated the Fifteenth Amendment.[200] In *Katzenbach*, the Court's ratification of Congress's power to enact the VRA was specific to the era as well as the manner and degree to which the infringement on the rights of African Americans were being infringed.[201]

Over the next almost fifty years, the Supreme Court continued to uphold the VRA as a legitimate exercise of Congress's power to enforce the Fifteenth Amendment.[202] The Court recognized Congress's authority to invalidate provisions that did not have a stated discriminatory purpose but had a disparate impact on the right of African Americans to vote. In *City of Rome v. United States*, the Court upheld the VRA's ban on changes to a municipality's voting provisions that would have had a discriminatory effect.[203] In that case, the city of Rome, Georgia challenged the VRA on federalism grounds.[204] But the Court made clear that the mandate embedded in the enforcement provisions of the Reconstruction Amendments trumped federalism concerns.[205] The Court stated that "principles of federalism that might otherwise be an obstacle to

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[197] *Id.* at 325–26; *see Ex parte* Virginia, 100 U.S. 339, 345–46 (1879) ("Whatever Legislation is appropriate, that is, adapted to . . . secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, *is brought within the domain of congressional power*.") (emphasis added).

[198] *Katzenbach*, 383 U.S. at 308.

[199] *Id.* at 335 ("Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.").

[200] *Id.*

[201] *Id.* at 326–31.

[202] *See, e.g.*, Lopez v. Monterey Cnty., 525 U.S. 266, 287 (1999); City of Rome v. United States, 446 U.S. 156, 173 (1980).

[203] *City of Rome*, 446 U.S. at 173.

[204] *Id.* at 178.

[205] *Id.* at 179.

congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'"[206] The Court held that Congress has the power to impose voting regulations on states and their political subdivisions because the "[Reconstruction] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[207]

The Supreme Court took its view of federal power over state regulations under the Fifteenth Amendment one step further in *Lopez v. Monterey County*.[208] In that case, Monterey County was subject to the coverage formula under section 4(b) of the VRA, but the State of California as a whole was not.[209] California passed a state law that determined the manner in which county judges were to be elected.[210] Voters alleged that the law was invalid as applied to Monterey County because any changes to existing law that applied to the county had to be precleared by the federal government.[211] The Court determined that the California law could not take effect in Monterey County until it received preclearance pursuant to section 5 of the VRA.[212] Therefore, the Court recognized that Congress's authority to enforce the Reconstruction Amendments includes the power to supersede the rights of states to regulate their own counties. Accordingly, at end of the twentieth century, Congress had broad authority under the Fifteenth Amendment to regulate federal elections through the VRA.

B. The Demise of the Voting Rights Act and the Shifting State-Federal Authority to Regulate Elections

The twenty-first century brought a dramatic shift in the Supreme Court's deference to Congress to enforce the Fifteenth Amendment through the VRA, which culminated in the Court's gutting of the VRA in *Shelby County v. Holder*.[213] Chief Justice John Roberts's general ideology appears to limit congressional power in favor of state sovereignty through principles of federalism.[214] Relying on federalism, the Roberts Court has limited Congress's

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206 *Id.* (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).

207 *Id.* at 179–80.

208 Lopez v. Monterey Cnty., 525 U.S. 266, 287 (1999).

209 *Id.* at 269.

210 *Id.*

211 *Id.* at 271, 274.

212 *Id.* at 287.

213 Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

214 Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 580 (2015); *see* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3 (2008) (demonstrating

ability to oversee elections and has elevated the role of states in regulating various aspects of the voting process and election conduct.[215] In sharp contrast to the Civil Rights era that led to the VRA, the Court in recent years has more closely scrutinized Congressional regulation of voting and elections while affording more deference to election laws enacted by states.[216]

In 2009, the Court foreshadowed its holding in *Shelby County* by expressing outright hostility to the VRA in *Northwest Austin Municipal Utility District Number One v. Holder*.[217] In that case, a Texas municipal district challenged the VRA's preclearance requirement.[218] The Court avoided the question of the VRA's constitutionality by resolving the district's claims on statutory grounds.[219] In dicta, however, the Court raised concerns about whether the VRA was constitutional.[220] In his majority opinion, Chief Justice Roberts noted that section 5 of the VRA "authorizes federal intrusion into . . . state and local policymaking" and "imposes substantial 'federalism costs.'"[221] The Court also stated that section 5 exceeded Congress's mandate under the Fifteenth Amendment by suspending all changes to election law in the jurisdictions falling under its coverage formula.[222] In the concluding paragraphs of the opinion, which foreshadowed *Shelby County*, the Court claimed that the "exceptional conditions" that justified the VRA no longer exist as "we are now a very different Nation."[223]

Four years later, in *Shelby County*, the Supreme Court struck down section 4(b) of the VRA.[224] Section 4(b) had delineated the "coverage" formula that determined which states and localities were subject to federal preclearance before enacting new voting legislation.[225] In invalidating portions of the VRA, the Court described its rationale as a combination of federalism issues, concerns

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that judicial ideology impacts judicial decisions regarding voting rights).

215 Douglas, *supra* note 214, at 583.

216 *Id.* at 579; *see* Franita Tolson, *Election Law "Federalism" and the Limits of the Anti-Discrimination Framework*, 59 WM. & MARY L. REV. 2211, 2215 (2018) (arguing that recent case law has limited the extent of Congress's powers under the Fourteenth and Fifteenth Amendments due to federalism concerns and the Supreme Court now views states as having broad authority to regulate federal elections).

217 Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009).

218 *Id.* at 196.

219 *Id.* at 205–06.

220 *Id.* at 204.

221 *Id.* at 202 (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).

222 *Id.*

223 *Id.* at 211.

224 Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

225 Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 (codified as amended in scattered sections of 52 U.S.C.).

about equal sovereignty among states," and changed conditions regarding racial inequality in voting.[226] A concern for state sovereignty predominated Justice Roberts's majority opinion.[227] The Court described the VRA's requirement that certain states obtain federal permission before enacting voting laws as "a drastic departure from basic principles of federalism."[228]

Scholars and interested parties soon discovered that the *Shelby County* decision definitively altered the Court's view of the balance between state and federal government in regulating elections under the Reconstruction Amendments.[229] Prior to *Shelby County*, the Court had generally recognized Congress's authority to supersede state laws regulating elections in order to protect voters' rights.[230] *Shelby County* turned that assumption on its head. Contrary to the prior understanding of the federal-state balance regarding elections, the Court stated that the original intent of the framers was for states to have primary authority to regulate federal elections.[231] The Court in *Shelby County* held that the VRA was only a legitimate exercise of Congress's power when it was enacted because it was the product of a particular time in history.[232]

However, the Court's emphasis in *Shelby County* on federalism and state sovereignty in conducting elections was misguided. The Court viewed the authority to regulate elections solely from an antidiscrimination perspective and, ignoring its *City of Rome* precedent, focused on overt discriminatory intent.[233] By only evaluating Congress's power to protect the rights of minority voters under the Fourteenth and Fifteenth Amendments, the Court discounted Congress's broad powers to contradict state laws and regulate elections under the Elections Clause.

C. *The Elections Clause Grants Congress Broad Authority to Regulate Federal Elections*

Congress's authority to regulate federal elections under the Elections Clause

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226 *Shelby County*, 570 U.S. at 534–44, 547.

227 *Id.* at 535 (stating that the VRA infringed on state sovereignty and section 4 violated "the principle that all states enjoy equal sovereignty").

228 *Id.*

229 *See* Charles & Fuentes-Rohwer, *supra* note 1, at 488, 522 (presenting the case against an "optimistic" reading of the *Shelby County* holding for voting rights advocates).

230 *Id.* at 500–01, 516.

231 *Id.* at 517.

232 *Id.* at 495 (noting that Chief Justice Roberts' majority opinion stated that the VRA was only acceptable in 1966 because "exceptional conditions can justify legislative measures not otherwise appropriate" (quoting South Carolina v. Katzenbach, 303 U.S. 301, 334 (1966))).

233 *See Shelby County*, 570 U.S. at 551, 553, 556.

is significantly broader than the Court has acknowledged since *Shelby County*.[234] In *Federalist 59*, Alexander Hamilton explained that the Elections Clause invested ultimate authority to regulate federal elections in "the national legislature."[235] Because of the clear mandate of the Elections Clause, the Supreme Court was remiss in *Shelby County* to overvalue state sovereignty in regard to the conduct of federal elections.[236] The Court mistakenly relied on what it called a "prevailing view that federalism best explains" the U.S. election system.[237]

1. Decentralization Versus Federalism

The Elections Clause precludes viewing the balance of state-versus-federal authority to regulate elections through traditional notions of federalism.[238] The text and history of the Elections Clause demonstrate that the Constitution prescribed a system for federal elections based on decentralization rather than federalism.[239] Though often conflated, "federalism" and "decentralization" are distinct concepts.[240] Decentralization is a hierarchically organized "managerial concept" in which the leader at the top has plenary power over the subordinate units.[241] Federalism may be structurally similar to decentralization.[242] But as a political concept, federalism implies that the subordinate units retain certain rights and "areas of jurisdiction that cannot be invaded by the central authority[.]"[243] In the United States, federalism denotes separate sovereignty and a "system of parallel federal and state governance."[244]

Regarding federal elections, the Elections Clause prescribes a system of decentralization rather than federalism.[245] A traditional notion of federalism does not bar Congress from enacting broad legislation to dictate the manner in

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234 Tolson, *supra* note 216, at 2217.

235 THE FEDERALIST NO. 59 (Alexander Hamilton).

236 Tolson, *supra* note 216, at 2214.

237 *Id.* at 2216.

238 *Id.* at 2215–18; *see* Tolson, *supra* note 164, at 321–22.

239 U.S. CONST. art. I, § 4; *see* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1247 (2012) ("The organizational structure of the [Elections] Clause itself is not really federalist, but reflects a decentralized organizational structure that is often confused with federalism."); Weinstein-Tull, *supra* note 3, at 790 (noting that some scholars argue that federal election statutes do not implicate federalism, but demonstrate a form of "managerial decentralization").

240 Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910–11 (1994).

241 *Id.*

242 *Id.* at 911.

243 *Id.*

244 Weinstein-Tull, *supra* note 3, at 775.

245 Tolson, *supra* note 239, at 1202, 1247.

which federal elections will be conducted.[246] In contrast, states have no plenary power to regulate federal elections.[247] States can administer federal elections under direct grant from the Elections Clause but subject to Congress's ultimate authority.[248] Pursuant to the Elections Clause, "the Constitution primarily treats states as election administrators rather than sovereign entities."[249] Therefore, states may only regulate federal elections in a managerial sense.[250] Congress has the final say in how authority is delegated and has generally left states "to fill in . . . the blanks with respect to the nuts and bolts of federal elections[.]"[251]

2. Congress Has Used Its Election Clause Authority to a Limited Degree

In addition to exercising federal authority over elections under the Fifteenth Amendment, Congress has, at times, used its Elections Clause power.[252] Two examples of statutes enacted under the Elections Clause that have been upheld by courts are the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA).[253]

Congress enacted the NVRA to increase voter participation in elections by making voter registration easier for all eligible citizens.[254] The NVRA requires states to provide opportunities to register to vote when citizens interact with various state government offices, such as applying for driver's licenses or applying for aid through public assistance and disability services offices.[255] The NVRA also authorizes the federal government to enforce its provisions through civil actions against states.[256]

Federal courts have generally upheld the NVRA as a legitimate exercise of Congress's Elections Clause authority.[257] Despite giving no weight to the

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246 Tolson, *supra* note 216, at 2216 ("Congress and the courts can disregard state sovereignty in enacting, enforcing, and resolving the constitutionality of legislation passed pursuant to the Elections Clause.").

247 Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 849 (2015).

248 *Id.*

249 Harkless v. Bruner, 545 F. 3d 445, 454 (6th Cir. 2008).

250 *See* Tolson, *supra* note 239, at 1197.

251 Tolson, *supra* note 216, at 2218.

252 Franita Tolson, *The Elections Clause and Underenforcement of Federal Law*, 129 YALE L.J. F. 171, 173 (2019).

253 *See* Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 101–906, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901–21145); *see* National Voter Registration Act of 1993, Pub. L. No. 103-31, §§ 1–13, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501–20511).

254 § 2, 107 Stat. at 77.

255 §§ 4–5, 7, 107 Stat. at 78, 80–81.

256 § 11, 107 Stat. at 88.

257 *See* Weinstein-Tull, *supra* note 3, at 762–63, 765.

Elections Clause in *Shelby County*, the Supreme Court recognized Congress's broad power to regulate voter qualification standards under the Elections Clause in *Arizona v. Inter Tribal Council of Arizona, Inc.*[258] In *Inter Tribal Council*, the Court held that the NVRA preempted an Arizona state law.[259] The Court noted that the Elections Clause grants Congress final policymaking authority over many aspects of federal elections.[260] The NVRA required states to accept a national mail registration form developed by the Federal Election Commission.[261] The Court held that the NVRA mandate that states "accept and use" a federal form to register voters superseded Arizona's law that required voters to present proof of citizenship to register to vote.[262]

In some cases, courts have noted that Congress's right to disregard states' autonomy under the Elections Clause is even broader than its powers under the Commerce Clause.[263] For example, "[i]f Congress determines that the voting requirements established by a state do not sufficiently protect the right to vote, it may force the state to alter its regulations."[264] In *ACORN v. Miller*, the Sixth Circuit rejected Michigan's challenge to the NVRA.[265] Michigan argued that "Congress overstepped its power to regulate federal elections by compelling state legislation to effectuate a federal program, directing states to legislate toward a federal purpose, and forcing states to bear the financial burden of enacting a federal scheme."[266] However, the Sixth Circuit held that, unlike the Commerce Clause, the Elections Clause "specifically grants Congress the authority to force states to alter their regulations regarding federal elections."[267]

Congress's power under the Elections Clause extends as far as commandeering state offices and state election officials to carry out federal

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258 Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 14–15 (2013).

259 *Id.* at 14–15, 20.

260 *Id.* at 8–9.

261 National Voter Registration Act of 1993, Pub. L. No. 103-31, § 6, 107 Stat. 77, 79–80 (codified as amended at 52 U.S.C. §§ 20501–20511). When HAVA was enacted, this function of the Federal Election Commission transferred to the Election Assistance Commission. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, § 303, 116 Stat. 1666, 1713–14 (codified as amended at 52 U.S.C. §§ 20901–21145).

262 *Inter Tribal Council*, 570 U.S. at 15.

263 *See* Harkless v. Bruner, 545 F. 3d 445, 454 (6th Cir. 2008) ("[U]nlike the Commerce Clause . . . Article I section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections." (quoting ACORN v. Miller, 129 F.3d 833, 836 (6th Cir. 1997))). Congress's power to prescribe the details that state legislatures must adopt to hold federal elections stands in stark contrast to virtually all other provisions of the Constitution. *Id.*

264 *ACORN*, 129 F.3d at 837.

265 *Id.* at 837–38.

266 *Id.* at 836.

267 *Id.*

law.[268] For example, the NVRA imposes duties on state officials: each state must designate a particular state election official to be responsible for carrying out state obligations under the Act.[269] States have claimed that the NVRA violates the anticommandeering doctrine because it forces them to enact new legislation to administer a federal program.[270]

The anticommandeering doctrine prohibits the federal government from compelling states to "implement, by legislation or executive action, federal regulatory programs."[271] However, as it relates to commandeering, courts have distinguished the source of congressional power in upholding federal election legislation.[272] The prohibition on commandeering under Congress's Commerce Clause authority does not extend to Congress's authority under the Elections Clause.[273] In contrast to the Commerce Clause, the Elections Clause allows Congress to "conscript state agencies" to administer a federal election scheme.[274] Therefore, under the Elections Clause, Congress may "enact election legislation that forces a state to take action it might not otherwise take, without violating the anticommandeering doctrine."[275] Despite this mandate, Congress has been reluctant to use the full extent of its Elections Clause authority because of "federalism" concerns.[276]

Congress passed HAVA in response to the challenges encountered in the 2000 presidential election.[277] That election was plagued by unreliable voting systems that varied by jurisdiction, culminating in the "hanging chad" debacle in Florida.[278] HAVA provided federal funds for states to update their voting machines while placing several requirements on states.[279] HAVA's mandatory provisions include allowing voters to review and verify votes before casting a

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268 Tolson, *supra* note 216, at 2220 (noting that Congress's primacy in regulating elections is embodied by "its independent authority to make legislation, alter state law, and commandeer state officials to implement federal law").

269 National Voter Registration Act of 1993, Pub. L. No. 103-31, § 10, 107 Stat. 77, 87 (codified as amended at 52 U.S.C. §§ 20501–20511)

270 Voting Rts. Coal. v. Wilson 60 F.3d 1411, 1415–16 (9th Cir. 1995); *see* ACORN v. Edgar, 56 F.3d 791, 793 (7th Cir. 1995) (describing an argument by the state of Illinois that the NVRA would require it to change its state laws that govern voter registration).

271 Printz v. United States, 521 U.S. 898, 925 (1997).

272 Weinstein-Tull, *supra* note 3, at 782.

273 *Id.*

274 *Voting Rts. Coal.*, 60 F.3d at 1415.

275 Weinstein-Tull, *supra* note 3, at 782.

276 *See infra* Part III.A.

277 Weinstein-Tull, *supra* note 3, at 757.

278 *Id.*

279 Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 102, 301, 303, 116 Stat. 1666, 1670–71, 1704–05, 1708 (codified as amended at 52 U.S.C. §§ 20901–21145).

ballot, making voting accessible to people with disabilities, and centralizing voter registration databases at the state level.[280] But HAVA did not "fully nationalize election administration."[281] Even after HAVA, states and municipalities remain relatively autonomous in conducting elections.[282]

With HAVA, Congress used a carrot as much as a stick to coax states into making voting more secure and accessible.[283] HAVA required states to update voting machines and provided funds for the upgrades, but left states to determine which systems to use.[284] HAVA requires that elections be auditable, but stops short of requiring paper ballots.[285] In March 2018, the U.S. Election Assistance Commission announced that it would provide $380 million in election security grants to states, but it left states with discretion in how to use the funds.[286] Under the Elections Clause, Congress has much more authority than it exercised with HAVA. Congress can create a national plan for elections and force states to comply with and administer the plan.[287]

Thus, unlike the antidiscrimination framework of the Fourteenth and Fifteenth Amendments, Congress is not constrained by federalism when it exerts its authority under the Elections Clause.[288] Courts can and should disregard claims of state sovereignty in resolving the constitutionality of legislation passed pursuant to the Elections Clause.[289] But Congress has exercised its Elections Clause power far less often than it has used its authority to enforce the Fourteenth and Fifteenth Amendments.[290] Because the Supreme Court's decision in *Shelby County* diminished Congress's power to regulate elections under the Reconstruction Amendments, Congress must rely on its Elections Clause authority to enact legislation that protects U.S. election infrastructure.[291]

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280 §§ 301, 303, 116 Stat. at 1704–05, 1708.

281 Weinstein-Tull, *supra* note 3, at 759.

282 *Id.*

283 *Cf.* JAMES T. BENNET, MANDATE MADNESS: HOW CONGRESS FORCES STATES AND LOCALITIES TO DO ITS BIDDING 211, 214–15 (2014) (describing and criticizing the "carrot and stick" approach of HAVA, which provided federal funds to help induce states to comply with the statute's requirement that they update and modernize voting equipment).

284 §§ 102–305, 116 Stat. at 1670–71, 1714.

285 §§ 301, 116 Stat. at 1704–06.

286 *U.S. Election Assistance Commission to Administer $380 Million in 2018 HAVA Election Security Funds*, U.S. ELECTION ASSISTANCE COMM'N NEWS (Mar. 29, 2018), https://www.eac.gov/news/2018/03/29/us-election-assistance-commission-to-administer-380-million-in-2018-hava-election-security-funds.

287 *See infra* Part III.A.

288 Tolson, *supra* note 252, at 173.

289 Tolson, *supra* note 216, at 2216.

290 Tolson, *supra* note 252, at 173.

291 Tolson, *supra* note 216, at 2215.

While Congress has not previously exercised the full extent of its power under the Elections Clause, it could do so to create a uniform federal election system.

III. CONGRESS SHOULD ACT TO PROTECT U.S. ELECTION INFRASTRUCTURE

Due to the threat of foreign interference in U.S. elections, Congress has both the authority and an obligation to act. The notion that Congress cannot create a federal plan for elections because such action would infringe on states' rights misinterprets the Constitution. The Elections Clause gives Congress a definitive right to regulate federal elections.[292] The combination of multiple sources of constitutional authority—the Elections Clause and the Reconstruction Amendments—provides Congress with even greater power to act.[293] Congress is also duty-bound to protect the integrity of our democracy and to ensure the rights of all citizens to have their votes properly counted.[294] It has a responsibility to take action to protect U.S. election infrastructure in the face of cybersecurity threats because state and local election officials are incapable of doing so.[295]

Therefore, to combat foreign interference, Congress must enact legislation to improve the security of election systems throughout the country. Congress should pass a federal plan for three main reasons. First, the structure and purpose the Elections Clause bestows upon Congress a duty to maintain the legitimacy of the federal government.[296] In other words, Congress must ensure that the result of federal elections reflects the will of voters. Second, states are ill-equipped and reticent to take the cybersecurity measures necessary to protect election infrastructure.[297] Third, the enforcement clauses of the Fourteenth and Fifteenth Amendments obligate Congress to protect the right of all citizens to vote.[298]

A. Congress Has an Obligation Under the Elections Clause to Protect U.S. Democracy

The integrity of elections is critical to maintaining democracy in the United States. Almost 150 years ago, the Supreme Court analogized the power to

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292 *See supra* Part II.C.

293 Tolson, *supra* note 164; *see infra* Part III.C.

294 *See* United States v. Slone, 411 F.3d 643, 649 (2005) ("Under the Elections Clause, Congress is authorized to protect the integrity of federal elections.").

295 *See infra* Part III.B.

296 *See* U.S. CONST. art. I, § 4, cl. 1; Tolson, *supra* note 216, at 2218.

297 *See infra* Part III.B.

298 U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2; *see infra* Part III.C.

regulate federal elections to the right to defend the nation itself.[299] In *Ex parte Yarbrough*, the Court stated "[t]hat a government whose essential character is republican . . . has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest consideration and demand the gravest consideration."[300] Foreign interference in U.S. elections is not a necessary, but a sufficient, condition for Congress to exercise its authority under the Elections Clause. Congress has a constitutional responsibility to ensure the integrity of the U.S. election process and to protect the fundamental right of citizens to vote.

The overarching purpose of the Elections Clause "is to ensure the continued existence and legitimacy of federal elections."[301] Hamilton described the critical point of the Elections Clause: "every government ought to contain in itself the means of its own preservation."[302] According to Hamilton, Congress must use its authority to assume from states the responsibility of regulating the manner of federal elections "whenever extraordinary circumstances might render that imposition necessary to its safety."[303] Foreign interference in U.S. elections is one such extraordinary circumstance.[304] Therefore, for the safety of the nation and the preservation of confidence in federal elections, Congress has an obligation to invoke the Elections Clause to create a federal plan for election administration.[305]

While Congress has occasionally exercised its broad powers to regulate elections under the Elections Clause, it has been reluctant to take full action against the threat of foreign interference. In response to Russia's cyberattacks in 2016 and 2018, the Democratic-led House of Representatives attempted to take small steps to improve the security of federal elections. In 2018, Congress authorized $380 million under HAVA for states to bolster their election security.[306] While several states used the HAVA funds to strengthen cybersecurity and purchase new voting equipment, the amount of money is far

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299 *Ex parte* Yarbrough, 110 U.S. 651, 657–58 (1884).

300 *Id.* at 657.

301 Tolson, *supra* note 216, at 2218.

302 THE FEDERALIST NO. 59 (Alexander Hamilton).

303 *Id.*

304 Lynch, *supra* note 187, at 2008–11.

305 Tolson, *supra* note 216, at 2218.

306 Dustin Volz, *U.S. Spending Bill to Provide $380 Million for Election Cyber Security*, REUTERS (Mar. 21, 2018, 1:30 PM), https://www.reuters.com/article/us-usa-fiscal-congress-cyber/u-s-spending-bill-to-provide-380-million-for-election-cyber-security-idUSKBN1GX2LC; Norden & Cordova, *supra* note 110.

from sufficient.[307] Congress has otherwise been reluctant to pass legislation that would be effective enough to prevent further cyberattacks.[308]

Although the House passed three election security bills in 2019, predominantly along party-line votes, the bills have made no progress in the Senate.[309] Congressional Republicans have downplayed the extent of foreign interference in the 2016 and 2018 elections.[310] Objecting to the 2019 Securing America's Federal Elections (SAFE) Act, Representative Rodney Davis (R-Ill.) stated that Congress should not force states to update voting technology because "there is no evidence of voting machines being hacked in 2016, 2018[,] or ever[.]"[311] Senate Majority Leader Mitch McConnell (R-Ky.), who has refused to bring any of the House bills up for a vote in the Senate, has also minimized the risk.[312] Senator McConnell even chided the media for fostering panic among voters and for not giving more credit to the current administration for preventing major security breaches in the 2018 election.[313]

However, in objecting to the SAFE act, Congressional Republicans have primarily argued that the bill's provisions interfere with the authority of states and localities to conduct elections.[314] Senator McConnell stated that while he believes Russian meddling to be real, he doesn't believe that the federal government should tell states how to run elections.[315]

The Republican sentiment, as expressed by Senator McConnell, misinterprets the authority granted to Congress under the Constitution. Because the Elections Clause gives Congress final policymaking authority over the times, places, and manners of federal elections, it "allows Congress to legislate independent of and without deference to state sovereignty."[316] Therefore, the

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307 Norden & Cordova, *supra* note 110.

308 *Id.*

309 For the People Act of 2019, H.R. 1, 116th Cong.; Stopping Harmful Interference in Elections for a Lasting Democracy (SHIELD) Act, H.R. 4617, 116th Cong.; Securing America's Federal Elections (SAFE) Act, H.R. 2722, 116th Cong.

310 Maggie Miller & Julie G. Brufke, *House Passes Sweeping Democratic-Backed Election Security Bill*, HILL (Jun. 27, 2019, 5:00 PM), http://thehill.com/homenews/house/450737-house-passes-sweeping-democrat-backed-election-security-bill; Hailey Fuchs & Karoun Demirjian, *Divided House Passes Election Security Legislation over Republican Objection*, WASH. POST (Jun. 27, 2019, 4:45 PM), https://www.washingtonpost.com/powerpost/divided-house-passes-election-security-legislation-over-republican-objections/2019/06/27/a071c10c-98f1-11e9-8d0a-5edd7e2025b1_story.html.

311 Miller & Brufke, *supra* note 310.

312 Fuchs & Demirjian, *supra* note 310.

313 *Id.*

314 *Id.*

315 DeChiaro, *supra* note 18.

316 Tolson, *supra* note 164, at 324.

notion that Congress must cajole states to undertake security fixes to their election systems and abide by federal security standards is grossly misguided.[317] Congress has an obligation under the Elections Clause to preserve the legitimacy of the federal government by ensuring that federal elections reflect the will of the people.[318] A strong and uniform federal plan is needed to protect against efforts by foreign actors to disrupt U.S. elections.

B. Congress Has a Duty to Secure U.S. Elections Against Foreign Interference Because States Are Ill-Equipped and Reluctant to Do So

The United States is unique in that it currently has no nationwide election authority.[319] Conducting elections in the United States is a complex process "that involves multiple levels of government, personnel with a variety of skills and capabilities, and numerous electronic systems that interact in the performance of a multitude of tasks."[320] State or local officials manage elections in accordance with state laws and local regulations.[321] Elections are administered by over 9,000 state and local jurisdictions containing over 114,000 polling places.[322] The thousands of jurisdictions vary widely in size, in funding available for election administration, and in the ability to detect and manage irregularities, particularly cyberattacks.[323] Several of the small elections offices "have few dedicated staff and little access to the latest information technology (IT) training or tools."[324]

A lack of cyber sophistication was evident in the 2016 election as states and municipalities were unequipped to deal with the severity of the threat. One state official said, "I don't think any of us expected to be hacked by a foreign government."[325] Another official stated, "If a nation-state is on the other side, it's not a fair fight. You have to phone a friend."[326] In most states, the decentralized structure means that counties and municipalities have varying

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317 *See* SENATE INTELLIGENCE REPORT, *supra* note 13, at 54 (stating in its recommendations that "[s]tates should remain firmly in the lead on running elections, and the federal government should ensure they receive the necessary resources and information").

318 *See* THE FEDERALIST NO. 59 (Alexander Hamilton) ("Every government ought to contain in itself the means of its own preservation.").

319 NAS REPORT, *supra* note 11, at 31.

320 *Id.* at 4.

321 NAS REPORT, *supra* note 11, at 17.

322 Manpearl, *supra* note 71, at 169.

323 NAS REPORT, *supra* note 11, at 17. *See generally* David C. Kimball & Brady Baybeck, *Are All Jurisdictions Equal? Size Disparity in Election Administration*, 12 ELECTION L.J. 130 (2013) (discussing how size disparities lead to diverging experiences for election officials and voters in large versus small jurisdictions).

324 NAS REPORT, *supra* note 11, at 17.

325 SENATE INTELLIGENCE REPORT, *supra* note 13, at 39.

326 *Id.*

levels of resources to conduct elections.[327] County election officials, who are on the front lines of defending election equipment, often have very limited IT support.[328] A Wisconsin state election administrator noted that some counties' election teams may only consist of "a county clerk and one more person working on elections."[329]

Many county officials have not received any cybersecurity training, even after the 2016 cyberattacks were made known. In Pennsylvania, election officials in three of the four largest counties had not received cybersecurity training as of August 2017.[330] In Michigan, officials in fewer than one-third of counties indicated that they received formal cybersecurity training.[331] And in Arizona, officials in only five of fifteen counties received such training.[332]

States also vary widely in the level of security they maintain around voter registration databases. DHS analysis of state election systems found significant variance in the security of state voter registration databases, including lack of encryption and lack of backups in many states.[333] As of May 2017, forty-one states were still using voter registration systems that were created more than a decade prior.[334] Types of vote casting systems also vary dramatically from state to state. Forty-five states continue to use outdated voting machines that are no longer manufactured.[335] Some machines are at least fifteen years old and run on outdated software that is no longer supported, such as Windows XP.[336] In the November 2018 election, fourteen states did not use a voting mechanism that allowed for a voter-verified paper audit trail.[337]

Many states understand the need for more secure voting equipment but lack sufficient financial resources. Although the 2018 HAVA funds were dispersed quickly, states did not have enough time to make major improvements to their

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327 *See* Norden & Cordova, *supra* note 110.

328 *Id.*

329 *Id.*

330 Likhitha Butchireddygari, *Many County Officials Still Lack Cybersecurity Training*, NBC NEWS (Aug. 23, 2017, 5:20 AM), https://www.nbcnews.com/politics/national-security/voting-prep-n790256.

331 *Id.*

332 *Id.*

333 SENATE INTELLIGENCE REPORT, *supra* note 13, at 46.

334 Tim Lau, *U.S. Elections Are Still Vulnerable to Foreign Hacking*, BRENNAN CTR. FOR JUST. (Jul. 18, 2019), https://www.brennancenter.org/our-work/analysis-opinion/us-elections-are-still-vulnerable-foreign-hacking.

335 Norden & Cordova, *supra* note 110.

336 *Id.*

337 Lin et al., *supra* note 51, at 22.

election systems before the 2018 midterm elections.[338] The funding has also been insufficient for states to overhaul their elections systems and replace outdated voting machines.[339] Most states recognized a need to purchase new equipment before the 2020 election, but two thirds of the state officials claimed that they lack the money to do so, even with the additional HAVA funds.[340]

Consequently, states and municipalities cannot be relied on to successfully combat foreign cyberattacks against U.S. election systems. According to Senator Ron Wyden (D-Or.),

> If there was ever a moment when Congress needed to exercise its clear constitutional authorities, this is it. America is facing a direct assault on the heart of our democracy by a determined adversary. We would not ask a local sheriff to go to war against the missiles, planes and tanks of the Russian army. We shouldn't ask a county IT employee to fight a war against the full capabilities and vast resources of Russia's cyber army. That approach failed in 2016 and it will fail again.[341]

Simply providing funding to states is also not enough. Congress must create a comprehensive plan to secure federal elections against foreign attacks.

C. *Congress Must Enact a Federal Plan to Preserve the Right of All Citizens to Vote*

Professor Franita Tolson has effectively described how Congress's license to enact comprehensive federal election legislation may be even greater than its Elections Clause power alone because it derives from multiple sources of authority.[342] In addition to its obligation to preserve the integrity of federal elections under the Elections Clause, Congress has a responsibility to exercise its authority under the enforcement clauses of Fourteenth and Fifteenth Amendments to protect the right of all citizens to vote.[343] Multiple sources of authority confer even broader power when Congress acts to protect constitutional rights and may provide the impetus for the Supreme Court to find a federal statute valid where it would have considered it unconstitutional under a single source of authority.[344] Therefore, notwithstanding the Supreme Court's

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338 The EAC dispersed 96% of the HAVA funds by August 2018. Lynch, *supra* note 187, at 1999.

339 Norden & Cordova, *supra* note 110.

340 *Id.*

341 SENATE INTELLIGENCE REPORT, *supra* note 13, Minority Views of Senator Wyden, at 1.

342 Tolson, *supra* note 164, at 329.

343 *Id.* at 324.

344 *Id.* at 329. The Supreme Court has been inconsistent in its recognition of a greater scope of authority when Congress acts pursuant to multiple sources of authority. *Compare* Tennessee v. Lane, 541 U.S. 509, 516

holding in *Shelby County*, the Reconstruction Amendments provide additional power to Congress's Elections Clause authority to establish a federal system for election infrastructure.[345] With this power comes a duty for Congress to act.

Cyberattacks that disrupt the voting process and create risks that vote tallies will be manipulated infringe on the right of citizens to vote. The fundamental right to vote includes the right to be certain that one's vote matters.[346] Courts have found that plaintiffs have standing to bring Fourteenth Amendment Due Process and Equal Protection claims where they allege that certain voting methods prohibit their votes from being properly counted.[347] In *Stewart v. Blackwell*, the Sixth Circuit found that the increased probability that plaintiffs' votes would not be properly counted due to a faulty punch-card system was "neither speculative nor remote" and was therefore a justiciable claim.[348] Similarly, a Pennsylvania court found that voters had proper standing to bring a Fourteenth Amendment claim because the machines they used to vote did not allow them to know whether their votes had been cast or would be counted.[349]

A recent lawsuit brought by voters in Georgia demonstrates how voting systems that are not secure against cyberattacks infringe on voters' rights.[350] A federal court granted an injunction against using insecure DRE machines based on the merits of the plaintiffs' Fourteenth Amendment Due Process and Equal Protection claims.[351] The plaintiffs in *Curling* claimed that the state had violated their Due Process rights by placing a "substantial burden" on their fundamental right to vote and had violated their Equal Protection rights by placing "more severe burdens" on their right to vote than voters who did not have to use DRE machines.[352] The court agreed and granted plaintiff's relief in part because the

(2004) (upholding Title II of the Americans with Disabilities Act (ADA) based on "the power to enforce the [F]ourteenth [A]mendment and to regulate commerce"), *with* Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001) (ignoring the Congress's Commerce Clause authority when invalidating the ADA in part as an improper exercise of the Fourteenth Amendment enforcement clause), *and* Shelby Cnty. v. Holder, 570 U.S. 529, 553 (2013) (giving no weight to Congress's additional authority for enacting the VRA under both the Fourteenth and the Fifteenth Amendments).

345 *See* Tolson, *supra* note 164, at 330 ("[F]ar-reaching and potentially controversial legislation can gain substantial legitimacy from the fact that Congress can draw on multiple sources of power.").

346 *See* Curling v. Kemp, 334 F. Supp. 3d 1303, 1328 (N.D. Ga. 2018).

347 *E.g.*, *id.*

348 Stewart v. Blackwell, 444 F.3d 843, 855 (6th Cir. 2006), *superseded by* Stewart v. Blackwell, 473 F.3d 692 (6th Cir. 2007).

349 Banfield v. Cortes, 922 A.2d 36, 44 (Pa. Commw. Ct. 2007).

350 *Curling*, 334 F. Supp. 3d 1303; Curling v. Raffensperger, 397 F. Supp. 3d 1334 (N.D. Ga. 2019).

351 *Curling*, 397 F. Supp. 3d at 1410.

352 *Curling*, 334 F. Supp. 3d at 1312.

state's ongoing use of an insecure voting method "'pierce[d] citizens' confidence in the electoral system and the value of voting."[353]

Therefore, in some instances, voting rights advocates can protect the right to vote against insecure voting systems through litigation.[354] Federal courts may be willing to recognize that an infringement on voters' right to feel secure that their votes will count is an injury for which relief may be granted.[355] Insecure voting systems can also affect voters' ability to merely cast a ballot. Long wait times to vote—resulting from erroneous registration data or voting equipment dysfunction—may impact minority voting districts to a greater degree than predominantly white precincts.[356] And as wait times increase, voter participation drops.[357] Consequently, the Equal Protection Clause and the Fifteenth Amendment may be implicated when citizens of color are disproportionately denied the right to vote when cyberattacks disrupt voting on election day.

However, litigation is cumbersome and cannot always protect the rights of all voters or ensure the integrity of federal elections. Indeed, one impetus for the VRA in 1965 was that piecemeal litigation had failed to sustainably protect the African Americans' right to vote in most jurisdictions in the Deep South.[358] With each hard fought victory in courts, state and local governments found ways to enact new restrictions.[359] Moreover, litigation only grants relief after harm has occurred. Courts can grant prospective relief to require security measures for future election cycles.[360] But there is no sufficient remedy for the harm to voters that has already occurred after they participated in an insecure election.[361] Thus,

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353 *Curling*, 397 F. Supp. 3d at 1411 (quoting *Curling*, 334 F. Supp. 3d at 1328).

354 *Id.* at 1410.

355 *Id.*; *see Curling*, 334 F. Supp. 3d at 1328 ("A wound or reasonably threatened wound to the integrity of a state's election system carries grave consequences beyond the results in any specific election, as it pierces citizens' confidence in the electoral system and the value of voting."). *Contra* Heindel v. Andino, 359 F. Supp. 3d 341, 357 (D.S.C. 2019) (holding that plaintiffs failed to show a clearly impending injury that was traceable to state election officials because they "merely speculate and make assumptions about whether their votes will be inaccurately counted as the result of a potential hack" (quoting Clapper v. Amnesty Int'l, 568 U.S. 398, 411 (2013))).

356 Stephanie Mencimer, *Even Without Voter ID Laws, Minority Voters Face More Hurdles to Casting Ballots*, MOTHER JONES (Nov. 3, 2014), https://www.motherjones.com/politics/2014/11/minority-voters-election-long-lines-id/; German Lopez, *Minority Voters Are Six Times More Likely as White Voters to Wait More Than an Hour to Vote*, VOX (Nov. 8, 2016, 1:30 PM), https://www.vox.com/identities/2016/11/8/13564406/voting-lines-race-2016.

357 *Lopez*, *supra* note 356.

358 South Carolina v. Katzenbach, 303 U.S. 301, 314 (1966).

359 *Id.*; ANDERSON, *supra* note 165, at 13; *see supra* Part II.A.

360 *See Curling*, 397 F. Supp. 3d at 1412.

361 *See Curling*, 334 F. Supp. 3d at 1315.

the federal government must respond comprehensively to protect voters' rights against cyberattacks from foreign actors.

In sum, Congress must act to protect U.S. election infrastructure and to combat foreign interference in federal elections. Congress has the primary obligation to safeguard the legitimacy of the federal government, to protect the fundamental right of citizens to vote, and to ensure that the election results reflect the choice of the majority of voters. And Congress has the authority to act pursuant to the Elections Clause coupled with the enforcement provisions of the Reconstruction Amendments, which provide additional power to protect the right of all citizens to vote.

IV. A PROPOSED FEDERAL PLAN TO SECURE U.S. ELECTIONS

Congress has the power under the Elections Clause to enact legislation that establishes a federal plan to which state election authorities must adhere.[362] The Elections Clause authorizes Congress to designate the manner in which federal elections are conducted in order to protect the integrity of the federal government against a threat of foreign interference.[363] After Russian cyberattacks against state and local election systems in 2016 and 2018, and the anemic, ineffective response by state election officials, the need for a uniform federal election plan is evident.[364] Therefore, Congress has the obligation to enact a national plan that creates uniform standards across all election jurisdictions to ensure that federal elections are secure and that all citizens are able to exercise their right to vote and know their votes will count.

A national plan for federal elections does not imply that the entirety of election administration should be conducted by the federal government. The decentralized approach to U.S. elections, which relies on states and localities to manage the nuts and bolts of elections, provides efficiency.[365] The cybersecurity benefit of a decentralized structure remains—it protects against the devastating impact of a single widespread cyberattack or technological breakdown.[366] But an ongoing role for states to conduct elections does not preclude implementing uniform rules and standards for federal elections. Measures to secure U.S.

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362 *See supra* Part III.A.

363 *See id.*

364 *See supra* Part I.C.

365 *See* THE FEDERALIST NO. 59 (Alexander Hamilton) (stating that regulation of federal elections is left to local administrations because "it may be more convenient and more satisfactory").

366 Manpearl, *supra* note 71, at 182; NAS REPORT, *supra* note 11, at 119.

election infrastructure would be most effective if they are implemented at a national level.[367]

Although Congress's national plan for federal elections should be mandatory for states to follow, the Elections Clause does not grant Congress authority over state and local elections.[368] However, Congress can encourage states to follow a federal election plan for their own internal elections. First, because of logistics, efficiency, and cost, states would likely use federal election infrastructure to conduct state and local elections along with federal elections. Second, states' inability to take appropriate cybersecurity measures for their own elections provides the impetus for Congress to act under the Fourteenth and Fifteenth Amendments to protect the right of all citizens to know that their votes with count.[369] Unlike the Elections Clause, the Fourteenth and Fifteenth Amendments apply to *all* elections: federal, state, and local.[370] Third, Congress could use its Spending Clause power to condition funding for election infrastructure on a state's compliance with a federal plan for all elections conducted within the state.[371]

A national election plan should have three main components. First, it should create uniform federal standards for securing voter registration databases and for transmitting voter information to polling places so that voters can be checked-in on election day. Second, Congress should require that all states implement a secure method of voting that uses a uniform ballot design. All voters should be allowed to mark and record their selections in the manner that is least susceptible to cyberattacks: hand-marked paper ballots read by secure, state-of-the-art optical scanners. Finally, to ensure the integrity of every federal election, states must be required to submit to federal post-election audits.

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367 *See* Mark Lanterman, *Fair Elections and Cybersecurity*, 75 BENCH & BAR MINN. 10, 10 (2018) ("[T]he sorts of measures that would most likely effect positive security outcomes are best implemented at a national level, where standardized procedures can provide a framework for ongoing improvement.").

368 U.S. CONST. art. I, § 4, cl. 1.

369 *See supra* Part III.C.

370 U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged *by the United States or by any State* . . . .") (emphasis added).

371 *See* Art. I, § 8, cl. 1 (empowering Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"); South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("[O]bjectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the spending power and the conditional grant of federal funds.") (internal quotation marks omitted).

A. Congress Should Establish Binding Federal Standards for States to Register Voters, Maintain Secure Voter Databases, and Check-in Voters at the Polls

Voter registration databases that are maintained electronically are particularly vulnerable to manipulation by malicious cyber actors.[372] Election administrators currently rely on county or state government IT departments to secure voter registration databases.[373] A DHS analysis found that the security of voter databases varied significantly by state, and many states lacked encryption and backups for their databases.[374] Federal intelligence and cybersecurity officials have made recommendations to states and have offered to provide cybersecurity measures to protect voter registration databases.[375] But many states have demonstrated a reluctance to receive help from the federal government or to follow recommendations.[376]

Consequently, Congress must pass legislation that directs states to implement specific cybersecurity measures for voter registration databases, which include updating relevant software, creating paper back-ups, and instituting two-factor authentication for user access to the databases.[377] This action would not be novel—Congress has previously set mandatory requirements for state voter databases.[378] A federal plan should also require states to put in place standard security procedures for monitoring voter database integrity.[379] Such measures should include installing monitoring sensors on state registration systems to detect attempts to hack into the systems and reporting any identified compromises immediately to DHS.[380]

A national plan must also create standards for transmitting voter data to polling places for voter verification and check-in. Because they are electronic, e-pollbooks are vulnerable to cyberattacks, particularly if they are locally

372 SENATE INTELLIGENCE REPORT, *supra* note 13, at 57.

373 NAS REPORT, *supra* note 11, at 58.

374 SENATE INTELLIGENCE REPORT, *supra* note 13, at 46.

375 *Id.* at 52.

376 *See supra* Part III.B; SENATE INTELLIGENCE REPORT, *supra* note 13, at 48–49; *see also id.*, Minority Views of Senator Wyden, at 2 ("The Committee report describes a range of cybersecurity measures needed to protect voter registration databases, yet there are currently no mandatory rules that require that require states to implement even minimum security measures.").

377 SENATE INTELLIGENCE REPORT, *supra* note 13, at 57.

378 Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301-15545) (requiring "a single, uniform, official, centralized, interactive, computerized statewide voter registration list defined, maintained, and administered at the state level").

379 NAS REPORT, *supra* note 11, at 63.

380 SENATE INTELLIGENCE REPORT, *supra* note 13, at 57.

networked or connected to the internet.[381] Cyberattacks could change voter data, alter information on who has voted, or simply shut down operation of an e-pollbook through a "denial of service" attack.[382] Congress should, therefore, include national security standards for the use of e-pollbooks in its federal plan. Because e-pollbooks have advantages over paper and are easy to use, their use should not be discontinued.[383] Rather, the NAS recommends that Congress authorize and fund the National Institute of Standards and Technology to develop security standards along with verification and validation protocols for e-pollbooks.[384] In addition, each precinct should be required to maintain a paper copy of the precinct's pollbook as a back-up in the event that voter data is manipulated or access to electronic data is disrupted.[385]

B. Congress Should Mandate Uniform Paper Ballots for All Federal Elections

Voters across the country cast their ballots using methods that are subject to varying degrees of cyber risks, and many states are either unwilling or incapable of following the recommendations of cybersecurity experts.[386] Voting systems that do not provide human-readable printouts for voters to confirm their selections and do not maintain a voter-verified paper audit trail are most vulnerable to cyberattacks.[387] Experts have called for discontinuing the use of paperless DRE machines because they are vulnerable to hacking without detection and do not produce auditable paper trails.[388] Yet, in 2019, twelve states were still using paperless DRE machines in at least some jurisdictions, and four states still used them statewide.[389] Congress should pass legislation that prohibits states from using outdated, paperless voting machines and requires the use of a uniform method of voting that will provide an auditable paper trail.

The Senate Intelligence Report concluded that "[p]aper ballots and optical scanners are the least vulnerable to cyberattack."[390] The most secure and cost-effective method for voting would be to use hand-marked paper ballots in all

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381 See *supra* Part I.B. regarding the vulnerability of e-pollbooks.

382 NAS REPORT, *supra* note 11, at 71, 86.

383 *Id.* at 72.

384 *Id.*

385 *Id.*

386 *See supra* Part III.B.

387 SENATE INTELLIGENCE REPORT, *supra* note 13, at 42.

388 See *supra* Part I.B. for a detailed description of the security flaws associated with DRE voting machines.

389 Norden & Cordova, *supra* note 110.

390 SENATE INTELLIGENCE REPORT, *supra* note 13, at 59.

federal elections.[391] Using a uniform paper ballot for federal elections that voters mark by hand would also allow states to continue and expand the use of vote-by-mail.[392] Alternatively, Congress could require and provide funding for uniform BMD machines to be used across all jurisdictions. The BMDs must produce a paper record of the voter's choices, which each voter can review before casting their ballot. However, because BMD machines are potentially vulnerable to cyberattacks, the most secure election systems use hand-marked paper ballots as the primary method for voting.[393] Moving forward, Congress should mandate that all federal elections be conducted using human-readable paper ballots that are counted either by hand or by using federally certified optical scanners.[394]

C. Congress Should Require All States to Submit to Federal Election Audits

As part of a federal election plan, Congress should require that all states submit to post-election audits. Audits require voter-verifiable paper ballots that provide a human-readable record of the voter's selections.[395] Such audits provide assurance that the outcome of any election reflects the voters' choices and is based on an accurate tabulation of the ballots cast.[396]

NAS election cybersecurity experts recommend risk-limiting audits as the most efficient and effective means to ensure the reliability of an election.[397] Risk-limiting audits examine randomly selected, individual ballots until a predetermined level of statistical assurance is reached.[398] In 2017, risk-limiting audits were piloted statewide in Colorado, and several other states plan to conduct pilots in the next few years.[399] However, rather than leaving the requirement for audits to the discretion of states, Congress should pass

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391 *Id.*; Christopher Deluzio & Kevin Skoglund, *Guess Which Ballot Costs Less and Is More Secure—Paper or Electronic?*, PATRIOT NEWS (Aug. 20, 2019), https://www.pennlive.com/opinion/2019/08/guess-which-ballot-costs-less-and-is-more-secure-paper-or-electronic-opinion.html.

392 In 2016, Colorado, Oregon, and Washington used mail-only voting, and most ballots in California and Utah were cast by mail. NAS REPORT, *supra* note 11, at 48–50.

393 *See generally* Andrew Appel, Richard A. DeMillo & Philip B. Stark, *Ballot-Marking Devices (BMDs) Cannot Assure the Will of the Voters*, 19 ELECTION L.J. 432 (2020) (describing the vulnerability of BMD voting machines to hacking as well as risk that BMDs may not accurately record a vote as the voter had intended and arguing that the most secure method of voting is a system that uses hand-marked paper ballots).

394 NAS REPORT, *supra* note 11, at 80.

395 *Id.* at 94.

396 *Id.*

397 *Id.* at 95.

398 *Id.*

399 *Id.*

legislation to require all states to submit to federal risk-limiting audits after each federal election.

The federal government's response to ongoing Russian cyberattacks must extend beyond offers to provide resources to states.[400] To protect and defend U.S. elections, Congress must "establish mandatory nation-wide cybersecurity requirements."[401] Such requirements must designate specific measures to ensure the security of voter registration databases and pollbooks and should compel the use of uniform paper ballots and post-election audits.

CONCLUSION

The right of citizens to freely choose who will represent them is the essence of our republican form of government. The founders understood that maintaining free and fair elections is a core tenet of this nation. Therefore, they placed in the Constitution the means for Congress to have final authority to regulate federal elections when the need arises. Russian cyberattacks on state and local election systems constitute a challenge to the core values of American democracy, which require a comprehensive, uniform federal response.

To varying degrees over the past 150 years, Congress has imposed regulations on states to protect election integrity by ensuring that all citizens have the right to vote. The current threat requires an even greater response. This Comment describes a source of authority that authorizes Congress to prescribe cybersecurity measures to which states must adhere in conducting federal elections. The value implicit in the Elections Clause is that federal elections must be administered in a manner that produces a clear and legitimate outcome. Congress has the authority and an obligation under the Elections Clause to ensure the integrity of American democracy in the face of cyberattacks by a foreign adversary. Congress must exercise this power to create a comprehensive national plan for federal elections.

SUMAN MALEMPATI*

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400 SENATE INTELLIGENCE REPORT, *supra* note 13, Minority Views of Senator Wyden, at 1.

401 *Id.*

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THE MEANING, HISTORY, AND IMPORTANCE OF THE ELECTIONS CLAUSE

Eliza Sweren-Becker and Michael Waldman[*]

Historically, the Supreme Court has offered scant attention to or analysis of the Elections Clause, resulting in similarly limited scholarship on the Clause's original meaning and public understanding over time. The Clause directs states to make regulations for the time, place, and manner of congressional elections, and grants Congress superseding authority to make or alter those rules.

But the 2020 elections forced the Elections Clause into the spotlight, with Republican litigants relying on the Clause to ask the Supreme Court to limit which state actors can regulate federal elections. This new focus comes on the heels of the Clause serving as the primary constitutional basis for democracy reform legislation that passed the U.S. House of Representatives in 2019 and was reintroduced in 2021. Increased interest heightens the need for a deeper understanding of the intent and meaning of the Elections Clause. This Article fills a gap in the literature by providing a comprehensive analysis of the purpose, meaning, and interpretation of the Elections Clause by the Framers, early Congresses, and federal courts.

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I. INTRODUCTION

The Elections Clause—Article I, section 4 of the U.S. Constitution—has been rarely studied and infrequently adjudicated. That is changing.

The Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[1] In other words, the Elections Clause affirmatively directs states to regulate federal congressional elections, but reserves to Congress the superseding

[1] U.S. CONST. art. 1, § 4, cl. 1.

power to make its own regulations or to modify state election law.

It is a provision of extraordinary, if often latent power. Nowhere else in the original Constitution is Congress given explicit authority to "alter" state laws even absent a conflicting federal statute. It is also one of the few places in the Constitution where states are given an explicit instruction to act – in this case, to ensure the continuation of the federal legislature. Beyond the significance of this exertion of federal power, what is noteworthy about the Clause is the motive that drove its inclusion: a clear-eyed sense of the risk of political abuse by state lawmakers and the unambiguous decision *not* to leave federal elections in their hands alone.

Unexpectedly, the Elections Clause has emerged as the latest voting rights battleground. In 2020, litigants filed more than forty cases raising Elections Clause and Electors Clause[2] claims, largely seeking to limit voting access before the election or to overturn results after election day.[3] Unlike bizarre claims about Dominion voting machines and a deceased Venezuelan president,[4] these cases had the patina of constitutional seriousness. Today, in partisan voting rights battles, litigants focus on the meaning of the word "legislature," assuming it to restrict election regulation only to elected representatives in each state capitol. They claim, variously, that election officials, governors, or even state courts interpreting state constitutions cannot act. From the founding era to the present, one would have to look far and wide for evidence that the framers sought to limit these actions only to legislators (as opposed to understanding that language to refer to states generally). Indeed, suspicion of those very legislators suffuses the purpose and history of the Clause. After four justices—considering

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[2] The Electors Clause, U.S. CONST. art. II, § 1, directs how *presidential* electors are appointed by the states. "[C]ourts have construed the Electors Clause coextensively with the Elections Clause, holding that the former endows Congress with the same authority over presidential elections that the latter grants it over congressional races." Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, CONST. COMM. at 39 (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715826; *see also, e.g.*, *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) ("The broad power given to Congress over congressional elections has been extended to presidential elections.") *Ass'n of Cmty. Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995) ("Article II section 1 . . . has been interpreted to grant Congress power over Presidential elections coextensive with that which Article I section 4 grants it over congressional elections."); Eugene Gressman, *Uniform Timing of Presidential Primaries*, 65 N.C. L. REV. 351, 355 (1987) ("[T]he Court employs the same constitutional analysis—the same broad treatment of vested congressional power—in dealing with article II, section I.").

[3] Brennan Center for Justice, Voting Rights Litigation 2020 (May 28, 2021)

[4] Glenn Kessler, *Fact-checking the craziest news conference of the Trump presidency*, Wash. Post (Nov. 19, 2020), https://www.washingtonpost.com/politics/2020/11/19/fact-checking-craziest-news-conference-trump-presidency/.

voting cases on the U.S. Supreme Court's 2020 "shadow docket"[5]—suggested that they would limit which state entities can regulate federal elections under the Elections and Electors Clauses,[6] several petitioners sought certiorari to ask the Court to limit which state entities can regulate federal elections.[7]

At the same time, the Elections Clause serves as the primary constitutional rationale for federal democracy reform legislation to expand and protect voting access, the For the People Act, which passed the U.S. House of Representatives in 2019 and again in 2021.[8] And the Elections Clause took center stage in the Supreme Court's 2019 political gerrymandering decision, *Rucho v. Common Cause*.[9] The Clause was the subject of a 2015 ruling that allowed voters to enact election reforms through ballot initiatives.[10] In 2013, the Clause was the basis of a case on the scope of the National Voter Registration Act.[11] Understanding the Elections Clause's purpose, history, and application over more than 200 years is now essential.

Though the Elections Clause generated substantial friction during the

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[5] The term "shadow docket," coined by William Baude, refers to Supreme Court decisions decided outside of its regular docket, without oral argument. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & LIBERTY 1, 20 (2015).

[6] *See, e.g.*, *Wise v. Circosta*, No. 20A71, 2020 WL 6305035, at *1 (U.S. Oct. 28, 2020) (Justices Thomas, Alito, and Gorsuch would have granted an application to enjoin the North Carolina State Board of Elections' extension of the state's absentee ballot receipt deadline, which was challenged based on the claim that the Board is not the "legislature" under the Elections and Electors Clauses); *Democratic Nat'l Comm. v. Wisconsin State Legislature*, No. 20A66, 2020 WL 6275871, at *2–*3 (U.S. Oct. 26, 2020) (in denying an application to stay a Seventh Circuit decision—which stayed the district court's order to extend the ballot receipt deadline—Justice Gorsuch, concurring, wrote that state legislatures, not judges or other state officials, bear primary responsibility for setting election rules, and Justice Kavanaugh agreed that designing electoral procedures is a "legislative task"); *Republican Party of Pa. v. Boockvar*, No. 20A54, 2020 WL 6128193, at *1 (U.S. Oct. 19, 2020) (Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted an application to stay the Pennsylvania Supreme Court's ruling to extend the mail ballot receipt deadline, which was challenged based on the claim that the state court is not the "legislature" under the Elections and Electors Clauses).

[7] *See, e.g.*, *Pa. Democratic Party v. Boockvar* and *Scarnati v. Pennsylvania Democratic Party*, 238 A.3d 345 (Pa. 2020), *petitions for cert. filed*, (U.S. Oct. 23 and Oct. 27, 2020) (Nos. 20-542 and 20-574); *Bognet v. Boockvar*, 2020 WL 6686120 (3rd Cir. 2020), *petition for cert. filed* (U.S. Nov. 27, 2020) (No. 20-740). The Court declined to grant certiorari in each of these cases.

[8] For the People Act, H.R. 1, 116th Congress (2019); For the People Act, H.R. 1, 117th Congress (2021).

[9] 139 S. Ct. 2484 (2019).

[10] *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) (*AIRC*).

[11] *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) (*ITCA*).

state constitutional ratification debates from 1787 to 1790, it is not widely known, at least as far as constitutional provisions go. Congress did not legislate pursuant to its power under the Elections Clause until 1842,[12] and the Supreme Court did not elaborate on its meaning until 1879.[13] In a nearly unbroken string of cases since then, the Court has deemed uncontroversial a wide range of elections regulations. But the Court did not engage in a robust analysis of the provision's history until 2013.[14] Given the Court's scant attention, scholarship on the Clause—especially its original meaning and public understanding over time—has been limited and is typically directed to the relationship between the Elections Clause and a specific issue.[15] This Article builds on this literature by providing a comprehensive examination

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[12] Ch. 47, 5 Stat. 491 (1842).

[13] *Ex parte Siebold*, 100 U.S. 371 (1879).

[14] *ITCA*, 570 U.S. at 7–9.

[15] *See, e.g.*, Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021 (2005); Troy McCurry, *Leeway for Judicial Usurpation: Ignoring the Default of the Elections Clause in the Texas Redistricting Cases*, 25 QUINNIPIAC L. REV. 631 (2007) (justiciability of partisan gerrymandering); Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (2010) (campaign finance); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012) (Elections Clause, when combined with Congress's ability to enforce the Fourteenth and Fifteenth Amendments, provides constitutional justification for the VRA); MICHAEL KLARMAN, THE FRAMERS COUP 340–48 (2016); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 317 (2019) (exploring the breadth of congressional power over elections, which derives from multiple sources of congressional authority and should overcome federalism concerns); Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. FORUM 171 (2019) (addressing Congress's Elections Clause authority to enact The For the People Act of 2019 (H.R. 1));; *Recent Legislation*, 133 HARV. L. REV. 1806 (2020) (addressing anti-commandeering under the Elections Clause in the contest of H.R. 1); *but see* Stephanopoulos, *supra* note 2 (writing more broadly on congressional authority over elections). A separate line of scholarship addresses the "independent state legislature" doctrine. *See, e.g.*, Vikram D. Amar, *Federal Court Review of State Court Interpretations of State Laws That Regulate Federal Elections: Debunking The "Independent State Legislature" Notion Once and for All, and Keeping Federal Judges to their Important but Limited Lanes*, (Nov. 24, 2020) (U. of Ill. College of Law Legal Studies Research Paper No. 21-02), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731755; Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions* (Nov. 2, 2020) (FSU College of Law, Public Law Research Paper No. 917), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530136; Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 734 (2016); Michael T. Morley, The New Elections Clause, 91 NOTRE DAME L. REV. ONLINE 79 (2016); Richard L. Hasen, *When "Legislature" May Mean More Than "Legislature": Initiated Electoral College Reform and the Ghost of* Bush v. Gore, 35 HASTINGS CONST. L.Q. 599 (2008); Hayward Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

of the purpose, meaning, and understanding of the Elections Clause over time.

The full sweep of the history of the Clause – from its drafting to the current day – tells a clear story. It was understood from the start to give Congress extraordinary power over federal elections. Some derided it for this reason; others welcomed that federal oversight; all took it for granted. It was an important, if narrow, aspect of the Constitution's federalist clockwork machinery. From the start, the Elections Clause was motivated by great and still-relevant constitutional goals: to guarantee and amplify basic democratic rights by ensuring fair and accurate representation, and by precluding tactics that could be used by incumbent factions and parties to blunt representation and exclude voters.

Part I analyzes the drafting of the Elections Clause along with the state constitutional ratification and public debates on the provision. Part II considers the early congressional record and Congress's understanding of its authority under the Elections Clause. Part III explores the Supreme Court's interpretation of the Clause. And Part VI explains the importance of the Elections Clause for today's legal and political fights about our democracy.

II. THE ELECTIONS CLAUSE AT THE FOUNDING

A. The Constitutional Convention

1. The Framers' Goals

The Framers' inclusion of the Elections Clause was driven by two overlapping concerns of current relevance: a focus on representation and a distrust of state lawmakers.

First, the Framers cared passionately about representation.[16] As every American schoolchild knows, a fighting slogan was "No taxation without representation." Americans understood the risks of electoral manipulation to minimize effective representation – manipulation they saw in England, and to a degree in their own pre-revolutionary past.

During the fight over British repressive acts that led up to the revolution, Americans bristled at the notion that they need not be represented directly in parliament. Britain insisted that "virtual representation" was enough. In the colonies, where many more people owned land and the electorate was a larger share of the population than in Britain, especially in the north, actual representation was deemed a

[16] *See* J.R. Pole, Political Representation in England & the Origins of the American Republic (1966).

necessary aspect of legitimate government.

British parliamentary seats were notoriously malapportioned. The booming industrial cities of Birmingham and Manchester had no representation. On the other hand, a verdant hilltop known as Old Sarum had a seat in parliament.[17] Britain had ample reason to avoid the topic. As one historian writes, "Heeding American arguments about representation of the colonists in Parliament would open up the Pandora's box of defective representation in Britain."[18]

In American colonies, on the other hand, new towns were awarded legislative seats. Larger communities, such as Philadelphia and Boston, were awarded extra seats. As tensions rose, the Crown attempted to manipulate this practice. In Pennsylvania, it refused to add legislative representation when new towns were incorporated.

John Adams articulated the colonists' focus on ensuring the representative nature of legislatures in his *Thoughts on Government*, written in the spring of 1776 as the Continental Congress was preparing to formally declare independence.

> THE principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it.[19]

Others echoed Adams's words.[20]

As the revolutionaries established new governments, they kept an eye on the need to ensure accurate representation. One pamphlet, possibly

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[17] Stephen Farrell, "Old Sarum," History of Parliament Trust, http://www.historyofparliamentonline.org/volume/1820-1832/constituencies/old-sarum.

[18] R.B. Bernstein, The Education of John Adams (New York: Oxford University Press, 2020), 52.

[19] John Adams, "Thoughts on Government, April 1776," *Founders Online National Archives*, https://founders.archives.gov/documents/Adams/06-04-02-0026-0004; John Phillip Reid, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50-62 (1989); Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 161-75 (2017).

[20] *See, e.g.*, the "Essex Result" of 1778, drafted by Theophilus Parsons: "They should think, feel, and act like them, and in fine should be an exact miniature of their constituents." [Theophilus Parsons], Result of the Convention Holden at ipswich in the County of Essex ... (Newburyport, 1778), reprinted in The Popular Sources of Political Authority 341 (Oscar Handlin & Mary Handlin eds., 1966).

written by Thomas Paine, proposed that "A Constitution should lay down some permanent ratio, by which the representation should afterwards encrease or decrease with the number of inhabitants; for the right of representation, which is a natural one, ought not to depend upon the will and pleasure of future legislatures."[21]

The second impetus for the inclusion of the Elections Clause came from a strong distrust of state lawmakers. During the "Critical Period" between the victory in the war and the 1787 gathering in Philadelphia, the newly independent states offered ample evidence of the self-dealing and political corruption of local-minded officials. Indeed, as one Framer put it, the Constitutional Convention was appointed specifically because of the "corruption & mutability of the Legislative Councils of the States."[22] The Constitution was intended to rectify the weak Articles of Confederation, under which the national government had little leverage over States. The Confederation Congress could not impose taxes, enact statutes, regulate international or interstate commerce, or enforce treaty obligations. States operated largely out of self-interest. For example, New York enacted its own import duties in 1784, generating substantial revenue and keeping its property taxes low, leading to the state's reluctance to approve an amendment to the Articles that would have permitted federal taxing.[23] Madison's diligent preparation for the convention included thorough study of all the ways state governments had frustrated the national interest.[24] That distrust permeated the final Constitution.

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[21] Four Letters on Interesting Subjects (Philadelphia, 1776), partly reprinted in 1 Founders' Constitution at 639.

[22] 2 Records of the Federal Convention of 1787 at 288 (Max Farrand ed., Yale University Press 1937) (hereinafter "Farrand's") (Notes of James Madison, recording arguments of John Francis Mercer); *see also* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009) (corruption was discussed more often in the Constitutional Convention than factions, violence, or instability).

[23] KLARMAN, *supra* note 15, at 31.

[24] "Vices of the Political System of the United States, April 1787," *Founders Online*, National Archives, https://founders.archives.gov/documents/Madison/01-09-02-0187; *see also The Papers of James Madison*, vol. 9, *9 April 1786–24 May 1787 and supplement 1781–1784* 345–358, (Robert A. Rutland & William M. E. Rachal, eds. 1975) pp.; 5 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., 2d ed. 1836) (hereinafter "Elliot's Debates") at 119–20 (July 25, 1788, North Carolina) (noting that the States repeatedly failed to heed the Confederation Congress, failed to fulfil their national obligations, and even tried to keep secret their defiance of Congress).

2. Drafting the Elections Clause and Debate at the Constitutional Convention

The Elections Clause came together over the course of fifteen days in the summer of 1787. Between July 26 and August 6, a five-member Committee of Detail[25] pulled together a first draft of the Constitution based on the resolutions approved to date.[26] Over successive versions, the Clause's broad purpose to protect the integrity of elections came into view.

An early version produced by the Committee of Detail focused only on the timing of congressional elections.[27] Over the next four drafts, the Committee of Detail coalesced around broader language that grew to include authority over the manner of elections.[28] The sixth draft, significantly, introduced the notion that the Clause protects not just the frequency of elections, but the qualification of voters.[29] But by later drafts, the language had been boiled down to a more concise wording.[30] When John Rutledge (S.C.) delivered the Committee's report on August 6, the Elections Clause read:

> The times and places and [the] manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions

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[25] The Committee of Detail was comprised of Edmund Randolph, James Wilson, Oliver Ellsworth, John Rutledge, and Nathaniel Gorham. *See* KLARMAN, *supra* note 15, at 173.

[26] *See id.* at 147; 2 Records of the Federal Convention of 1787 at 129–74 (Max Farrand ed., Yale University Press 1937) (hereinafter "Farrand's").

[27] 2 Farrand's at 135 (Committee of Detail, III, Article 7) ("The Time of the Election of the Members of the H. D. and of the Meeting of U. S. in C. assembled.").

[28] *Id.* at 139 (Committee of Detail, IV, Articles 7–10: "The elections shall be biennially held on the same day through the same state(s) except in case of accidents, and where an adjournment to the succeeding day may be necessary. . . . The place shall be fixed by the (national) legislatures from time to time, or on their default by the national legislature. . . . So shall the presiding officer . . . (Votes shall be given by ballot, unless 2/3 of the national legislature shall chose to vary the mode.)") (emphasis in original).

[29] *Id.* at 153 (Committee of Detail, VI, Article 4: "The Members of the House of Representatives shall be chosen every second Year (in the Manner following) by the People of the several States comprehended within this Union (the Time and Place and the Manner and the of holding the Elections and the Rules) Manner and the of holding the Elections and the Rules) *The Qualifications of the Electors* shall be (appointed) *prescribed* by the Legislatures of the several States; but their provisions (which they shall make concerning them shall be subject to the Control of) *concerning them may at any Time be altered and superseded by* the Legislature of the United States.") (emphases in original).

[30] *Id.* at 165 (Committee of Detail, IX, Article 6: "The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered (or superseded) by the Legislature of the United States.").

> concerning them may, at any time, be altered by the Legislature of the United States.[31]

As the Clause evolved, the Committee toyed with various roles for Congress (the August 6 version did not yet include its power to "make" elections regulations, an authority added by amendment on August 9). But the drafters consistently preserved Congress's veto power over state regulations of federal elections.

On August 9, 1787, when the full federal convention considered the proto-Elections Clause, delegates proposed several amendments.[32] Among the suggested changes was an addition to Congress's power – the authority to *make* (not just "alter") regulations for congressional elections. In his notes, James Madison explained that the delegates added this authority "in case the States should fail or refuse altogether."[33] This fear, that states might not set up rules for congressional elections *at all*, permeated state ratification debates and congressional debates all the way through Reconstruction. One reason for the provision was the concern that state legislators would try to strangle the new government by refusing to hold federal elections at all. That fear was not far-fetched. Local potentates such as Patrick Henry, who dominated the Virginia legislature, and George Clinton, who held sway in Albany as New York's governor, would prove the new Constitution's most dogged foes.[34] There was a risk the whole experiment could collapse.

One of the amendments proposed that day generated meaningful debate. John Rutledge and Charles Pinckney represented South Carolina, a state with a notoriously malapportioned legislature, with large coastal plantations far better represented than newly populated inland areas.[35] They moved to strike from the Elections Clause the phrase, "but their provisions concerning them may at any time be altered by the Legislature of the United States."[36] According to Madison's notes, Rutledge and Pinckney argued that the

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[31] *Id.* at 179.

[32] *Id.* at 229.

[33] 2 Farrand's at 242.

[34] *See infra* notes 54, 70, 77.

[35] The western "back country" contained as much as 75 percent of the colony's white population and was settled by yeoman farmers who enslaved relatively few people. James Haw, *Political Representation in South Carolina, 1669-1794: Evolution of a Lowcountry Tradition*, 103 S.C. HIST. MAG. 106, 112 (2002). As described in greater detail *infra*, South Carolina's malapportionment was repeatedly offered as an example during state ratification debates to demonstrate the need for superseding congressional authority under the Elections Cause.

[36] 2 Farrand's at 240.

"States could & must be relied on in such cases."[37] The delegates from the nascent union's most gerrymandered state (before that word was invented) aimed to strike Congress's power to do anything about it.

Several delegates rose to defend the congressional veto. Nathaniel Ghorum remarked that the absence of congressional authority over elections would be just as improper as county control over British parliamentary elections.[38] Rufus King warned that the absence of a congressional override would repeat the mistakes of the Articles of Confederation.[39] Gouverneur Morris rejected the "dangerous" and "fatal" idea that the federal government should depend on state lawmakers, warning that without that congressional authority, states might make "false returns" and then fail to hold new elections.[40] Roger Sherman expressed "sufficient confidence in the State Legislatures," but still approved of congressional authority.[41]

Madison offered the most extensive defense (at least according to his own notes), along with an explanation of the purpose and scope of the Elections Clause.[42] He described the Clause as containing "words of great latitude," stressing the many ways that states could misuse their authority. And recognizing that state lawmakers would abuse their power in ways that were impossible to predict at the time, he warned that the Elections Clause was needed to prevent self-interested partisans from twisting election rules to benefit their faction. Given its singular importance, we quote Madison's defense of the provision in full:

> The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode, This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrouled right of regulating the times places

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[37] *Id.*

[38] *Id.*

[39] *Id.* at 241.

[40] *Id.*

[41] *Id.*

[42] Madison requested that his Notes be published posthumously, a full half century later in 1940. *See* THE PAPERS OF JAMES MADISON (H. Gilpin ed. 1842); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 24 (1986). Madison was known to have edited and "improved" the transcripts, including his own contributions. *Id.* at 25–35; KLARMAN, *supra* note 15, at 135–36.

> & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures. and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controuling power to the Natl. Legislature? Of whom was it to consist? 1. of a Senate to be chosen by the State Legislatures. If the latter therefore could be trusted, their representatives could not be dangerous. 2. of Representatives elected by the same people who elect the State Legislatures; surely then if confidence is due to the latter, it must be due to the former. It seemed as improper in principle — though it might be less inconvenient in practice, to give to the State Legislatures this great authority over the election of the Representatives of the people in the Genl. Legislature, as it would be to give to the latter a like power over the election of their Representatives in the State Legislatures.[43]

Particularly focused on fair representation, Madison echoed these concerns during the Virginia ratification debates a year later, "Elections are regulated now unequally in some states, particularly South Carolina, with respect to Charleston, which is represented by 30 members."[44]

Madison's denunciation of the likely machinations of self-interested state politicians seemed to have stilled the debate in Philadelphia. He recorded no subsequent interjections. Before moving on to consider other provisions of the new Constitution, the delegates agreed to Article IV,

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[43] 2 Farrand's at 240–41.

[44] *The Documentary History of the Ratification of the Constitution* (hereinafter "*DHRC*"), Vol. IX, Ratification by the States: Virginia, No. 2 at 1259–60 (June 14, 1788).

section 1. The vote was unanimous.[45]

B. Ratification of the Constitution

Publication of the Constitution in September 1787 led to a roaring national debate. Antifederalists cautioned that the Constitution would concentrate too much power in the new central government. The Elections Clause was one target for their fire. Antifederalists warned the provision would let Congress manipulate elections. In his pathbreaking 1961 study of the debate over ratification, historian Jackson Turner Main observed that this seemingly frivolous objection to the Elections Clause was "of great importance, judging from the number of times it was introduced."[46]

1. State Ratification Debates

Records indicate the Elections Clause was discussed at the ratification conventions in nine of thirteen states[47] and was the subject of proposed amendments from at least six states. Every state that proposed specific amendments included one to trim or eliminate the clause.[48]

Defenders of the Elections Clause repeatedly expressed an unvarnished distrust of state legislatures. For example, in Massachusetts, George Cabot argued that if state lawmakers exclusively regulated congressional elections "they may at first diminish, and finally annihilate that controul of the general government, which the people ought always to have through their immediate representatives—as one of the *people*, . . . the 4th section is to be as highly prized as any in the constitution."[49] Others warned against relying, even "for a moment, on the will of state legislatures," and expressed concern about state lawmakers trying to exercise "undue influence in elections" and making "improper regulations" arising from "sinister views."[50]

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[45] 2 Farrand's at 240.

[46] JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788 (1961), 149–51.

[47] No such debate was found in records of the Connecticut, Delaware, Georgia, and New Jersey ratification debates (in Elliot's Debates or the Documentary History of the Ratification of the Constitution). These four states ratified the Constitution most quickly. The vote was unanimous in Delaware, Georgia, and New Jersey; in Connecticut, the margin in favor of ratification was more than three to one. *Supra* KLARMAN, *supra* note 15, at 422–23.

[48] MAIN, *supra* note 46, at 151.

[49] *DHRC*, Vol. VI, Ratification by the States: Massachusetts, No. 3 at 1217, (Jan. 16, 1788).

[50] *See also id.*, Vol. XXII, Ratification by the States: New York, No. 4 at 1906 (June 25, 1788) ("Richard Morris suggested that so far as the people, distinct from their

Backers worried that balky states would simply refuse to participate in federal elections.[51] Rhode Island's refusal to send delegates to Congress and the Constitutional Convention was top-of-mind.[52] Indeed, in New York, supporters of George Clinton would manage to stall the first House election in two districts in 1788.[53] At times, supporters assured anti-federalists that the purpose of the Clause was simply to ensure that states held elections. At the first ratification convention the prominent lawyer James Wilson claimed the Clause was needed "for the very existence of the federal government." The authority would not be abused because Congress would act "only to correct the improper regulation of a particular state."[54] James Iredell

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legislatures, were concerned in the operation of the constitution, it was absolutely necessary that the existence of the general government should not depend, for a moment, on the will of the state legislatures. The power of perpetuating the government ought to belong to their federal representatives; otherwise, the rights of the people would be essentially abridged."); *id.*, Vol. II, Ratification by the States: Pennsylvania at 222 (Nov. 6, 1787) (essay of Plain Truth: Reply to An Officer of the Late Continental Army, published in the Philadelphia Independent Gazetteer) ("Congress indeed are to have control to prevent undue influence in elections, which we all know but too often happens through party zeal."); *id.*, Vol. XII, Ratification by the States: Maryland, No. 2 at 884 (July 21, 1788) (Text of a Federalist Speech Not Delivered in the Maryland Convention, published in the Maryland Journal) ("It has been said, that congress will be more likely to make improper regulations, than the general assembly. But that is an assertion without foundation, because although we may easily suppose improper regulations to take place in a state assembly, from the prevalence and sinister views of a party . . . .").

[51] *See, e.g.*, *DHRC*, Vol III, Ratification by the States: Delaware, New Jersey, Georgia, and Connecticut at 526 (Jan 7. 1788) (essay of A Citizen of New Haven, believed to be Roger Sherman, published in the Connecticut Courant) ("The regulating the time, place, and manner of elections seems to be as well secured as possible. The legislature of each state may do it, and if they neglect to do it in the best manner, it may be done by Congress; and what motive can either have to injure the people in the exercise of that right?"); *id.* at 569 (Jan. 11, 1788) (Letter of Samuel Holden Parsons to William Cushing, Middletown); *id.*, Vol. II, Ratification by the States: Pennsylvania at 402–03, 406 (Nov. 28, 1787) (statements of James Wilson); 4 Elliot's Debates at 60 (July 25, 1788, North Carolina) (statement of William R. Davie: "It would have been a solecism, to have a government without *any means* of self-preservation. The Confederation is the only instance of a government without such means, and is a nerveless system, as inadequate to every purpose of government as it is to the security of the liberties of the people of America. When the councils of America have this power over elections, they can, in spite of any faction in any particular state, give the people a representation.").

[52] *See, e.g.*, *DHRC*, Vol. VI: Ratification by the States: Massachusetts, No. 3 at 1210–11, Theophilus Parsons: Notes of Convention Debates, (Jan. 16, 1788) (Theodore Sedgwick: "But this controlling power is necessary to preserve the general government.. . . Attend to the conduct of Rhode Island last winter; without any reason, they recalled their delegate and refused to send any. The same may happen under the general government."); 4 Elliot's Debates at 60 (July 25, 1788, North Carolina) (statement of William R. Davie addressing "that little state of Rhode Island").

[53] FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 7 (1974).

[54] *DHRC*, Vol II: Ratification by the States: Pennsylvania at 566.

attempted to soothe critics by explaining that the provision would only be used when states failed to hold elections, such as in case of a military invasion (and even proposed an amendment along those lines).[55]

But many federalists, as well as antifederalists, saw the power given to Congress to be far more sweeping than just one to be used if a state refused to hold elections. Just as at the Constitutional Convention, proponents warned that powerful factions within states would use unchecked control over elections to gerrymander districts and entrench their power. Theophilus Parsons, who later became Massachusetts's chief justice, spoke at the commonwealth's ratifying convention in January 1788. During the ratification debate, he warned of abuse in prescient and eerily modern language:

> But a state legislature, under the influence of their senators, who would have their fullest confidence, or under the influence of ambitious or popular characters, or in times of popular commotion, and when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the State into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy[.][56]

The Elections Clause, Parsons explained, "provides a remedy—A controuling power in a legislature, composed of senators and representatives of twelve States, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election."[57] According to Parsons, the Elections Clause vested superseding power in Congress to "secur[e] to the people their equal rights of election."[58]

Indeed, federalists warned that voter suppression tactics by state lawmakers would make it harder for voters to be heard. For example, James Wilson, arguing for the Constitution, noted with a shiver that Pennsylvania's elections could be moved to far-west Pittsburgh.[59] Thomas McKean (Pennsylvania's chief justice) asked, if States directed that votes be cast by voice, Congress must be authorized to change that mode to secret

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[55] 4 Elliot's Debates at 53–54.

[56] *Id.*, Vol. VI, Ratification by the States: Massachusetts, No. 3 at 1218 (Jan. 16, 1788).

[57] *Id.*

[58] *Id.* at 1217.

[59] *Id.*, Vol. II, Ratification by the States: Pennsylvania at 403 (Nov. 28, 1787).

ballot "to preserve the suffrages of the citizens from bias and influence[.]"[60] He later explained that it is Congress's duty to ensure that its members were "fairly chosen" and, to do so, "it is proper they should have it in their power to provide that the times, places, and manner of election should be such as to insure free and fair elections."[61] One Massachusetts commentator explained, a state "might abuse the inhabitants, by appointing a place for holding the elections, which would prevent some from attending, and burthen [sic] others with very great inconveniences. These are cases in which the supreme power must interpose, and abuses which none but it can rectify."[62]

In particular, Elections Clause proponents sought to avoid the malapportionment that had plagued England and reemerged in South Carolina. One essayist explained that, in England,

> the people have by no means an equal representation, even in the house of commons, the only popular branch of their legislature. The old, decayed, and almost forgotten borough of Sarum, sends two members to parliament, when Bristol, the second town in the kingdom, sends only two. London, which contains at least the seventh part of the inhabitants of England, does not furnish the hundredth part of the representation in parliament.[63]

Early in 1788, at the Massachusetts ratification, Rufus King described that under South Carolina's constitution, Charleston held a disproportionate number of seats in the state's General Assembly and refused to "alter[] of this unequal mode of representation" even though the population had grown in "[t]he back parts of Carolina."[64] If South Carolina's legislature had unchecked power to draw congressional districts, congressional "representatives, therefore, from that State, will not be chosen by the people, but will be the representatives of a faction of that State." King then asked, "[i]f the general government cannot control in this case, how are the

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[60] *Id.* at 413.

[61] *Id.* at 537 (Dec. 10, 1787).

[62] *Id.*, Vol. V, Ratification by the States: Massachusetts, No. 2 at 738 (Jan. 17. 1788) (essay of Remarker, published in the Independent Chronicle); *see also* 4 Elliot's Debates at 54 (July 25, 1788, North Carolina) (James Iredell Sr. explained that the Elections Clause "might also be useful" . . . "lest a few powerful states should combine, and make regulations concerning elections which might deprive many of the fair exercise of their rights, and thus injure the community, and occasion great dissatisfaction.").

[63] *Id.*, Vol. XXVII, Ratification by the States: South Carolina at 240 (Apr. 1 and 2, 1788) (essay of Caroliniensis, published in the Charleston City Gazette).

[64] 3 Farrand's at 267 (Jan. 21, 1788, Massachusetts Convention).

people secure?"[65]

In addition, federalists urged national uniformity.[66] According to one Maryland commenter, the "great object" of the Framers at the convention "appears to have been, to institute a government as uniform and equal in all its parts, as could be accomplished. It was foreseen that the states, by different regulations with regard to the above recited instances, might obstruct that uniformity, and occasion great inconveniences."[67] Uniformity as to the time of elections, in particular, would ensure there would always be a quorum in the House, including during periods of emergency.[68]

Madison made his own arguments at the pivotal, contentious Virginia ratifying convention, consistent with his statement at the Constitutional Convention and the reasoning of his federalist colleagues in other states. For days, Madison defended the constitution against assault from Patrick Henry, George Mason, and other prominent foes. Henry warned that the Elections Clause could "totally destroy the end of suffrage" if Congress sets the election at a place "the most inconvenient in the state" or far from where voters live.[69] James Monroe (who would soon face Madison in the first congressional election) challenged the Clause. He asked why regulation of congressional elections was under the "ultimate controul" of the national legislature.[70] At Charlottesville, Madison set out his view of the broad purposes behind the Clause, beyond whether states held elections at all. State regulation of congressional elections, he declared, "should be uniform throughout the continent. Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust."[71] Critiquing South Carolina's malapportionment,[72] he added, "[s]hould the people of any State, by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government."[73]

Antifederalists waged repeated attacks. The Elections Clause, they argued, granted Congress too much power. One Massachusetts delegate

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[65] *Id.*

[66] 4 Elliot's Debates at 60 (July 25, 1788, North Carolina) (statement of William R. Davie); *DHRC*, Vol. II, Ratification by the States: Virginia No. 3 at 1259 (June 14, 1788) (statement of James Madison.

[67] *DHRC*, Vol. XI, Ratification by the States: Maryland No. 1 at 38 (Nov. 2, 1787) (Essay of Aratus: To the People of Maryland, thought to be authored by George Lux).

[68] *Id.*, Vol. II, Ratification by the States: Virginia No. 2 at 920–21 (June 4, 1788) (statement of George Nicholas).

[69] *DHRC*, Vol. IX, Ratification by the States: Virginia, No. 2 at 964 (June 5, 1788).

[70] *Id.*, Vol. X, Ratification by the States: Virginia, No. 3 at 1259 (June 14, 1788).

[71] *Id.* at 1260.

[72] *See supra* note 44.

[73] *Id.*

remarked that the Clause would "make Congress omnipotent."[74] A North Carolina delegate called the provision "reprehensible" and predicted that it would cause "state legislatures [to] entirely decay away."[75] In Virginia, Patrick Henry claimed that the control "given to Congress over the time, place, and manner of holding elections, will totally destroy the end of suffrage."[76] And the dissenting minority in Pennsylvania warned that "when the spirit of the people shall be gradually broken; when the general government shall be firmly established, and when a numerous standing army shall render opposition vain, the Congress may complete the system of despotism, in renouncing all dependence on the people, by continuing themselves, and [their] children in the government."[77]

Opponents warned that members of Congress could entrench themselves by situating polling places at inconvenient locations,[78] and they advanced similar arguments in published essays and private letters.[79] One opponent, John Steele in North Carolina, addressed these concerns by highlighting the newly powerful federal judiciary; if Congress enacted Elections Clause legislation that was "inconsistent with the constitution, independent judges will not uphold them[.]"[80] Many proposed that

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[74] *DHRC*, Vol. VI, Ratification by the States: Massachusetts, No. 3 at 1398–99 (Feb. 1, 1788).

[75] 4 Elliot's Debates at 50–51 (July 25, 1788, North Carolina).

[76] *DHRC*, Vol. IX, Ratification by the States: Virginia, No. 2 at 964–65 (June 5, 1788).

[77] *Id.*, Vol. II, Ratification by the States: Pennsylvania at 629–30, Dissent of the Minority of the Convention (Dec. 18, 1787).

[78] *See, e.g.*, *id.*, *DHRC*, Vol. XXVII, Ratification by the States: South Carolina at 147 (Jan. 18, 1788) (statement of Charles Pinckney); Vol. IX, Ratification by the States: Virginia, No. 3 at 1290–91 (June 14, 1788) (George Mason: expressing concerns that Congress could establish polling place at inconvenient locations); *id.*, Vol. VI: Massachusetts, No. 3 at 1409 (Feb. 2, 1788) (Undelivered Speech by Timothy Winn); *id.*, Vol. II, Ratification by the States: Pennsylvania at 510 (Dec. 6, 1787); 2 Elliot's Debates at 30–32 (Jan. 17, 1788, Massachusetts); *id.* (Vol. 4) at 70 (July 25, 1788, North Carolina).

[79] *See, e.g.*, *DHRC*, Vol. II, Ratification by the States: Pennsylvania at 210 (Nov. 6, 1787) (essay of An Officer of the Late Continental Army, published in the Philadelphia Independent Gazetteer); *id.*, Vol. VII: Massachusetts, No. 4 at 1734–35 (Apr. 9 and 16, 1788) (Consider Arms, Malachi Maynard, and Samuel Field: Dissent to the Massachusetts Convention, published in Hampshire Gazette); *id.*, Vol. V: Massachusetts, No. 2 at 680 (Jan. 10, 1788) (essay by Samuel, published in the Independent Chronicle); *id.*, Vol. IX: Virginia, No. 2 at 802 (May 14, 1788) (essay by Brutus, published in the Virginia Independent Chronicle); *id.*, Vol. XII: Maryland, No. 2 at 467 (Apr. 1, 1788) (essay by A Farmer and Planter, published in the Maryland Journal); Commentaries on the Constitution, Vol. XIV, No. 2 at 479 (Dec. 13, 1787) (letter from John Brown Cutting to William Short).

[80] 4 Elliot's Debates at 71; *see also Wesberry*, 376 U.S. at 16 (same). Judicial review was not foreign to the Framers, even if finding legislation unconstitutional was atypical. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 891, 927–92 (2003) (noting that "there is a wealth of evidence that the Founders

Congress's power to regulate should only be triggered by a state's complete failure to enact federal election regulations.[81] Generally, they assumed that would require a rewrite of the Clause. The Pennsylvania antifederalist Samuel Bryan (or his father, George) suggested that the language of the Clause *already* limited Congress's authority to apply only in cases of state default,[82] and John Jay of New York seems to have understood the Clause in the same manner.[83] But that interpretation was belied by the fact that, upon ratifying the Constitution, nearly half of all states proposed amendments to limit Congress's power to occasions of state default or, in Massachusetts and New Hampshire, if states acted in a way that was "subversive of the rights of the people to free and equal representation in Congress."[84] Ultimately, however, those amendment efforts failed.

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believed that the courts could exercise some form of judicial review over federal statutes" and presenting such evidence, including review of state statutes); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 Wash. & Lee L. Rev. 787, 798 (1999) ("[F]or many Americans in the 1790s judicial review of some sort did exist. But it remained an extraordinary and solemn political action. . . ."). In the years before *Marbury v. Madison*, judicial review particularly reflected distrust of state lawmakers, as "exercises of judicial review served to keep state legislatures, rather than Congress, in check." *See* William Michael Treanor, *Judicial Review Before Marbury*, 58 Stan. L. Rev. 455, 459 (2005). Notably, in a case shortly after ratification in which a circuit court struck down a state statute (unrelated to elections), the court made the case for judicial review by arguing that state lawmakers "surely" could not make election laws that contravened a state's constitution. *See VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 309, 1 L. Ed. 391 (C.C.D. Pa. 1795) ("Could the Legislature have annulled these articles, respecting . . . elections by ballot? Surely no. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves . . . The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times . . . "); *but see Rucho*, 139 S. Ct. at 2496 (2019) ("The Framers were aware of electoral districting problems and considered what to do about them. . . . At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.").

[81] *See, e.g.*, *DHRC*, Vol. VI, Ratification by the States: Massachusetts, No. 3 at 1213–22 (Jan. 16, 1788); *id.*, Vol. XXVI, Ratification by the States: Rhode Island, No. 3 at 920–21 (Mar. 3, 1790); *id.*, Vol. XXIII, Ratification by the States: New York, No. 5 at 2206 (July 17, 1788); Commentaries on the Constitution, Volume XXVII: South Carolina, No. 1 at 39 (Nov. 10, 1787) (letter from David Ramsay to Benjamin Rush, Charleston).

[82] *See, e.g.*, *DHRC*, Vol. II, Ratification by the States: Pennsylvania at 163–64 (essay of Centinel I, thought to be Samuel Bryan, published in the Philadelphia Independent Gazetteer) (Oct. 5, 1787) ("The plain construction of [Art. I, s. 4] is, that when the state legislatures drop out of sight, from the necessary operation of this government, then Congress are to provide for the election and appointment of Representatives and Senators.").

[83] *DHRC*, Vol. XXII Ratification by the States: New York, No. 4 at 1905 (June 25, 1788).

[84] *See* 1 Elliot's Debates at 322 (Feb. 7, 1788, Massachusetts); *id.* at 325 (May 25,

2. Federalist Papers

During the state debates, Madison, along with Alexander Hamilton and John Jay, made the case for ratifying the new Constitution in the Federalist Papers. In Federalist Papers Nos. 59, 60, and 61, published in late February 1788, Hamilton addressed "the Power of Congress to Regulate the Election of Members" and rebutted objections to that power. These articles are illuminating, though they are somewhat misleading in their narrow focus on what to do if states fail to hold elections.

In Federalist No. 59, Hamilton was charged with defending the congressional veto found in the Elections Clause. Hamilton affirmed that Congress must have the authority to regulate the election of its own members because "EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION."[85] Hamilton made no attempt to disguise his distrust of state lawmakers:

> Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs.[86]

Hamilton also offered a rationale for why the Elections Clause uses "words of great latitude." No specific regulation "would have been always applicable to every probable change in the situation of the country."[87] Therefore, "a discretionary power over elections" was preferable to a more specific provision that would later require a constitutional amendment to change.[88]

In Federalist No. 60, Hamilton addressed fears that the Elections Clause

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1788, South Carolina); *id.* at 326 (June 21, 1788, New Hampshire); *id.* at 329–30 (July 26, 1788, New York); 4 Elliot's Debates at 246 (Aug. 1, 1788, North Carolina); *DHRC*, Vol. XXVI: Rhode Island, No. 3 at 999–1000 (May 29, 1790) (Rhode Island Form of Ratification and Amendments); *see also* 2 Elliot's Debates at 545 (Sept. 3, 1788, Meeting at Harrisburg, after Pennsylvania had ratified the Constitution)+.

[85] Federalist No. 59 (emphasis in original).

[86] *Id.*; *see also id.* ("With so effectual a weapon in their hands as the exclusive power of regulating elections for the national government, a combination of a few such men . . . might accomplish the destruction of the Union, by seizing the opportunity of some casual dissatisfaction among the people (and which perhaps they may themselves have excited), to discontinue the choice of members for the federal House of Representatives.").

[87] *Id.*

[88] *Id.*

conferred on Congress the power to "promote the election of some favorite class of men in exclusion of others."[89] Concerns that Congress could effectively select its members by setting polling places at inconvenient locations were "chimerical."[90] A "victorious and overbearing majority" might, "in certain turbulent and factious seasons," violate the right to vote for "a particular class of citizens[.]"[91] But Hamilton was confident that such a manipulation by Congress—if it affected "the great mass of the people"—would occasion a "popular revolution" led by State governments.[92] He dismissed the worry that Congress would favor, say, landowners over merchants, because the House of Representatives would be made up of diverse members with varying interests.[93] Nor could Congress regulate elections to accommodate the rich because the "wealthy and well-born" were not concentrated in particular locations, but were instead "scattered over the face of the country as avarice or chance may have happened to cast their own lot or that of their predecessor."[94] The Constitution had avoided giving Congress the power to restrict voting to property owners because the power granted by the Elections Clause is "expressly restricted to the regulation of the TIMES, the PLACES, the MANNER of elections."[95]

In Federalist No. 61, Hamilton noted that states were more likely than Congress to abuse their elections authority to favor a particular class of electors.[96] Congress could establish uniformity, particularly as to the time of electing House members.[97] And although uniformity would be most easily achieved by a constitutional provision setting a date for federal elections, Hamilton explained that "if a time had been appointed, it might, upon experiment, have been found less convenient than some other time."[98] Nevertheless, Hamilton argued that Congress's flexible time power would facilitate uniformity as to the time of elections, enabling the House to assemble at a particular period each year and allowing citizens to vote out the entirety of the House at one time, if an "improper spirit" prevailed on all its members.[99]

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[89] Federalist No. 60.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Federalist No. 61
[97] *Id.*
[98] *Id.*
[99] *Id.*

III. EARLY CONGRESSIONAL UNDERSTANDING OF THE ELECTIONS CLAUSE

A. The First Fifty Years

In the first five decades after the ratification of the Constitution, Congress enacted no legislation pursuant to its authority under the Elections Clause. However, Congress was far from silent. In debates about proposed constitutional amendments and contested House elections, lawmakers consistently embraced broad conclusions about the Clause's meaning, recognizing that it empowered Congress to supersede state provisions for congressional elections, even if states had not defaulted on their duty to hold such elections.

1. The First Congress (1789)

The original public meaning of the Clause – that it gave Congress sweeping power and aimed to curb abuse by state lawmakers – was evident in congressional debates held just a few months after ratification.

In 1789, the First Congress rejected a constitutional amendment that would have let Congress "alter, modify, or interfere in the times, places, or manner" of congressional elections *only* "when any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such election."[100] Introduced by antifederalist Aedanus Burke of South Carolina as the House considered what became the Bill of Rights, the proposal instigated debate that mirrored the ratification debates. As Fisher Ames, Chair of the House Committee on Elections, stressed, "such an amendment as was now proposed would alter the Constitution: it would vest the supreme authority in places where it was never contemplated."[101] [T]he Constitution," Madison maintained, "stands very well as it is."[102]

By denouncing the constitutional status quo, the amendment's antifederalist proponents confirmed that the Elections Clause conferred unilateral, plenary power upon Congress – going beyond whether states held elections at all. Elbridge Gerry (Mass.) condemned the provision as granting Congress unchecked authority over its own elections—the power of "controlling the elections of the people."[103] The Elections Clause, he warned, enabled Congress to "abolish the mode of balloting," require that "every person must publicly announce his vote," or move the polls to "remote places."[104] Notably, none of the critics contested that Congress

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[100] 1 ANNALS OF CONG. 767–74 (1789).

[101] *Id.* at 770.

[102] *Id.* at 768–69.

[103] *Id.* at 769.

[104] *Id.*; *see also id.* (Michael Stone of Maryland endorsed the amendment on the

could revise state laws for congressional elections as it saw fit or that "manner" conveyed comprehensive control, including over balloting and districting.[105]

Madison, Sherman, and others did not dispute critics' claim of sweeping congressional power. Rather, they argued those powers were integral to the Constitution's design. "The Convention were very unanimous in passing this clause," Sherman insisted, noting that "it was an important provision, and if it was resigned, it would tend to subvert the Government."[106] Madison warned that limiting congressional power over elections would "destroy the principles and the efficacy of the Constitution."[107] The purpose was broad: "as much injury might result to the Union from improper regulations, as from a neglect or refusal to many any" and "inadequate regulations were equally injurious as having none[.]"[108] In this spirit, Theodore Sedgwick (later Speaker of the House) proposed a compromise amendment that would have let Congress "alter the times, manner, and places of holding elections, provided the States made improper ones."[109] Ames argued that the elections power was "one of the most justifiable of all the powers of Congress" because "it was essential to a body representing the whole community that they should have power to regulate their own elections, in order to secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only."[110]

2. Rejected Constitutional Amendments (1801 and 1823)

In the coming decades, Congress would twice more reject proposed amendments that sought to change the Elections Clause. Its decision confirmed the founding-era view that the clause confers upon Congress discretionary, plenary, and superseding authority over congressional elections.

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ground that the federal government should not have "the power of determining on the mode of their own election"); *id.* at 771 (Thomas Tucker of South Carolina lamented that the Elections Clause granted Congress the power to decide for itself whether and how states should district for House elections. "It had been supposed by some States, that electing by districts was the most convenient mode of choosing members to this House; others have thought that the whole State ought to vote for the whole number of members to be elected for that State," Tucker observed. "Congress might, under like impressions, set their regulations aside.").

[105] *Id.* at 769–71.

[106] *Id.* at 770.

[107] *Id.*

[108] *Id.* at 770 (statements of Reps. Theodore Sedgwick (Mass.) and Fisher Ames (Mass.)).

[109] *Id.* at 770.

[110] *Id.* at 768.

In 1801, Congress set aside a proposal to amend the Constitution to require that House members be elected from single-member districts in each state "in the manner which the Legislature thereof shall prescribe."[111] The House Committee on Elections concluded that the amendment would be "superfluous and inconvenient" because requiring single-member districts was "already within the limits of the legislative authority of the Government of the United States . . . to which recurrence may be had at all times, as the public good or convenience may require."[112] Further, the Committee worried that adopting the amendment would "indirectly tend to withdraw from the Government of the United States its existing control" over House elections by reassigning control of their "manner" to the States.[113]

In 1823, Congress rejected a proposed constitutional amendment that similarly would have required uniform House elections by single-member districts.[114] A special committee urged the House to reduce both congressional and state legislative power over federal elections because that power was so vast that factions at either level could wield it to entrench themselves or their partisans.[115] The Elections Clause, the committee recognized, granted Congress "controlling and superseding power" over its own elections.[116] With that power, Congress could decide whether to hold elections by districts or by "general-ticket" (i.e., at-large, statewide winner-take-all voting) and how to draw the district lines.[117] Congress could even treat some states differently from others.[118] The special committee found these powers to be "exceedingly dangerous" because Congress could create "an artificial arrangement of districts" such that a "small minority of the people elect a majority of the national representatives."[119]

Yet the committee equally feared the power the Elections Clause granted the states. The Clause, it was argued, permitted "the very foundations of the two most important branches of this Government . . . to fluctuate with the mutable counsels of twenty-four separate Legislatures."[120] This "Constitutional laxity" undermined the "stability of the law," which should have been an "indispensable safeguard."[121] "Temporary factions" might seize state legislatures and use their Elections

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[111] 6 ANNALS OF CONG. 785 (1801).
[112] 1 AMERICAN STATE PAPERS: MISCELLANEOUS 218 (1801).
[113] *Id.*
[114] 41 ANNALS OF CONG. 850–66 (1823).
[115] *Id.* at 850–53.
[116] *Id.* at 852.
[117] *Id.* at 853.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 852.
[121] *Id.*

Clause power to entrench themselves or their allies.[122] The "existing system" was actually "without system" and should be remedied to prevent majorities from adopting measures that would "deprive the minority of their just rights," which was "one of the primary objects of a written Constitution."[123]

Notwithstanding these concerns, Congress rejected the proposed amendments and left the body's vast powers as it found them.

3. Contested Elections (1789–1841)

Though Congress did not legislate pursuant to the Elections Clause during its first fifty years, contested House elections gave lawmakers occasion to reflect on the scope of their election powers.

For example, in 1804, after Representative William Hoge vacated his congressional seat, his brother John Hoge was sent to Congress in a special election held at the direction of Pennsylvania's governor.[124] Pennsylvania lacked legislation pertaining to special elections in the event of a vacancy. The scenario presented Congress with occasion to consider how the Elections Clause interacts with Article I, section 2, clause 4, which directs the state executive to issue a writ of elections to fill a congressional vacancy.[125] Representative William Findley (Penn.), who chaired the Committee of Elections, acknowledged that Congress could regulate the times, place, and manner of holding an election for congressional vacancy, even if that election was ultimately called by the governor.[126] John Lucas, also of Pennsylvania, noted that state lawmakers were vested with the power to regulate elections, but added that this is "a subject of such importance that Congress is empowered to control the State Legislature in that very case."[127] Three years later, when the House seated a member even though his election defied a state statute requiring that he reside in one subsection of his district, the House reasserted this power. "The Federal Constitution indeed *provisionally* delegates to the State Legislature the authority of directing the time, place, and manner of holding elections *at the discretion of Congress*," Findley explained.[128] Although Findley thought that Congress should not exercise its Elections Clause power except to

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[122] *Id.*

[123] *Id.*

[124] 14 ANNALS OF CONG. 838 (1804).

[125] Article I, section 2, clause 4 provides: "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

[126] 14 ANNALS OF CONG. 842–44 (1804).

[127] *Id.* at 852.

[128] 17 ANNALS OF CONG. 874 (1807) (emphasis added)

check "abuses or usurpations of power by the States," he readily conceded that the national legislature "may do so at discretion."[129] Similar endorsements of Congress's supreme, discretionary power permeate the record of contested House elections throughout these decades.[130]

Congressional debates in this era reflected not only the supremacy of Congress's elections power, but also the variety of legitimate interests that the Elections Clause countenanced. At a minimum, Congress could legislate in order to preserve its existence.[131] Others recognized additional interests, particularly uniformity and the protection of the right of qualified electors to vote in congressional elections.[132] Congress's power to regulate the "manner" of elections included regulation of balloting, counting, election administration, and districting. For example, one representative noted without dispute that the term encompassed whether "the election may be *viva voce*, by ballot, by districts for the convenience of voters, or by the States in a general ticket."[133] In 1834, Aaron Vanderpoel, a New York Representative and member of the House Committee on Elections, explained that the "manner" of holding elections included "the means, the judges, the instruments by which the election is to be carried into effect," along with "the sheriff of the county, and a clerk and two judges, appointed by the county court at their term next preceding the election."[134] These collectively formed "[t]he conduits through which the will of the voter is to flow[.]"[135] Nevertheless, some legislators pointed to the limits of the "manner" authority, noting that the qualifications of voters and

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[129] *Id.*

[130] *See, e.g.*, 10 CONG. DEB. 4303 (1834) (statement of Rep. Patrick H. Pope, Ky.: "[T]he right to vote for members of this House is derived, not from the constitution of Kentucky, but from the constitution of the United States . . . that instrument gives to the Legislature, and not to the constitution, or those who framed it, the right to prescribe the time, place, and manner of voting . . . *so long as Congress shall permit it.*") (emphasis added)); 14 CONG. DEB. 1186–87 (1837) (statement of Rep. Hugh S. Legaré, S.C.: Congress "controlled absolutely the whole subject of Congressional elections, with the single exception of the place of electing Senators.").

[131] *See, e.g.*, CONG. GLOBE, 25th Cong., 2d Sess. 68 (1838) (statement of Rep. Charles Eaton Haynes, Ga.); CONG. GLOBE, 26th Cong., 1st Sess. 12–13 (1840) (statement of Rep. Robert Rhett, S.C..

[132] *See, e.g.*, CONG. GLOBE, 25th Cong., 1st Sess. 91–92 (1836) (statement of Rep. George W. Towns, Ga..

[133] 17 ANNALS OF CONG. 912–13 (1807) (statement of Rep. Philip B. Key, Md.); *see also* 14 CONG. DEB. 1187 (1837) (statement of Rep. Hugh S. Legaré, S.C., noting that when discussing an 1837 election dispute, another representative offered a nonexhaustive list of Congress's "manner" authority, which included the power to "pass uniform laws requiring all elections to be by ballot or *viva voce*—all to be general ticket or by district—all to be at the same season of the year, &c").

[134] 10 CONG. DEB. 4286, 4287 (1834).

[135] *Id.* at 4287.

representatives went beyond such power.[136]

B. The Apportionment Act of 1842 and its Aftermath

In its first exercise of its power under the Elections Clause, Congress enacted an Apportionment Act in 1842, requiring that House members be elected from contiguous single-member districts.[137] The Act also reduced the size of the House of Representatives by increasing the ratio of persons per representative.[138] The fact that Congress had never before enacted any Elections Clause legislation loomed over the debate.[139] With a slight Whig majority in the Twenty Seventh Congress, it passed the House by just two votes, along mostly partisan lines.[140]

Coming a half-century after the ratification of the Constitution, it was also a chance for the young nation to reflect on the original intent of the document. Madison's *Notes on the Debates in the Federal Convention* were first published in 1840, and Elliot's Debates—a compilation from the state ratifying conventions—came out between 1827 to 1830.[141] Members had a novel opportunity to ground their arguments in the Framers' original intent. As one scholar has noted, "perhaps the most striking feature of the debate was the backward-looking tone and structure of the argument."[142]

At the time, ten states used at large voting for House elections. Since the first Congress, in fact, nearly one-third of members had been elected that way.[143] This magnified the power of small states, which for decades successfully resisted a requirement for districts.[144] Whigs believed the districting legislation would help preserve their new majority and were

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[136] *See, e.g.*, 17 ANNALS OF CONG. 908 (1807) (Rep. Josiah Quincy, Mass., explaining that Congress had exclusive power to establish the qualifications of its members through the Qualifications Clause, Art. I, Sec. 5, cl. 1, and that states were not granted such power by the Elections Clause); 10 CONG. DEB. 4303 (1834) (statement of Rep. Patrick H. Pope, Ky..

[137] Ch. 47, 5 Stat. 491 (1842).

[138] *Id.*

[139] *See, e.g.*, 27th Congress, 2nd Session, Cong. Globe app. 316 (1842) (Rep. Andrew Kennedy, D-Ind.: "[H]ere is a proposition to commence the exercise of a power by this Government, which, if it possess the power at all, it is admitted has never been exercised, but has lain dormant for the entire period of our national existence."); *id.* at 842 (statement of Rep. George S. Houston, D-Ala..

[140] Martin. H. Quitt, *Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, 28 J. EARLY REPUBLIC 627, 637 (2008).

[141] *Id.* at 639–40.

[142] Johanna Nicol Shields, *Whigs Reform the 'Bear Garden': Representation and the Apportionment Act of 1842*, 5 J. EARLY REPUBLIC 355, 358 (1985).

[143] ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850 129 (1987).

[144] *Id.*

angered by Alabama's switch to an at-large ticket in 1840, which deprived the state of Whig representation.[145] But partisanship was not the only factor at play. The politics of slavery also led Southerners (including Southern Democrats) to support the Bill, because elections held by district decreased the likelihood that northern districts would elect critics of slavery.[146] One South Carolina Democrat warned, "On all the questions peculiar to Southern interests, the Northern States, owing to the district system, were now divided," but if "the general system prevail[ed], [the Northern states] would overwhelm the South."[147] Reducing the size of the House by increasing the ratio of persons to representatives also favored the less populous Southern states.[148]

The Bill's enactment (despite sharply polarized debate), the next Congress's decision not to repudiate it as unconstitutional, and successive districting legislation confirmed that Congress understood it had the power to regulate congressional elections and the drawing of districts.

1. Elections Clause Issues Raised by the Apportionment Act

Controversy centered on the Apportionment Act's second section, which required single-member congressional districts: "[I]n every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative."[149] States would be barred from holding at-large elections, or from electing multiple members from the same district.

a. Federalism

Some Apportionment Act opponents tried to resurrect a familiar objection: Congress must defer to states unless they refuse or fail to act

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[145] Shields, *supra* note 142, at 371; James Thomas Tucker, Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?, 7 MICH. J. RACE & L. 357, 375 (2002).

[146] James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 913 n.114 (2006); ZAGARRI, *supra* note 143, at 140; *see, e.g.*, 27th Congress, 2nd Session, Cong. Globe 468 (1842) (Rep. Garret Davis, W-Ky: "The peculiar principles of the South, and every interest it cherished, were to be protected by the district system.").

[147] 27th Congress, 2nd Session, Cong. Globe 445 (1842) (statement of Rep. John Campbell, D-S.C.).

[148] Shields, *supra* note 142, at 371.

[149] Ch. 47, 5 Stat. 491 (1842).

themselves. "[I]t would be unconstitutional to exercise this power now," Representative John G. Floyd (D-NY) told the House, "because the debates in the National Convention prove that it was only intended to be an ultimate power, for self-preservation, in case the States neglected to exercise it."[150] The Senate heard similar arguments. "It was only intended that Congress should exercise it in case the States should make insufficient regulations, or fail to make them altogether," one opponent insisted.[151]

The Act's supporters countered that the text expressly empowered Congress to "alter" state laws for congressional elections at any time. "[W]hat plain, unsophisticated man, reading this clause, would for a moment doubt the power of Congress to control the whole subject, whenever, in its discretion, it shall see fit to do so? Could language be more direct, full, and explicit?" asked Representative Sampson H. Butler (D-S.C.).[152] "Nor is it only in case of a neglect or failure, for any cause, to perform this duty, that it then devolves upon Congress," Representative Daniel Barnard (W-N.Y.) argued. "To Congress, moreover, the power is ultimate and appellate. If the States fail altogether, or if any one of them fail, Congress must act. If the States act, Congress has a right to review, and revise, and, if need be, correct and 'alter' the regulations which they may adopt."[153] Others echoed this interpretation,[154] and contested rival claims about the Framers' intent.[155]

Each side acknowledged that Congress could not order the states to enact particular laws. "Congress *may* itself make the *alterations*," one lawmaker complained, "but may not, cannot, direct the Legislatures of the States to make them."[156] Similar statements recurred throughout the debates.[157] Even the Bill's advocates, such as Senator Nathanial P.

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[150] 27th Congress, 2nd Session, Cong. Globe app. 322 (1842).

[151] *Id.* at 786; *see also id.* at 584; *id* at 524 (statement of Sen. Samuel McRoberts, D-Ill.: "This power was not to be exercised by Congress," another asserted, "*except when the Legislatures of any State shall neglect, refuse, or be disabled by invasion, or rebellion, to prescribe the same.*") (emphasis in original).

[152] *Id.* at 319.

[153] *Id.* at 380.

[154] *See, e.g., id.* at 490 (statement of Sen. Jabez W. Huntington, W-Conn.); *id.* at 512 (statement of Sen. Nathaniel P. Tallmadge, W-N.Y.); *id.* at 793 (statement of Sen. Isaac C. Bates, W-Mass.); *id.* at 789 (statement of Sen. Jacob W. Miller, W-Mass.).

[155] *Id.* at 380 (statement of Rep. Daniel D. Barnard, N.Y.); *see also id.* at 408 (statement of Rep. Nathaniel G. Pendleton, W-Ohio); *id.* at 789 (statement of Sen. Miller, W-Mass.).

[156] *Id.* at 467 (statement of Sen. Silas Wright, D-N.Y.) (emphasis in original).

[157] *See also id.* at 360 (Rep. William W. Payne, D-Ala.: "I do deny that Congress has power to command a State Legislature to district a State."); *id.* at 449 (Sen. James Buchanan (D-Penn.): "That no such command can be constitutionally issued, I consider to be a clear, nay, an almost self-evident proposition."); *id.* at 397 (statement of Rep. Charles

Tallmadge (W-N.Y.), conceded: "no one on this side of the question has said anything about a mandamus or a mandate to the States. No one pretends that Congress or this Government has any power to issue such a mandate . . . Congress has no such power, and will not attempt to compel the States."[158]

The Act's opponents saw partial election laws as a violation of what would later be called the anti-commandeering principle.[159] One senator insisted: "If they are required to elect by districts, Congress must go on and prescribe the boundaries of the districts."[160] Senator Silas Wright (D-N.Y.), one of the bill's most dedicated opponents, added that "The great principle was, that whatever regulations Congress should attempt to make in this matter, should be so made that the people might be able to act under them, without the intervention and aid of laws to be passed by the State Legislatures."[161]

The Act's defenders insisted that Congress could exercise as much or as little of its Elections Clause power as it saw fit. Any command to the states came from the Constitution, not from Congress. "[T]he power of Congress and the duty of the States, in relation to this subject, are correlative," Tallmadge explained.[162] "Whenever Congress exercises its power, the States must perform their duty . . . The extent to which Congress will go in making or altering these regulations, whether in whole or in part, is entirely within its own discretion."[163] Partial legislation left the states free "to fill up the measure of legislation which the case requires."[164] Senator Isaac C. Bates (W-Mass.) explained, "[t]here is not only no command in [this bill], which seems so offensive to some Senators; but there is nothing in the form of a command, nor in effect a command."[165]

With the enactment of the Apportionment Act, the understanding that the Elections Clause allowed Congress to control *some* of the "manner" of elections without having to control *all* of it prevailed.

G. Atherton, D-N.H.; *id.* at 422 (statement of Sen. Leonard Wilcox, D-N.H..

[158] *Id.* at 512.

[159] Under the "anti-commandeering" doctrine, Congress cannot directly compel states or state officials to enforce federal law. *See, e.g., Printz v. United States*, 521 U.S. 898, 924 (1997).

[160] *Id.* at 524 (statement of Sen. McRoberts).

[161] *Id.* at 469.

[162] *Id.* at 512.

[163] *Id.*; *see also id.* at 513; *id.* at 793 (statement of Sen. Bates.

[164] *Id.* at 380 (statement of Rep. Barnard).

[165] *Id.* at 793.

b. The Meaning of "Manner"

Although the precise scope of "manner" remained contested, the Apportionment Act's passage confirmed that Congress understood the term to include a broad array of topics, including districting. Senator Wright acknowledged that "manner" included "the manner of voting, the manner of receiving, keeping, counting, and returning the votes, and the districts of territory within which the freemen should meet and vote at the same poll."[166] Representative William W. Payne (D-Ala.) argued that "manner" meant "[n]othing more than that Congress might, by law, provide that the electors should vote *viva voce*, or by ticket; that the United States marshal, the sheriff of a county, commissioners of roads and revenue, the county judge, or other officer appointed by Congress, should open the polls, receive and count the votes, declare the result, and issue the certificate of election," before paradoxically adding, "&c. [*etcetera*], and nothing more."[167] Representative Walter Colquitt, a newly minted Democrat from Georgia, construed districting as a de facto regulation of the qualifications of representatives and voters, and argued this went beyond Congress's "manner" authority.[168]

Supporters offered similar lists, but often added districting. Tallmadge explained that "[t]he manner includes the districts; the voting by ballot or *viva voce*; the officers to conduct the election; the form of the ballot, whether written or printed; the ballot boxes; the poll lists; the returns, and all the incidents from the commencement to the close of an election."[169] In a sign of how hard it was to deny that "manner" included districting, the Act's opponents were divided about how (or even whether) to contest that claim. Buchanan, who criticized the bill for commandeering state legislatures, "freely admit[ted] the power of Congress to divide the States into single congressional districts" as one "expressly given to them by the terms of the Constitution itself."[170] Though he and opponents of the Apportionment Act "might complain of such an act as an abuse of power, we could never contend that it was a violation of the Constitution."[171] One Representative told his colleagues that he could not justify his claim that "manner" excluded districting.[172] A smaller number of the Act's critics

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[166] *Id.* at 469.

[167] *Id.* at 361.

[168] *Id.* at 447.

[169] *Id.* at 513; *see also id.* at 490 (likewise Sen. Huntington explained that "[t]he 'manner' of holding elections embraces several things: such, among others, as an election by districts or general ticket; *viva voce* or by ballot; by a plurality or by a majority").

[170] *Id.* at 449.

[171] *Id.* at 451.

[172] *Id.* at 360 ("The weight of authority is against me," he confessed, "but I am not

offered more confident (if not more convincing) objections.[173] But none of these members won many colleagues to these positions.

The clear (and ultimately successful) majority of the Twenty Seventh Congress interpreted the "manner of holding elections" to include districting.[174] Like other supporters of the Act, Tallmadge emphasized the original public meaning of the Elections Clause and the intent of the Framers more generally. Congress's power to direct that representatives be elected by district was "fully beyond all question," Tallmadge argued, because of "the contemporaneous exposition given by [the Framers] and those associated with them, in the journal of the convention which formed the Constitution - in the publications that enforced its adoption - in the debates of the conventions of the States which ratified it - and in the proceedings of the first Congress which assembled under it."[175] Representative Nathaniel G. Pendleton (W-Ohio) reasoned that if the Elections Clause gave the *states* the power to elect their representatives by single-member districts, so too must the Elections Clause give *Congress* the same power.[176]

Supporters of the Apportionment Act also advanced the understanding of the Elections Clause that would prevail by Reconstruction: that the Clause conferred plenary power over congressional elections except as to the matters the Constitution seemed to expressly preclude (*e.g.*, the site of elections to the Senate and the qualifications of voters and candidates).[177] Affirmations that the phrase "times, places, and manner of holding elections" confers plenary power appear throughout these debates.[178]

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lawyer enough to have my thoughts trammeled by precedent, or my mind swayed by authority.").

[173] Senator Arthur P. Bagby (D-Ala.) claimed that the Constitution *required* at-large congressional elections, arguing that single-member districts denied each voter the right to vote for all of his state's House members. *Id.* at 786. Rep. Andrew Kennedy (D-Ind.) suggested that the "manner of holding elections" meant "prescribing the mode in which the voter shall exercise the right of suffrage," a definition he thought denied Congress the power to "break into our territorial limits, and there 'gerrymander' our States." *Id.* at 317.

[174] *See, e.g.*, *id.* at 512 (Sen. Tallmadge: "Congress has the power to direct that Representatives to the other House be elected by single districts.").

[175] *Id.*

[176] *Id.* at 408.

[177] *Id.* at 512 (Sen. Tallmadge: the Elections Clause "includes everything necessary to ascertain, under our system of Republican Government, the popular will in regard to those who shall represent them.").

[178] *See, e.g.*, *id.* at 789 (Sen. Miller: "The exercise of the power by Congress . . . is a primary overruling power, embracing the whole subject."); *id.* at 490 (statement of Sen. Huntington: Congress's power "is ample, full, and plenary; and, so far as it is exercised, it is supreme, overriding State legislation, and is the paramount law, to be obeyed and enforced."); *id.* at 319 (statement of Rep. Butler: "Now, sir, what plain, unsophisticated man, reading this clause, would for a moment doubt the power of Congress to control the

Representatives read the constitutional and ratification conventions, together with the history of rejected constitutional amendments, to confirm their claims. For example, Senator Jabez Huntington explained:

> The foregoing views are sustained by the opinions expressed in the National and State conventions, by all who spoke on the subject, and by the resolutions of several of the State conventions, which admitted that full power was given, but expressed an ardent desire that the Constitution might be so amended as that this power should not be exercised except in cases of necessity. All the debates and proceedings connected with this subject show the entire concurrence of all the friends and all the opponents of the Constitution in the opinion that the power of Congress was entire and supreme.[179]

Pendleton explained that "General Hamilton . . . had no such doubts" about whether "the words 'manner of holding' . . . can be made to extend to the question whether the elections shall be by districts or by general ticket." Indeed, Hamilton "treated the authority of the Legislature, whether National or State, as covering the whole ground, embracing all the regulations necessary to the consummation of an election, except such as are established by the Constitution."[180]

c. Legitimate Congressional Interests

Debate on the 1842 Apportionment Act also addressed the ends to which Congress could legitimately exercise its Elections Clause power.

i. Self-Preservation

The least controversial interest that Congress could advance under the Elections Clause was one familiar from the Framing: ensuring that congressional elections would take place. As "a legal and moral person," Congress necessarily had the power "of continuing and perpetuating its own existence, by the due election and perpetuation of these officers," one representative explained.[181] Opponents of the Act went further, arguing that self-preservation was the *only* permissible basis for the exercise of this

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whole subject . . .? Could language be more direct, full, and explicit?").

[179] *Id.* at 491.

[180] *Id.* at 407–08.

[181] *Id.* at 379 (statement of Rep. Barnard).

federal power. "The power to prescribe the 'times, places, and manner' of electing Senators and Representatives, was conferred on this Government for the sole purpose of enabling it to preserve its own existence, provided the States should fail or refuse to elect Representatives, and for no other," Representative Payne asserted in typical remarks.[182] Over the course of the debate, most of the Act's critics raised some version of this point.[183]

Some of the Act's advocates replied that even if the Framers had adopted the Elections Clause to enable Congress to protect itself, the Framers had nevertheless written a sweeping grant of general power over congressional elections that should be interpreted broadly. For example, in response to a critic arguing Congress could not exercise its Elections Clause power "until it is indispensable to prevent a dissolution of the Government," Pendleton took a "much larger and more liberal, and [he] believe[d] more accurate, view of what the Convention intended by the *preservation of the Government.*"[184] Pendleton argued that the Elections Clause must be understood broadly to ensure "the purity of popular representation in this House, according to the true principles of the Constitution[.]"[185] He urged the embrace of substance over form. Preservation of the federal government would be meaningless if "the show, the appearance, the form of our Government" was maintained "but the spirit and life are gone" because "the Government is almost as much dissolved by a vicious representation as by no representation."[186] Senator Bates likewise encouraged his chamber to take a broad view of the permissible purposes of the Elections Clause power, arguing that "a particular inducement to a grant is not a limitation upon the grant."[187]

ii. Uniformity and Equality

Representatives also acknowledged that Congress could exercise its Elections Clause power to ensure uniformity and equality among districts. According to Representative Barnard, "[t]he power conferred on Congress by the Constitution, on the subject of the elections, was designed to be exercised in either of two events": if the states did not provide for congressional elections or "if these regulations in the different States should be such as to produce a want of uniformity and an inequality in the

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[182] *Id.* at 361.

[183] *See id.* at 397 (statement of Rep. Atherton); *id.* at 465 (statement of Sen. Wright); *id.* at 786 (statement of Sen. Bagby); *id.* at 450–51 (statement of Sen. Buchanan); *id.* at 322 (statement of Rep. Floyd).

[184] *Id.* at 407.

[185] *Id.*

[186] *Id.*

[187] *Id.* at 793.

representation on this floor."[188] Many others agreed.[189] As Senator Huntington explained, Congress could require that its members be elected by district because it would ensure "the right of the people to a free, equal, and just representation in the Legislature" and it would "establish a system uniform, practicable, just, [and] equal—giving to every portion of the people its fair and legitimate political influence[.]"[190] Huntington added that such a system would ensure the representativeness of the body by "send[ing] up to the House of Representatives men identified in feeling and interest with those whom they represent."[191] Even some opponents embraced the principle of equal representation. Buchanan, for example, called it "the *beau ideal* of a system of representation[.]"[192] Buchanan acknowledged that "[a]s the people of the respective congressional districts enjoy equal rights, their Representatives ought to meet and deliberate on terms of perfect equality; and they ought individually to be subjected to an equal responsibility to those by whom they were elected."[193] And chief foe Senator Wright conceded that Congress had the power to "alter" state election regulations "[b]ecause the Legislature of a State, from disaffected feeling, or other cause, might make regulations subversive of the principle, of fair and equal representation, impracticable as to time, unreasonable as to place, odious as to manner, or otherwise subversive of those popular rights intended to be secured by the Constitution-and by this provision, as a most essential part of it."[194]

iii. Protecting Political Minorities

Protecting political (*i.e.*, partisan) minorities emerged as an important congressional interest during these debates. One refrain of advocates for single-member districting was that at-large elections denied political minorities proportional (or, sometimes, any) representation. This denial of due representation, they contended, amounted to the disenfranchisement of

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[188] *Id.* at 381.

[189] *See id.* at 491 (Sen. Huntington, arguing that one aim of the Elections Clause was "to produce uniformity in the manner of holding elections, so far as Congress should deem it proper to have the manner uniform"); *id.* at 788 (statement of Sen. Miller; *id.* at 792 (statement of Sen. Bates). Only in the years after this debate would Congress enact legislation to enable uniform administration of federal elections. *See, e.g.*, Ch. 1, 5 Stat. 721 (1845) (uniform presidential election day); Ch. 11, 5 Stat. 568 (1851) (uniform process for resolving contested House elections).

[190] 27th Congress, 2nd Session, Cong. Globe app. 493 (1842).

[191] *Id.*

[192] *Id.* at 439.

[193] *Id.*

[194] *Id.* at 467.

political minorities and the entrenchment of majorities. The Elections Clause gave Congress the power to right that wrong.

Many in Congress were confident that political minorities had rights that Congress had the duty and power to secure. "It needs no argument to prove the importance of minorities to the preservation of public liberty, and the equitable administration of Government," Huntington said. "They have rights too, which ought to be protected."[195] Chief among these was the right to vote and be represented. "If the general-ticket system be adopted, that political party which is in a minority, however near it may approximate to an equality in numbers, will virtually be disenfranchised," Senator Huntington elaborated, ". . . and a free and equal representation of the people be prevented."[196] Senator Bates echoed that concern. "The general-ticket system disfranchises the minority in a State," he declared, and "may be used by the majority to perpetuate their power."[197] "[M]inorities, as well as majorities, shall be represented in the Legislature," another explained. "Majorities certainly must govern, but minorities must be heard."[198] For many members, single-member districting seemed likely to mitigate, if not eliminate, the threat of the tyranny of the majority.[199]

In response, the Act's opponents waved off concerns about such a threat and defended a narrower conception of the right to vote as the right (of qualified voters) to cast a ballot and have it counted. Senator Leonard Wilcox (D-N.H.), for example, predicted that House of "nearly or mainly of the same party character" was not "an event to be apprehended or expected" because "[i]f it should ever exist, it would break down the party by its own cumbrous weight."[200] Senator Bagby argued that denying political minorities representation did not deny the right to vote at all: "When the right to vote according to the dictates of conscience and judgment remains unfettered and uncontrolled, no man is disfranchised. It is said, however, that it is destructive of the rights of minorities. Beyond the ballot-box minorities have no rights."[201] In enacting the Apportionment Act, Congress repudiated this claim that merely casting a ballot is all that the right to vote guarantees.

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[195] *Id.* at 493.

[196] *Id.*

[197] *Id.* at 793–94.

[198] *Id.* at 409 (statement of Rep. Pendleton).

[199] *See id.* at 493 (statement of Sen. Huntington); *id.* at 391 (statement of Sen. John J. Crittenden, Ky.); *id.* at 320 (statement of Rep. Butler).

[200] *Id.* at 424.

[201] *Id.* at 584.

iv. Preventing partisan manipulation

Finally, and intertwined with the protection of political minorities, the Apportionment Act debate reflected that Congress understood the Elections Clause to enable it to combat partisan manipulation of election law—especially gerrymandering. State power to regulate federal elections, one member observed, led to "a violent struggle for the ascendancy in the State Legislatures, growing out of the knowledge that this power may, and the apprehension that it will, be abused."[202] Partisan conflict, in turn, would lead to the reality (or at least the appearance) that the minority "had in some way been defrauded of their electoral rights."[203] "The mode of forming districts, which has received the name of gerrymandering . . . which is alike subversive of popular rights and of the spirit of the Constitution," was one particularly threatening means by which partisan interests could suppress minority representation.[204] Through the Elections Clause, Congress could decide for itself how its elections would proceed, reducing the stakes of state political strife and ensuring that "[a]ll attempts to arrange districts for political, party, or selfish purposes, would be in vain, and the people would be secure in their right to be represented in Congress."[205]

2. Enactment and Aftermath

The first complete draft of the Apportionment Act passed the House with the single-member districting requirement by a vote of 113-87.[206] The Senate rejected a motion to eliminate the districting requirement by a vote of 4-40.[207] The House passed the final version of the Bill, embracing two Senate amendments to the apportionment ratio, by votes of 113-103 and 111-102.[208] The Senate passed the final Bill by a vote of 25-19.[209]

In the years after the enactment of the Apportionment Act of 1842, debate about whether the Elections Clause permitted Congress to control congressional districting slowly abated. By the close of Reconstruction, Congress had enacted two similar districting laws with almost no debate.

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[202] *Id.* at 407 (statement of Rep. Pendleton).

[203] *Id.*

[204] *Id.* at 493 (statement of Sen. Huntington); *cf. id.* 556 (Sen. Wright denouncing the "vice" of gerrymandering, which he predicted would be the result of districting under the Apportionment Act).

[205] *Id.* at 493 (statement of Sen. Huntington).

[206] 27th Congress, 2nd Session, Cong. Globe 471 (1842).

[207] *Id.*

[208] *Id.* at 649.

[209] *Id.* at 614.

In the first congressional elections under the 1842 Apportionment Act, four states defied the statute and elected their representatives at-large.[210] The outgoing House Committee on Elections recommended a bill suspending single-member districting for the upcoming Congress, but it was not adopted.[211]

When the Twenty-Eighth Congress convened, Democrats had ousted the Whig majority. The majority report of the new Congress's committee on the dispute recommended declaring the single-member districting provision unconstitutional on anti-commandeering grounds. Because the Act could not "execute itself without the intervention of State legislatures" (*i.e.*, unless states drew maps), Congress had commandeered the states.[212] The report did make a significant concession, however, acknowledging that Congress could intervene to protect political rights against state laws that threatened them. "If the legislatures of the States fail or refuse to act in the premises or act in such a manner as will be subversive of the rights of the people and the principles of the Constitution," the report concluded, "then this conservative power interposes, and, upon the principle of self-preservation, authorizes Congress to do that which the State legislatures ought to have done."[213] The minority report repeated the constitutional claims that the Act's original supporters had advanced, and concluded that the state laws providing for at-large elections were void because Congress had acted lawfully in passing the Apportionment Act.[214]

After relitigating the constitutional questions discussed in 1842,[215] Congress voted to seat the disputed representatives-elect,[216] but also voted down a resolution declaring the 1842 law unconstitutional.[217] This seemingly contradictory position likely reflected politics more than a particular view on the Elections Clause. As Franita Tolson, authoritative scholar on the Elections Clause and federalism, notes: "Arguably, the Democrats wanted to impose principled limitations on the exercise of federal power to protect the slaveholding states, which had been concerned about *any* broad interpretation of federal power, while simultaneously taking advantage of their majority status by reaffirming the more expansive

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[210] *See* Chester A. Rowell, A Historical and Legal Digest of All the Contested Election Cases in the House of Representatives of the United States from the First to the Fifty-Sixth Congress, 1789-1901 at 117–20 (1901).

[211] *See id.* at 117 n.1; 27th Congress, 3rd Session, Rep. 100 (1843).

[212] *See* ROWELL, *supra* note 210, at 118.

[213] *See id.*; *see also* Tolson, *Congressional Authority*, *supra* note 15, at 352.

[214] *See* ROWELL, *supra* note 210, at 120.

[215] *See* 28th Congress, 1st Session, Cong. Globe 248–77 (1844).

[216] *Id.* at 278.

[217] *Id.* (voting 127 to 57 to substitute a resolution seating the disputed representatives in lieu of one that would have declared the Act unconstitutional).

interpretation of federal authority embraced by the Whigs through the 1842 Act."[218]

Subsequent congresses embraced the interpretation of the Elections Clause that the Twenty-Seventh Congress had put forward (and rejected the narrower view of the Twenty-Eighth Congress). In 1862, Congress enacted an Apportionment Act substantially similar to the 1842 statute, again requiring that House members be elected from contiguous single-member districts.[219] Debate was desultory.[220] In the Apportionment Act of 1872, Congress again required contiguous single-member districts, and further required that each district "contain[] as nearly as practicable an equal number of inhabitants."[221]

C. Reconstruction, 1865–77

During Reconstruction, congressional activity under the Elections Clause centered on two issues. Between 1865 and the ratification of the Fifteenth Amendment in 1870, Congress debated whether the Elections Clause granted it the power to extend the right to vote to more people—namely, Black men. Then, having enacted the Fifteenth Amendment, Congress enacted three bills to protect the right to vote—constructing the first comprehensive system of federal election administration and enforcement. The three Enforcement Acts drew on the constitutional authority of the Fourteenth and Fifteenth Amendments, but they also relied on the Elections Clause. By the close of this period, Congress cemented the understanding that—with the exceptions of voter qualifications and the place of choosing Senators—the national legislature could exercise plenary power over its own elections.

1. Congressional Power to Expand the Franchise, 1865–69

Between 1865 and 1869, Congress debated drafts of what became the Fourteenth and Fifteenth Amendments. That debate is as revealing for what Congress assumed as for what it rejected. Most notably, although a few

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[218] Tolson, Congressional Authority Over Elections, *supra* note 15, at 349.

[219] Ch. 170, 12 Stat. 572 (1862).

[220] *See* 37th Congress, 2nd Session, Cong. Globe 3117–18 (1862); *id.* at 3117 (Sen. Lyman Trumbull, Ill.: "This bill reenacts [the 1842 Act], and makes it a permanent law."); 37th Congress, 2nd Session, Cong. Globe 3117 (1862) (Sen. Daniel Clark, N.H.: "After the passage of the old law requiring members to be elected by single districts, the State of New Hampshire refused to comply with the law, and elected all her members by general ticket, and they were all admitted by the House of Representatives. I thought the precedent wrong at the time.").

[221] Ch. 11, 17 Stat. 28 (1872).

prominent members of each house contended that the Elections Clause granted Congress the power to specify the qualifications of federal voters, *i.e.*, who was eligible to vote, Congress largely declined to act on that theory.

Congress began to consider this question even before the Civil War had ended. In 1865, New York's legislature formally requested that the Senate adopt "a law making uniform regulation throughout the United States of the times, places, and manner of holding elections for Senators and Representatives, except as to the place of choosing Senators, defining the qualifications requisite for electors, and abrogating such regulations prescribed by the Legislatures in each State or otherwise as may be inconsistent therewith."[222] The Senate referred the request to the Committee on the Judiciary,[223] which later decided not to act.[224]

Debate on federal legislation to expand the franchise—primarily to prohibit denial of the right to vote on the basis of race, color, or previous condition of servitude—unfolded in earnest after the war concluded. In an 1866 debate about a bill to prohibit denial of the right to vote "on account of color," Representative William D. Kelley (R-Penn.) advanced what appears to be the first postwar congressional argument that the Elections Clause (read in conjunction with the Guarantee Clause) granted Congress the power to decide who could vote.

> [The Framers] made it the duty of the United States Government to guaranty to each State a republican form of Government, and having done that they did not fail to provide the means by which the Government on which they had laid that duty should be able to perform it. And they gave Congress the amplest power to execute that section . . . in section four, article one . . . . Now, sir, what did they mean by that provision? . . . Mr. Madison said . . . "*Should the people of any State by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government.*"[225]

Remarking on the injustice of denying the right to vote to the "educated, industrious, taxpaying, school-sustaining, church-building people of this District[,]" Kelly exclaimed: "How bitterly would Madison, unimpassioned as he was, have denounced such treachery to the essential principle of

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[222] 38th Congress, 2nd Session, Cong. Globe 849 (1865).

[223] *Id.* at 849.

[224] *Id.* at 977.

[225] 39th Congress, 1st Session, Cong. Globe 182–83 (1866) (emphasis in original).

republicanism—universal suffrage."[226] As Kelley understood the ratification debates, the word "manner" was universally acknowledged to include who could vote. "[T]he whole country, so early as the 9th of August, 1787, two years before the final adoption of the Constitution, were informed that that word ['manner'] in the clause in question embraced not merely the method of voting, the place of voting, and the order of voting," he contended, "but the grand fundamental question of who should vote, and by what power they might be invested with the right of suffrage."[227]

Few shared Kelley's view. "Mr. Speaker, it is utterly impossible, by any rules of construction that have ever properly been applied to language, to place any such construction as that upon the simple clause in the Constitution which has been read," one representative replied.[228] Another denounced Kelley's argument as "one of the most dangerous and startling that has yet been suggested in connection with our national policy."[229] Kelley acknowledged the opposition, but argued that the Elections Clause was fundamentally intended to provide for universal suffrage. "Gentlemen tell me that this is a new construction of the Constitution," he acknowledged, but "I reply that it is the true one, which is enough for me, and that the old and false one was the fruitful source of discord and war and misery."[230]

The following year, 1867, Congress did enact one statute expanding the franchise, but the body did not clearly identify the constitutional source of its power to do so.[231] The First Reconstruction Act required the former Confederate States to convene constitutional conventions of delegates "elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election," and specified that the resulting constitutions "shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates."[232] The Act directly set the qualifications for *state* voters, and some members sporadically invoked the Guarantee Clause.[233]

Support for the claim that Congress could decide who could vote in federal elections grew in the remaining years before the passage and

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[226] *Id.* at 183.

[227] *Id.* at 409.

[228] *Id.* at 412 (statement of Rep. Samuel S. Marshall, D-Ill.).

[229] *Id.* at 454 (statement of Rep. Michael C. Kerr, D-Ind.).

[230] *Id.* at 409.

[231] 39th Congress, 2nd Session, Cong. Globe 1315–40, 1458–69 (1867) (debating the First Reconstruction Act without invoking the Elections Clause).

[232] Ch. 153, 14 Stat. 428 (1867).

[233] *Id.* at 1318–19.

ratification of the Fifteenth Amendment, but no more than a small minority of each house understood the Elections Clause that way.[234] In the Senate, Radical Republican Charles Sumner (Mass.) was the leading supporter of congressional power over voter qualifications.

> [T]here are two hostile pretensions which must be exposed; the *first*, founded on a false interpretation of "qualifications," being nothing less than the impossible assumption that because the States may determine the 'qualifications' of electors, therefore they can make color a criterion of the electoral franchise; and the *second*, founded on a false interpretation of the asserted power of the States 'to regulate suffrage,' being nothing less than the impossible assumption that, under the power to regulate suffrage, the rights of a whole race may be annihilated. These two pretensions are, of course, derived from slavery. They are hatched from the eggs that the cuckoo bird has left behind. Strange that Senators will hatch them . . . . Admitting that the States may determine the "qualifications" of electors; what then? Obviously it must be according to the legitimate meaning of this word . . . . The Constitution, where we find this word, follows the Declaration of Independence and refuses to recognize any distinction of color . . . . The "qualifications" of different officers, as President, Vice President, Senators and Representatives are named; but "color" is not among these . . . . The dictionaries of our language are in harmony with the Constitution. Look at "qualifications" in Webster or Worcester, the two best authorities of our time, and you will find that the word means "fitness" – "ability" – "accomplishment" – "the state of being qualified;" but it does not mean "color!" It embraces age, residence, character, education and the payment of taxes—in short, all those conditions which when honestly administered are in the nature of *regulation*, not of *disfranchisement* . . . *An insurmountable condition is not a qualification but a disfranchisement.*[235]

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[234] 39th Congress, 1st Session, Cong. Globe 173–83, 403–12, 447–60, 1054–62 (1866); 40th Congress, 2nd Session, Cong. Globe 2053–57, 3023–27 (1868); 40th Congress, 3rd Session, Cong. Globe 555–61, 642–45 (1869).

[235] 40th Congress, 2nd Session, Cong. Globe 3026 (1868) (emphases in original).

Because race was not a "qualification," he argued, then the Elections Clause empowered Congress to protect the federal right to vote from this unconstitutional restriction. Sumner pointed to Madison's argument that "[s]hould the people of any State by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government."[236] "Thus was it expressly understood, at the adoption of the Constitution," Sumner concluded, "that Congress should have the power to prevent any State, under the pretense of regulating the suffrage, from depriving the people of this right or from interfering with the principle of *Equality*."[237]

In the House, George Boutwell (R-Mass.) led the charge for the view that the Elections Clause was the source of both federal and state power over congressional elections. For that reason, any state power over federal voter qualifications was subject to Congress's controlling power to "make or alter" state regulations of federal elections. He argued that the Voter Qualifications Clause gives neither to the States nor to Congress the power to determine the qualification of voters.[238] Rather, "[i]t merely declares the fact that the voters for Representatives in Congress shall possess the qualifications of voters for members of the most numerous branch of the State Legislature . . . . But there is no declaration in this section that either [the States or the national Government] has the power, and certainly not that either has the power to the exclusion of the other."[239] The Elections Clause explained who "has the power," and on what terms:

> The word "manner," in this connection of course becomes important . . . . It includes, as I maintain, everything relating to an election, from the qualification of the elector to the deposit of his ballot in the box . . . . Either one or the other of two things is true: either these words as herein employed in their scope and meaning cover the entire subject of elections, from the qualifications of the voter to the deposit of his ballot in the box, or else, by necessary legal inference, the States have not the power which they have been in the habit of exercising . . . . But the history of the facts from the first, and the recognition by Congress of the powers of the States, go to the extent of conceding to them entire scope and original control of the whole matter of voting, including the qualifications of the voter, his registration, and the deposit of

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[236] *Id.* at 3027.
[237] *Id.* (emphasis in original).
[238] 40th Congress, 3rd Session, Cong. Globe 556 (1869).
[239] *Id.*

> his ballot in the box . . . . [T]herefore, when a State-rights man proves that by the Constitution of the United States a State has a right to decide who shall exercise the elective franchise, he has proved also that Congress may do the same thing under this provision of the Constitution which says that Congress may make any regulations it chooses relating to this subject or may alter such regulations as have been made by the States.[240]

Boutwell closed, "Mr. Madison says: 'Should the people of any State by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government.' Forty thousand citizens of the United States are deprived of the right of suffrage in the State of Kentucky."[241] With this authority, Boutwell urged, federal law should prohibit denial of the right to vote on the basis of race. Gauging support for Sumner's and Boutwell's position is difficult, but their arguments were not widely taken up by their colleagues. Congress chose to amend the Constitution instead.

2. *The Enforcement Acts*

In 1870 and 1871, in the wake of the Civil War, Congress invoked its powers under the Elections Clause and the new Fourteenth and Fifteenth Amendments to enact three Enforcement Acts to protect the right to vote, particularly for newly enfranchised Black men.[242] The Enforcement Acts and the associated debates underscore that Congress understood the Elections Clause to confer expansive power over congressional elections (the scope of the franchise aside), permitting the federal government to establish a comprehensive code for election administration, integrity, and security. The debates reveal a Congress focused on securing free, fair, and racially inclusive elections by any means deemed necessary and proper, and less concerned than its 1842 predecessor with defining the precise scope of "manner" or identifying particularized legitimate legislative interests.

a. The First Enforcement Act

On May 31, 1870, Congress enacted "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union"—

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[240] *Id.*

[241] *Id.* at 557.

[242] Ch. 114, 16 Stat. 140 (1870); Ch. 99, 16 Stat. 433 (1871); Ch. 22, 17 Stat. 13 (1871); 41st Congress, 2nd Session, Cong. Globe 3871–84; 41st Congress, 3rd Session, Cong. Globe 207–14, 1271–85, 1633–49.

the First Enforcement Act.[243] As the title suggests, the Act reached beyond the confines of the recently ratified Fifteenth Amendment (which applies to voting restrictions on account of race, color, or previous condition of servitude) to establish a federal regime for protecting the right to vote. For that reason, the Act's constitutionality rests in large part on the Elections Clause.

The First Enforcement Act deployed sweeping federal power over congressional elections.[244] Congress created new crimes, penalties, and civil causes of action against private individuals for interference with the right to vote, prohibiting the use of "force, bribery, threats, intimidation, or other unlawful means" to "hinder, delay, prevent, or obstruct . . . any citizen from doing any act required to be done to qualify him to vote for or from voting at any [congressional] election,"[245] or "to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same."[246] The Act gave federal district courts exclusive jurisdiction over all crimes and offenses committed against the provisions of the Act, and it granted to federal district and appellate courts concurrent jurisdiction over all other actions arising under the law.[247]

The First Enforcement Act also marked an unprecedented exercise of federal power over the states and their agents. For example, the statute attempted to preempt malfeasance by state actors by deeming that any eligible voter who offered or attempted to fulfill a state's "prerequisite[s]" for voting would be entitled to vote if a state officer wrongfully failed to receive or permit the performance of the prerequisite.[248] In any election involving a congressional race, the Act declared it a federal crime for any federal or state election officer to "neglect or refuse to perform" the duties imposed by any federal or state election law.[249] Congress established federal protection of, and regulation over, all state voter registration systems that served "any State or other election at which such representative or delegate in Congress shall be chosen," even if "the same shall also be made for the purposes of any State, territorial, or municipal election."[250] To escape federal reach, a state would have to operate a completely independent election system for its own elections. Congress authorized the

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[243] Ch. 114, 16 Stat. 140 (1870).

[244] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 454-09 (1988).

[245] *Id.* (Sections 4 and 5).

[246] *Id.* (Section 6).

[247] *Id.* (Section 8).

[248] *Id.* (Section 3).

[249] *Id.* (Section 22).

[250] *Id.* (Section 20).

military to augment the courts. The Act declared, "it shall be lawful for the President of the United States to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to aid in the execution of judicial process issued under this act."[251]

Relatively little debate about the Elections Clause preceded the First Enforcement Act—seemingly less than the Apportionment Act of 1842. Still, some House Democrats raised the familiar objection that the statute exceeded congressional authority under the Elections Clause. "Whence came the authority of Congress to make penal bribery, intimidation, or influence in respect of elections in the States . . . ?" Representative Clarkson Potter (D-N.Y.) asked.[252] Finding no basis in the Elections Clause or the Fifteenth Amendment, Potter argued that many of the Act's "provisions relate neither to the time, place, nor manner of holding elections . . . nor to the denial or abridgment of suffrage on account of race, color, or previous condition of servitude . . . and in all such respects, therefore, this bill is necessarily and flagrantly without authority."[253] Representative Michael Kerr (D-Ind.) fulminated, "every single section of this bill—twenty-three in number—save only the first, involves a palpable violation of the spirit and letter of the Constitution."[254] Kerr argued that "[i]t was never contemplated by the people that Congress would attempt to usurp control of the elections in the States, to dictate in what manner they should be conducted, to put them under the supervision of Federal officers, and give all judicial power over them to Federal courts"—but he made no attempt to reckon with the "manner" authority provided by the Elections Clause.[255] Another member objected that the bill was "placing in the hands of Congress all matters growing out of State elections."[256]

Republicans dismissed these objections. The law's provisions "are but a simple exercise of the power expressly conferred on the Congress of the United States to regulate elections of members and Delegates to Congress," Representative John Bingham (R-Ohio), principal author of the Fourteenth Amendment and a legal architect of Congressional Reconstruction, told his colleagues.[257] "[T]he sum total of the outcry against this bill is that by it the equal rights of the people of this country are to be enforced, for the first time in the history of the Republic, by a national statute and by the whole power of the Union and of the people of all the States."[258] Representative

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[251] *Id.* (Section 13).
[252] 41st Congress, 2nd Session Cong. Globe 3876 (1870).
[253] *Id.*
[254] *Id.* at 3872.
[255] *Id.* at 3872–73.
[256] *Id.* at 3875 (statement of Rep. James B. Beck, D-Ky.).
[257] *Id.* at 3872.
[258] *Id.* at 3883.

Noah Davis (R-N.Y.) thundered, "it is true, as has been asserted by gentlemen upon the other side, that heretofore in the history of this country it has not been necessary for Congress to interfere for the purpose of preserving the purity of the election of members of this House. But has not that time now arrived?"[259] Amid the white violence and subterfuge prevailing in the former Confederate States, "members of this body cannot be elected fairly and according to the will of those entitled to exercise the right of suffrage unless Congress intervenes and exercises that dormant power that has so long existed, but which has never yet been exercised."[260]

Indeed, the debates were studded with lurid claims about how the Enforcement Act subjugated white people, particularly when a draft of the bill also included measures ending racial discrimination in the taxation and treatment of immigrants.[261] Opponents chastised the Bill as unfair favoritism towards freed slaves. "The bill now before us seeks to give the negro rights, safeguards, and remedies which are withheld from the white man," one representative complained with reference to Section 5, which provided additional protection for the right to vote of anyone "to whom the right of suffrage is secured or guaranteed by the fifteenth amendment."[262] "You cannot with impunity trample upon this great white race," he added, arguing that if Congress "humiliate[d] and degrade[d] the white man" by enacting the Enforcement Act, states would simply adopt literacy tests (as Massachusetts had) and enfranchise immigrants to "increase" "the white majority at the polls."[263] In response to statements of unabashed white supremacy, Representative Davis tersely affirmed that the bill "simply prohibits crime."[264]

The final version of the First Enforcement Act passed the House with 133 yeas, 58 nays, and 39 members not voting,[265] and passed the Senate with 48 yeas and 11 nays.[266]

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[259] *Id.* at 3881.

[260] *Id.*

[261] *See, e.g., id.* (Rep. John D. Stiles, D-Penn.: "I protest against this outrage in the name of every white voter in the country. I protest against it because I am in favor of a white man's Government upon this continent, and utterly opposed to forcing upon an unwilling people negro suffrage, negro equality, and negro supremacy."); *id.* at 3874 (Rep. James A. Johnson, D-Cal.: "Mr. Speaker, this bill ought to be entitled an act to foster paganism . . . to foster child murder, to strike down Christianity, and to deprive the people of their liberties. Of course nearly all of this long conglomeration of vicious verbiage is directed against the white man and in favor of the Chinaman.").

[262] *Id.* at 3874 (statement of Rep. Beck, D-Ky.).

[263] *Id.* at 3874–75.

[264] *Id.* at 3881.

[265] *Id.* at 3884.

[266] *Id.* at 3809.

b. The Second Enforcement Act

The following year, Congress enacted the Second Enforcement Act, framed as a set of amendments to its predecessor.[267] The law established a new system of federal election administration and supervision. At the request of two citizens in any town of at least twenty thousand people, each United States circuit judge was required to commission two local "supervisors of election" to "guard[] and scrutinize[]" voter registration and balloting.[268] These federal election supervisors were authorized to "personally inspect and scrutinize each registry . . . in such manner as will, in their or his judgment, detect and expose the improper or wrongful removal therefrom, or addition thereto, in any way, of any name or names."[269] They were also authorized to supervise and challenge the counting of the votes,[270] to maintain clear lines of sight over all election processes,[271] and to investigate and challenge the seating of any representative-elect whose election defied the new regime.[272] Congress criminalized the obstruction of these supervisors or any other federal election administration officials—including the federal marshals and deputies tasked with enforcing much of the new election system—and undermining the integrity of the voter registration system.[273] The Act also required the states to conduct congressional elections with paper ballots, expressly displacing all state laws that said otherwise: "[A]ll votes for representatives in Congress shall hereafter be by written or printed ballot, any law of any State to the contrary notwithstanding; and all votes received or recorded contrary to the provisions of this section shall be of none effect."[274] Finally, the Second Enforcement Act doubled down on enforcement. Among other things, Congress empowered the federal marshals to enlist the local bystanders to combat violent resistance[275] and gave the federal courts complete jurisdiction over all matters arising under the Enforcement Acts.[276]

These additions to the growing federal election system prompted vigorous, if far from novel, congressional debate about the meaning of the Elections Clause.

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[267] Ch. 99, 16 Stat. 433 (1871).
[268] *Id.* (Section 2).
[269] *Id.* (Section 4).
[270] *Id.* (Section 5).
[271] *Id.* (Section 6).
[272] *Id.* (Section 7).
[273] *Id.* (Section 10).
[274] *Id.* (Section 19).
[275] *Id.* (Section 12).
[276] *Id.* (Section 15).

Some opponents raised the tired objection that Congress could only exercise its Elections Clause power if states defaulted on their duty to provide for congressional elections or otherwise threatened the existence of Congress.[277] Although Kerr argued that Congress could only act under very limited circumstances, he conceded that once Congress could act, it could set up the very sort of federal election administration system the two Enforcement Acts had created.[278] In those emergencies, "Congress may declare that elections shall be held at certain times and at certain places and in a certain manner; for example, that ballot-boxes shall be opened at each voting precinct . . . , and that an election board shall be organized there under Federal laws, and in the persons of one inspector and two judges."[279] When another opponent of the Second Enforcement Act, Senator George Vickers (D-Md.), rose to make a similar argument that Congress could act only for "reasons of absolute, unqualified necessity," he included among those "paramount reasons of State" not only "to perpetuate the existence of the Government," but also "to preserve representation" and "to protect minorities by the district system."[280]

Other opponents resurrected the anti-commandeering objection. Representative Charles Eldridge, for example, asked indignantly whether anyone would argue that under Elections Clause, or any other constitutional provision, Congress could "the Governors of the States and all other State officers can, under penalties, be required by the Federal Government to serve as its officers and do its bidding[.]"[281]

Some lawmakers questioned whether the "manner of holding elections" included the wide range of regulation imposed by the Second Enforcement Act.[282] In response, the statute's supporters, as in previous decades,

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[277] 41st Congress, 3rd Session, Cong. Globe 1277 (1871).

[278] *Id.*

[279] *Id.*

[280] *Id.* at 1633. Immediately after it passed, Vickers moved (unsuccessfully) to rename it "An act to prevent the free and intelligent voters of the United States from exercising the right of suffrage." *Id.* at 1655.

[281] *Id.* at 1272.

[282] *See, e.g.*, *id.* at 208 ("[W]hat is meant by the word 'manner,' and with what power does this simple word invest Congress? for it is upon this word, and this word only, that this measure is at all pretended to be justified. . . . Congress may, under this power, prescribe how the votes shall be received for Representatives, whether by ballot or *viva voce*; how they shall be counted or canvassed, how they shall be returned, and how certified; authorize the kind of ballot-boxes to be used, and such like things connected with the 'holding' of the election," he continued. "Nothing more could have been intended."); *id.* at 1637 ("But what right has Congress to interfere with the registration of voters? What clause of the Constitution gives them the right? The States have the exclusive power to judge of and fix the qualifications of voters; not denying or abridging the right by reason of race, color, or previous condition of servitude. The States are to fix the age and residence.

answered that the Clause granted Congress comprehensive power to regulate congressional elections. Calling attention to the Elections Clause, the Necessary and Proper Clause, and the Fourteenth Amendment, Representative William Lawrence (R-Ohio) contended, "Congress could provide officers to conduct the elections of Representatives in Congress. Under these provisions Congress may define and punish crimes against the exercise of the elective franchise in the election of Representatives in Congress."[283] Just as the constitutional power to tax permits Congress to criminalize violations of the revenue laws, and the constitutional power to establish post offices permits congress to define offenses against the postal service, so too "the power to make regulations as to the 'times, places, and manner' of holding elections for Representatives carries with it the right to define penal offenses against the exercise of the elective franchise."[284]

Representative Burton Cook (R-Ill.) likewise argued that the power to correct violations of election law was inherent in Congress's "manner" authority: "if these frauds in the elections grow to any extent out of the manner of conducting the elections, then clearly to that extent the remedy is within our power, and we are called upon to apply that remedy by every consideration that would induce us to preserve our free Government and preserve the liberties of our people."[285] Cook emphasized that "[t]here can be no valid reason urged against the passage of this bill, unless it can be shown that under a fair and reasonable administration of this act, if it should become a law, men who are justly entitled to vote would be deprived of their right to do so."[286] And he pointed out that "no evidence" had been produced to that effect.[287]

The bill's proponents argued that the enforcement legislation was authorized on even the narrowest traditional grounds: Congress's need to protect itself from subversion by states. In this emergency, nothing less than a federal election code could secure Congress's fundamental interest in its own existence and integrity. Bingham stated the case clearly. "Your Constitution would have been only a glittering bauble if it had not conferred, as it did confer, upon the national Legislature the power of self-preservation," he began.[288] "Who does not know that if the State Legislature should choose to incumber the exercise of this power with inconvenient or impossible conditions, and if the national Congress had not the power to

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The 'manner' of conducting an election refers to a different subject.").

[283] *Id.* at 1276.

[284] *Id.*

[285] *Id.* at 1280.

[286] *Id.*

[287] *Id.*

[288] *Id.* at 1283

overrule or alter such conditions, the nation would perish?"[289] Others concurred. "The idea that Congress cannot protect the national Government in the election of the very officers who are to make its laws is supremely ridiculous and absurd," Lawrence argued. "This power to preserve the purity of the ballot is simply the exercise of that inherent power, which this, like every other Government has—a power higher, if possible, than the Constitution—the power of preserving its own existence when that existence is threatened by force or fraud."[290] Lawrence reasoned that no member could deny that such force and fraud had already occurred: "Sir, we all know that Kuklux outrages have been committed, not only in North Carolina, where it was recently necessary to call out a military force to protect the people at the elections, but in other States of the South; and that in more than one city of this Union enormous frauds have been perpetrated upon the ballot-box."[291] Even if the legislation was unprecedented, the crisis was unprecedented too. "It is said that the last clause of this section [of the Elections Clause] giving the power to Congress has fallen into abeyance, never having been used, and should now be considered but as a dead letter," Representative Cook said. "Sir, the men who framed this Constitution foresaw that the exigency might arise, *as it has arisen*, requiring the exercise of this power by Congress, and they provided for its exercise when that exigency should arise."[292]

The bill passed the House by a vote of 144 yeas, 64 nays, and 32 members not voting,[293] and the Senate by a vote of 39 yeas to 10 nays.[294]

c. The Third Enforcement Act

Less than two months later, Congress enacted a third Enforcement Act, also known as the Ku Klux Klan Act.[295] "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes" pursued some of its "other Purposes" through the Elections Clause. Most of the Act's provisions increased federal military and judicial authority over regional violence, but Section 2 of the Act also created a new civil cause of action against voter intimidation and related interference with the right to vote, which remains in the U.S. Code as 42 U.S.C. § 1985(3), and a criminal equivalent, which does not.[296] The House

[289] *Id.*
[290] *Id.* at 1276.
[291] *Id.* at 1275.
[292] *Id.* at 1280 (emphasis added).
[293] *Id.* at 1285.
[294] *Id.* at 1655.
[295] Ch. 22, 17 Stat. 13 (1871).
[296] *Id.* (Section 2)

passed its first version by 118 to 91,[297] and the Senate passed its own by a vote of 45 to 19.[298] The House approved the final bill by a vote of 93 yeas, 74 nays, and 63 not voting,[299] and the Senate approved it with 36 yeas and 13 nays, 42nd Congress.[300]

Because this second section of the Act resembled the sixth section of the First Enforcement Act, which created a cause of action against conspiracies to violate the rights of federal citizenship, Congress engaged in little original constitutional debate. As Representative Samuel Shellabarger (R-Ohio) said while making the case for the bill, "it rests upon exactly the same legal ground, and is in its constitutional aspects identical with [the First Enforcement Act], the only difference being that the section of this bill defines the offense with greater exactness."[301] Only James Garfield felt the need to mention the Elections Clause as the source of constitutional authority for this federal protection of the right to vote, and his remarks on this point appear to have been relatively uncontroversial. "[I]t has again and again been elaborately argued upon this floor that the clause in the main text which gives to Congress the power to regulate the time, place, and manner of holding elections carried with it the whole question of suffrage. I was never able to believe that this clause went so far," he acknowledged. But, Garfield continued, "I did believe, and I do now believe, that it goes so far that, with the fifteenth amendment superadded, Congress is armed with more than a mere negative power, and had the right to pass the enforcement act of May last [*i.e.*, the First Enforcement Act]."[302]

IV. THE ELECTIONS CLAUSE IN FEDERAL COURTS

A. Reconstruction

The three Enforcement Acts marked Congress's first foray into creating a federal scheme of election regulations that went beyond districting. At the same time, the Acts granted federal courts jurisdiction over matters arising under the new laws. It's no surprise then, that the Enforcement Acts offered federal courts, including the U.S. Supreme Court, the first occasions to opine meaningfully on the Elections Clause and its scope.

Before Reconstruction, courts typically referred to the Elections Clause

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[297] 42nd Congress, 1st Session, Cong. Globe 522 (1871).
[298] *Id.* at 709.
[299] *Id.* at 808.
[300] *Id.* at 831.
[301] 42nd Congress, Special Session, Cong. Globe app. 69 (1871).
[302] *Id.* at 154.

as a way to understand some other issue or unrelated aspect of law.[303] For example, in establishing the foundational principle that federal courts retain the power to review state court decisions interpreting federal law or the Constitution, in *Martin v. Hunter's Lessee*, Justice Story pointed to the Elections Clause as an instance in which the Constitution makes federal law supreme.[304] In interpreting the word "manner" as used in a statute providing pensions to widows of the Revolutionary War, the Court of Claims explained that the word was so broad as used in the Elections Clause to permit Congress to enact the Apportionment Act of 1842 and compel elections by district.[305]

The Circuit Court for the Southern District of New York appears to have been the first federal court to elaborate on the purpose of the Elections Clause when the court considered the constitutionality of the First Enforcement Act less than six months after the law's passage.[306] Noah Davis was the attorney who argued that the Act (and a criminal prosecution thereunder) was constitutional under the Elections Clause.[307] Davis had been a congressman from New York and had vocally defended the Act just months earlier.[308] President Grant appointed Davis to be the U.S. District Attorney (now known as "U.S. Attorney") for the Southern District of New York in July of 1870.[309] As the first court to examine the underpinnings of the Elections Clause in nearly a century of the provision's existence, *Quinn* should be foundational to understanding the meaning and purpose of the

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[303] *See* Tolson, *Congressional Authority*, *supra* note 15, at 361 ("Prior to Reconstruction, there was not much mention of the Elections Clause in the Supreme Court's jurisprudence, much less any thorough analysis of the meaning of its terms.").

[304] 14 U.S. 304, 343 (1816); *see also Smith v. Turner*, 48 U.S. 283, 497–98 (1849) (*Passenger Cases*) (Daniel, J., dissenting).

[305] *Smith v. United States*, 1857 WL 4176, at *3 (Ct. Cl. Feb. 16, 1857) ("[In 1842 it] was considered by Congress that in the word 'manner' was included the power to prescribe that congressional districts should each be composed of contiguous territory, although in some of the States the elections for members of Congress had always been had by general ticket. Whether the authority of Congress in this particular has ever been contested or not, this act shows the construction given by Congress to the word manner. Now, if the manner of holding an election means that Congress may provide that the election of its members shall be by districts composed of contiguous territory, the word is surely comprehensive enough in the present case to mean that the pension shall commence on the 4th of March, 1848.").

[306] *See United States v. Quinn*, 27 F. Cas. 673 (C.C.S.D.N.Y. 1870).

[307] *Id.*

[308] *See supra* notes 259, 260, 264.

[309] "Davis, Noah, (1818–1902)" Biographical Directory of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000126. Davis was a personal friend of President Grant's, according to Davis's obituary. *See Ex-Justice Davis Dead*, N.Y. Times (Mar. 21, 1902), https://timesmachine.nytimes.com/timesmachine/1902/03/21/101942952.pdf.

Clause – but it has never been cited by the Supreme Court or any other federal court in analyzing the scope of the Clause.

The *Quinn* court looked to the intent in drafting and adopting the Elections Clause, examining "the explanations which were given by the great and good men who expounded it."[310] The court repeatedly recognized the singular importance of an accurate and fair vote: "those framers of the constitution did not, for one moment, lose sight of the indispensable condition—on which alone a government of the people could be safe to the people themselves or could secure the beneficent ends for which it was instituted—that her popular vote should be the true expression of the opinions and choice of the electors."[311] And the court articulated the Framers' underlying fears that "the states might become indifferent to the general good," and as a result fail to hold congressional elections or put obstacles in the way of "the full and fair expression of the popular voice[.]"[312]

Each of Congress's powers under the Elections Clause was, according to the *Quinn* court, was intended to ensure the people could express their voice through a fair vote. For example, Congress needed the authority to set the time of elections because "[t]ime might some where be so arranged, and for some end other than the well-being of the whole nation, that the popular voice might be denied a full expression."[313] Congress likewise required superseding power to establish the place of elections because "[p]lace might be so fixed as in that mode to defeat the general and the indispensable purpose."[314] Lastly, Congress retained authority over the manner of conducting elections because "[t]he manner of holding an election might be such as to operate to prevent an open, fair expression of the popular voice."[315] The Elections Clause was designed to avoid a scenario in which "either through an indifference of the states or otherwise, the general government might find itself unsupported by the very people in whose will the foundations of the government rested."[316] The *Quinn* court plainly stated that the "principle on which it was declared that this clause might be useful" was that "all legal voters should have full and fair opportunity to deposit their votes."[317]

The *Quinn* court rejected outright the argument that Congress's delay in using its Elections Clause power somehow diminished it because "failure to

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[310] *Quinn*, 27 F. Cas. at 678.
[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] *Id.*

exercise the power hitherto is shown, by the history of this government, to furnish no argument against its existence."[318]

After *Quinn*, lower federal courts upheld provisions of the Enforcement Acts under the Elections Clause before the challenges made their way to the Supreme Court. For example, in *In re Engle*, a Maryland district court ordered the release of special deputy marshals who were arrested after the marshals arrested at least two individuals who were breaching the peace at the polls (including by distributing disinformation to Black voters).[319] As in *Quinn*, the *Engle* court turned to the Framers to understand the scope of legislation that the Elections Clause permitted:

> The extent of the power given to the congress by this fourth section is readily seen from the reasons given for its adoption at the time of framing the constitution. Alexander Hamilton, in No. 59 of the Federalist, gives as a reason for its adoption, 'that every government ought to contain in itself the means of its own preservation.' According to his view, whatever was necessary to be done to anable [sic] the qualified voters of a state to freely express their choice for a representative in congress, the congress under the fourth section has a right to provide.[320]

The *Engle* court thus understood that Congress could legislate broadly to "preserv[e] ... the freedom and purity of elections," and could do so whether the threat came from "an open act of hostility of the state or from the neglect to provide such a manner of election as to guard against such hindrance and obstruction, or from organized bands of its inhabitants conspiring together for the purpose, or from the act of one evil-disposed person only[.]"[321]

Similarly, where defendants challenged the constitutionality of the law under which they were prosecuted for conspiracy to intimidate voters, a federal court in Louisiana concluded that the law was "clearly within the constitutional power of congress" as granted by the Elections Clause.[322] That provision was "framed to secure the existence of the government itself, and was made in the interest of all the people of all the states."[323] The Elections Clause, along with the Voter Qualifications Clause, was "intended

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[318] *Id.* at 679.
[319] 8 F. Cas. 716 (C.C.D. Md. 1877).
[320] *Id.* at 717.
[321] *Id.* at 718.
[322] *United States v. Goldman*, 25 F. Cas. 1350, 1353 (C.C.D. La. 1878).
[323] *Id.*

to place the election of representatives in the ultimate power of congress, so as to secure at all times a house of representatives, first by preventing obstructive legislation by the states, and, second, securing to the voter the protection of the general government."[324]

The Supreme Court first addressed the constitutionality of the Enforcement Acts in 1875, in two decisions issued on the same day—*United States v. Reese*[325] and *United States v Cruikshank*.[326] Neither relied on the Elections Clause,[327] and both cases reflect the Court's well-covered narrowing of the Reconstruction Amendments.[328]

Five years later, the Court was confronted with a challenge to other provisions of the First and Second Enforcement Acts in the context of a federal election. In *Ex Parte Siebold*, defendants (some of whom were election judges) were charged with stuffing ballot boxes and engaging in other acts of interference in and manipulation of a congressional election in Maryland.[329] The Court upheld several provisions of the First and Second Enforcement Acts as expressly authorized by the Elections Clause. In so doing, the Court embraced Congress's broad authority to legislate under the Clause and rejected the argument that Congress could not enact partial federal regulations:

> After first authorizing the States to prescribe the regulations, it is added, 'The Congress may *at any time*, by law, *make or alter* such regulations.' '*Make or alter:*' What is the plain meaning of these words? . . . There is no declaration that the regulations shall be made either wholly by the State legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them.[330]

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[324] *Id.*

[325] 92 U.S. 214 (1875).

[326] 92 U.S. 542 (1875).

[327] *Reese* expressly disclaimed application of the Clause because the case involved an election for state representatives only. *See Reese*, 92 U.S. at 218.

[328] *See, e.g.*, Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2350–51 (2003) (cataloguing the substantial scholarship on the Court's hollowing of the Fourteenth and Fifteenth Amendments).

[329] 100 U.S. 371, 377–79 (1879).

[330] *Id.* at 383–84.

In fact, the *Siebold* Court expressly blessed the 1842 Apportionment Act. "No one will pretend," it stated, "at least at the present day, that these laws were unconstitutional because they only partially covered the subject."[331] The Court rejected concerns about Congress and states legislating on the same issue concurrently, because federal regulations are always "paramount" to state laws where the two conflict.[332] The Court upheld the federal punishment of state officers for violating state laws, the violation of which was made punishable by the Enforcement Acts, because the state officers also owed duties to the United States and because Congress could effectively adopt state laws and "demand[] their fulfillment."[333]

For the first time, the Supreme Court in *Siebold* declared "that Congress has plenary and paramount jurisdiction over the whole subject" of federal elections.[334] Like the lower court in *Quinn*, the Supreme Court rejected any suggestion that the absence of significant federal elections legislation prior to 1870 diminished Congress's broad authority on the subject: "If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power."[335] The Court acknowledged that the "exigency" had arrived: "In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government."[336] In other words, voter intimidation and violence, fraud, and interference with election integrity had become issues of self-preservation for the federal government.

The Supreme Court decided a companion case, *Ex Parte Clarke*, on the same day as *Siebold*.[337] An election officer had been convicted under the Enforcement Act for neglecting to convey a poll-book to the county clerk of court and for permitting the poll-book to be broken open.[338] The Court upheld the conviction and denied the motion for habeas corpus, relying on its reasoning in *Siebold*.[339] Justice Field, joined by Justice Clifford,

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[331] *Id.* at 384.

[332] *Id.*; *see also id.* at 386.

[333] *Id.* at 387–88.

[334] *Id.* at 388.

[335] *Id.*

[336] *Id.* at 382.

[337] 100 U.S. 399 (1879).

[338] *Id.* at 400.

[339] *Id.* at 403–04 ("The principal question is, whether Congress had constitutional power to enact a law for punishing a State officer of election for the violation of his duty under a State statute in reference to an election of a representative to Congress. As this

dissented from the majority opinions in *Siebold* and *Clarke*, arguing, in part, that the Elections Clause's "make or alter" power did not permit Congress to penalize violations of state law.[340] Justice Field relied on the debates during the constitutional and state ratification conventions, pointing to language from the Framers that identified "self-preservation" as the primary purpose for the Clause.[341] Justice Field also echoed the anti-commandeering arguments of the Framers and members of Congress who had urged limitations on, or at least a narrower interpretation of, the Elections Clause.[342] Once again, however, this restrained view of Congress's power under the Elections Clause was a minority opinion that did not carry the day.

The Court reaffirmed its broad view of the Elections Clause in *Ex Parte Yarbrough*, a unanimous opinion that upheld the Third Enforcement Act's criminal provisions against conspiracy to intimidate federal voters and conspiracy to deny the "free exercise or enjoyment" of federal privileges or immunities.[343] Eight men sought habeas relief after being convicted of conspiring to prevent Berry Saunders, a Black man, from voting in Georgia's congressional election, and carrying out that conspiracy by violently assaulting Mr. Saunders on account of his race.[344] In response, the Court announced Congress's unmitigated power to protect voters and the integrity of federal elections:

> If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.[345]

Again rejecting the argument that Congress's delay in deploying its Elections Clause authority diminished his power,[346] the Court explained that

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question has been fully considered in the previous case, it is unnecessary to add any thing further on the subject. Our opinion is, that Congress had constitutional power to enact the law; and that the cause of commitment was lawful and sufficient.").

[340] *Id.* at 415–16 (Field, J., dissenting).

[341] *Id.* at 416–19.

[342] *Id.*

[343] 110 U.S. 651 (1884).

[344] *Id.* at 655–57.

[345] *Id.* at 657–58.

[346] *Id.* at 660–61.

Congress's powers must include the authority to: "provide laws for the proper conduct of those elections[;]" "provide, if necessary, the officers who shall conduct them and make return of the result[;]" "to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function[;]" and "protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud[.]"[347]

Looking beyond "specific sources of the power to pass these laws[,]" the Court relied on fundamental principles of American democracy in a lofty conclusion:

> It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, as that the original form of it should be so. . . . In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.[348]

Recognizing the profound terror and unrest inflicted throughout the South, the Court also predicted other election manipulations—namely, the distorting effect of money in politics—that were still to come.[349] The Constitution *must* include the power to prevent against such "evils[,]" because if not "then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force on the one hand, and unprincipled corruptionists on the other."[350]

After *Yarbrough*, the Supreme Court continued to uphold the

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[347] *Id.* at 661–62; *see also id* at 662 ("[I]t is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing.").

[348] *Id.* at 666–67.

[349] *Id.* at 667 ("If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.").

[350] *Id.*

constitutionality of federal criminal penalties for voter intimidation and federal supervision of congressional elections.[351] Lower federal courts likewise followed *Siebold* and *Yarbrough*, repeatedly recognizing the breadth of Congress's constitutional authority to enact laws to ensure election integrity and protect the right of citizens to vote freely and without interference.[352]

B. The Wide Range of Elections Clause Powers

As Congress and states began exercising their Elections Clause powers more regularly in the Twentieth Century, the Supreme Court repeatedly reasserted the extraordinary breadth of the "times, places, and manner" authority under the provision and largely approved of legislation regulating a wide range of aspects of elections.

In an oft-quoted passage, the Court affirmed in *Smiley v. Holm* that "[i]t cannot be doubted that" the "comprehensive words" of Article 1, section 4

> embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[.][353]

Explicitly recognizing that this list was not exhaustive, the Court explained

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[351] *See, e.g.*, *Ex Parte Coy*, 127 U.S. 731, 752 (1888) ("[T]he power, under the constitution of the United States, of congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and in fact whatever is necessary to an honest and fair certification of such election, cannot be questioned. The right of congress to do this by adopting the statutes of the states, and enforcing them by its own sanctions, is conceded by counsel to be established.") (citing *Ex Parte Clarke*); *Logan v. United States*, 144 U.S. 263, 293–94 (1892) *abrogated on other grounds by Witherspoon v. State of Ill.*, 391 U.S. 510 (1968); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (holding that criminal penalties for voter intimidation are constitutional because it is "unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.") (citing *Yarbrough* and *Logan*).

[352] *See, e.g.*, *Ex parte Geissler*, 4 F. 188, 191 (C.C.N.D. Ill. 1880); *United States v. Munford*, 16 F. 223, 228 (C.C.E.D. Va. 1883); *Ex parte Morrill*, 35 F. 261, 265–66 (C.C.D Or. 1888).

[353] *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

that the Elections Clause authorizes States "in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[354] The Court went on to acknowledge that this broad power extended to Congress, which may issue "regulations of the same general character" as States and "may supplement these state regulations or substitute its own" because Congress "'has a general supervisory power over the whole subject.'"[355] The Court has also recognized that breadth of Congress's power under the Elections Clause is further bolstered by the Necessary and Proper Clause.[356]

Although it was never disputed that the Elections Clause included the power to draw and redraw districts, in *Smiley*, the Court held that nothing in the Elections Clause prohibited State redistricting legislation from being subject to the governor's veto power.[357] In so holding, the Court implicitly accepted that the power to redistrict is part of the Elections Clause authority. Since *Smiley*, the Court has confirmed this conclusion explicitly. For example, in *Wesberry v. Sanders*, an apportionment challenge, the Court delved into the constitutional ratification debates and explained that the Framers intended the Elections Clause to give Congress the power to rectify the malapportionment that had developed in certain state legislatures and to "lay the state off into districts[.]"[358] Even as it acknowledged that the breadth of Congress's power under the Elections Clause was controversial during the constitutional debates, the Supreme Court has treated as undisputed that Article 1, section 4 left "in state legislatures the initial power to draw districts for federal elections," and "permitted Congress to 'make or alter' those districts if it wished."[359] The Court went on to list the many instances in which Congress had exercised such power, "in particular to restrain the practice of political gerrymandering[.]"[360]

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[354] *Id.*

[355] *Id.* at 366–67 (quoting *Siebold*, 100 U.S. at 387).

[356] *United States v. Classic*, 313 U.S. 299, 320 (1941) (the Necessary and Proper Clause "leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution" in order to "safeguard the right of choice by the people of representatives in Congress").

[357] 285 U.S. at 372–73.

[358] 376 U.S. at 16 (quoting 4 Elliot's Debates at 71).

[359] *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004).

[360] *Id.* at 276–77; *see also Rucho*, 139 S. Ct. at 2495 ("Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering."); *Oregon v. Mitchell*, 400 U.S. 112, 122 (1970) ("The Framers expected Congress to use this power [in Art. I, s 4] to eradicate 'rotten boroughs,' and Congress has in fact used its power to prevent States from electing all Congressmen at large.") (citations omitted); *cf. AIRC*, 135 S. Ct. at 2677 (holding that the Elections Clause permitted Arizona voters to amend the state constitution by proposition to vest congressional redistricting power in the newly created Independent Redistricting Commission).

In addition to redistricting, the Court has recognized Congress's power to issue regulations pertaining to voter registration,[361] campaign finance and corruption,[362] primary elections,[363] recounts,[364] party affiliation rules,[365] and balloting[366] (so long as the balloting rule did not impermissibly attempt to regulate electoral outcomes). In each of these cases, the Court remarked on the comprehensive and wide-ranging scope of the Elections Clause power.

The Court's jurisprudence is muddier with respect to whether Congress can expand the electorate using its Elections Clause powers. In *Oregon v. Mitchell*, Justice Black, announcing the judgments for the Court, concluded that Congress can require states to permit 18-year-olds to vote in federal elections, but could not do so for state elections.[367] Relying on the Elections Clause, as "augmented by the Necessary and Proper Clause," Justice Black explained that "[t]he breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the

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[361] *ITCA*, 570 U.S. at 8–9 ("The Clause's substantive scope is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections,' including, as relevant here and as petitioners do not contest, regulations relating to 'registration.' The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'").

[362] *Burroughs v. United States*, 290 U.S. 534, 545–47 (1934) (relying heavily on *Yarbrough* to uphold as constitutional the financial disclosure and reporting requirements of the Federal Corrupt Practices Act); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("This Court has also held that it has very broad authority to prevent corruption in national Presidential elections.") (citing *Burroughs*); *id.* at 13 ("The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case."); *McConnell v. FEC*, 540 U.S. 93, 186–87 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010) ("Congress has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes through the means it has chosen.").

[363] *United States v. Classic*, 313 U.S. 299, 319–20 (1941) (overturning *Newberry v. United States*, 256 U.S. 232 (1921)); *see Buckley* 424 U.S. at 257 (recognizing that *Classic* overturned *Newberry* "without so stating"); *Foster v. Love*, 522 U.S. 67, 69–73 & n.2 (1997) (invalidating Louisiana's "open primary" law because the law conflicted with time of elections set by federal statute pursuant to the Elections Clause).

[364] *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972).

[365] *Storer v. Brown*, 415 U.S. 724 (1974) (holding that a state can require that an independent candidate be unaffiliated with a political party for one year prior to a primary election).

[366] *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

[367] 400 U.S. 112 (1970).

power to lay out or alter the boundaries of the congressional districts."[368] Four justices agreed with Justice Black that Congress could lawfully require states to extend the franchise to 18-year-olds for federal elections, but did so on different grounds.[369] Writing separately, Justice Stewart, with Chief Justice Burger and Justice Blackmun, agreed that Congress *could* regulate some voter qualifications through the Equal Protection Clause, but could not do so with respect to age because the state laws that set the voting age at 21 did not invidiously discriminate against any discrete and insular minority.[370]

In *Tashjian v. Republic Party of Connecticut*, the Supreme Court later confirmed that the Constitution does "not require a perfect symmetry of voter qualifications in state and federal legislative elections[.]"[371] The Court unequivocally rejected the argument that the Voter Qualifications Clause requires identical voter qualifications in state and federal legislative elections as "plainly inconsistent" with the *Mitchell*.[372] However, Justice Stevens, with Justice Scalia, dissented and argued that the opinions of eight justices in *Oregon v. Mitchell* were consistent with the proposition that the Constitution "requires the same qualifications for state and federal elections."[373] More recently, justices have weighed in on this question, though in dicta or in minority opinions. For example, in a 2013 decision striking down Arizona's law requiring would-be voters to provide proof of U.S. citizenship, Justice Scalia waded into the debate, writing that "Prescribing voting qualifications . . . forms no part of the power to be conferred upon the national government by the Elections Clause, which is expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections."[374] Notwithstanding nonbinding statements to the

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[368] *Id.* at 121.

[369] *See id.* at 135–44 (Douglas, J., concurring) (Congress can compel states to permit 18-year-olds to vote in federal *and state* elections pursuant to the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment); *id.* at 239–81 (Brennan, J. concurring in part and dissenting in part) (with Justices White and Marshall, Justice Brennan dissented from the judgment insofar as it declared the age requirement unconstitutional as applied to state and local elections and concluded that Congress could compel states to extend the franchise to 18- to 21-year-olds pursuant to the Equal Protection Clause).

[370] *Id.* at 293–96 (Stewart, J., concurring in part and dissenting in part).

[371] 479 U.S. 208, 229 (1986).

[372] *Id.* The Voter Qualifications Clause provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. 1, § 2, cl. 1.

[373] *Id.* at 233.

[374] *ITCA*, 570 U.S. at 17 (citations and quotation marks omitted, emphases in original); *see also id.* at 29–33 (Thomas, J., dissenting); *Husted v. A. Philip Randolph Inst.*, 138 S.

contrary, *Oregon v. Mitchell* and *Tashijian* represent the state of the law: Congress can expand the federal electorate beyond state law voter qualifications. Perfect symmetry is not required so long as all electors for the most numerous state legislative body also qualify as electors for federal office.

C. Exceptions to the Rule?

Three cases run counter to the great weight of jurisprudence recognizing the Elections Clause as a broad grant of power to Congress; one of these cases has since been overturned and another has been called into question – by Justice Scalia in his majority opinion in *Inter Tribal Council of Arizona* and by the sweep of history.

In *Newberry v. United States*, the court struck down portions of the Federal Corrupt Practices Act that placed spending limits on spending in primaries or other nomination processes for federal office, in part because the term "elections" in Article I, section 4 did not include primary elections because that procedure was "unknown" to the Framers.[375] But the Court later rejected this rule in *Classic v. United States*, explaining that when the Elections Clause is read "in the sense which is plainly permissible and in the light of the constitutional purpose" the Court was required "to hold that a primary election . . . is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it."[376] The *Classic* Court explained that the Necessary and Proper Clause—when operating in conjunction with the Elections Clause—grants Congress the power to legislate to "safeguard the right of choice by the people of representatives in Congress[.]"[377]

In *United States v. Gradwell*, the Court held that criminal prohibition of fraud against the United States did not extend to election fraud (specifically, bribery of electors).[378] To reach this conclusion, the Court looked at Congress's history of exercising its Elections Clause power to date, and noted that Congress had rarely interfered with state regulations of elections, except for a period of 24 years.[379] The Court wrote off as an aberration the period from 1870 (when Congress issued muscular elections regulations though the Enforcement Acts) to 1894 (when Congress repealed a substantial portion of these laws as Reconstruction gave way to

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Ct. 1833, 1850 (2018) (Thomas, J., concurring).

[375] 256 U.S. at 250.

[376] 313 U.S. at 320.

[377] *Id.*

[378] 243 U.S. 476 (1917).

[379] *Id.* at 482–84.

Redemption). The Court could not expressly state that Congress lacked the authority to regulate on congressional elections; instead, the Court explained that it was merely a matter of "policy" that had prevented Congress from doing so.[380] Because Congress had previously exercised its election authority "by positive and clear statutes," the *Gradwell* Court declined to read an election regulation into "a law for the protection of the revenue."[381]

In practice, *Gradwell* has not narrowed the Court's interpretation of the Elections Clause. Indeed, in explaining why the presumption against preemption does *not* apply in Elections Clause cases, Justice Scalia limited *Gradwell* to its facts, explaining that the "provision at issue was adopted in a tax-enforcement bill, and that Congress had enacted but then repealed *other* criminal statutes specifically covering election fraud."[382] Thus, "*Gradwell* says nothing at all about pre-emption, or about how to construe statutes (like the NVRA) in which Congress has *indisputably* undertaken 'to regulate such elections.'"[383] Indeed, Congress's adoption of sweeping regulation of federal elections throughout the twentieth and twenty-first centuries all but nullifies *Gradwell*.

Finally, in *U.S. Term Limits, Inc. v. Thornton*,[384] the Court held that a state could not impose term limits on U.S. representatives or senators because the "Times, Places and Manner" authority granted to states did not contain the power to determine the qualifications for federal office. Such power would contravene the intent of the Framers, who were motivated by "evident concern that States would try to undermine the National Government[.]"[385] Justice Stevens several times noted that the Elections Clause was intended to grant Congress control over the "procedural" aspects of elections (i.e., how elections are run), rather than the "substantive" qualifications of candidates for office.[386] But it would be a mistake to read Justice Stevens's focus on election procedure too narrowly, given the Framers' emphasis on the breadth of the Elections Clause (*e.g.*, "words of great latitude"), the intent to protect against voter suppression

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[380] *Id.* at 482 ("Although Congress has had this power of regulating the conduct of congressional elections from the organization of the government, our legislative history upon the subject shows that except for about twenty-four of the one hundred and twenty-eight years since the government was organized, it has been its policy to leave such regulations almost entirely to the states, whose representatives Congressmen are.").

[381] *Id.* at 485.

[382] *ITCA*, 570 U.S. at 13 n.5.

[383] *Id.*

[384] 514 U.S. 779 (1995).

[385] *Id.* at 810.

[386] *Id.* at 810, 832, 833, 834, 835.

and intimidation, and early Elections Clause legislation (approved by the Supreme Court) aimed at ensuring free and fair elections.[387]

D. Who is a "Legislature"?

The most voluble recent Supreme Court jurisprudence on the Clause has addressed what once seemed like a quirky, ancillary issue. The Republican legislature challenged Arizona's nonpartisan redistricting commission, which had been established by ballot measure under the state's constitution. The commission violated the Elections Clause, the lawsuit insisted, because only the "legislature" could set the "times, places, and manner" of balloting and districts – and the voters were not the legislature. This argument, if successful, would have put at risk numerous other ballot measures in states across the country, especially in western states that joined the Union in the late nineteenth and early twentieth Centuries, with direct democracy as part of their constitutions.

In *Arizona Legislature v. Arizona Independent Redistricting Commission*, by 5-4, the Court ruled that the Constitution did not bar the people of Arizona from direct democracy when it came to the method for drawing district lines. "The history and purpose of the Clause weigh heavily against such preclusion, as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government."[388] Ominously for future jurisprudence, Justice Anthony Kennedy joined the majority. Chief Justice John Roberts wrote a stinging dissent, arguing that "legislature" must mean only the representative body. Kennedy's retirement augured a future Supreme Court ruling striking down dozens of state election procedures and provisions enacted by voters over the decades.

However, in *Rucho*, even as Roberts wrote that the courts could not police partisan gerrymandering, he acknowledged that Congress and state voters could. At length he cited with approval how

> numerous . . . States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts . . . . Missouri is trying a different tack. Voters there overwhelmingly approved the

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[387] *See supra.*

[388] *AIRC*, 576 U.S. at 813.

creation of a new position—state demographer—to draw state legislative district lines.[389]

These measures are constitutionally indistinguishable from the ones put at risk in Arizona. In a public talk several weeks later, Justice Ginsburg wryly noted that perhaps Roberts had grown.

Litigation on this question took center stage in the months leading up to, and following, the 2020 general elections. Faced with the difficulties of holding elections in the midst of the coronavirus pandemic, governors, secretaries of state, state election boards, county election administrators, and courts issued executive orders, rules, and interpretations to ensure that voters could safely cast ballots that would count. As a result, there were at least 43 cases, in both federal and state court, in which parties challenged an election rule or procedure on the grounds that the entity issuing the regulation or interpretation was not entitled to make rules as to the times, places, or manner of federal elections under the Elections and/or Electors Clauses.[390] Opining on voting cases that bubbled up to the Supreme Court's 2020 "shadow docket," four justices indicated their support for the independent state legislature doctrine, under which only the formal legislative body of a state would be permitted to regulate federal elections under the Elections and Electors Clauses.[391] These views contradict the Court's majority opinions in *AIRC* and *Rucho*, the practice of election administration nationally, and the unmistakable original intent of the Elections Clause to *limit* the power of state lawmakers, whom the Framers fundamentally distrusted. Ultimately, the Court denied the petitions for certiorari arising from these cases.[392]

V. CONCLUSION: THE ELECTIONS CLAUSE TODAY

One remarkable feature of the Founding-era debates on the Elections Clause is their resonance today. Madison's well-known warning that partisan factions in the States would write laws to entrench themselves still echoes profoundly: "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed."

For example, rules to limit ballot-access—including stricter voter identification requirements for in-person voting, stricter voter-registration

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[389] *Rucho*, 139 S. Ct. at 2507.

[390] Brennan Center for Justice, *Voting Rights Litigation 2020*, https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020 (last updated May 28, 2021).

[391] *Supra* note 6.

[392] *Supra* note 7.

requirements, and curtailment of early-voting opportunities—are advanced predominantly by one political party, often crafted to exclude some voters, and based on a premise about the relationship between turnout and electoral outcomes.[393] At the same time, partisan gerrymandering designed to entrench political parties has plagued Maryland, Michigan, North Carolina, Pennsylvania, and Wisconsin amidst the heightened partisanship of recent years,[394] consistent with Theophilus Parsons prediction that "in times of popular commotion, and when faction and party spirit run high," States "would introduce such regulations as would render the rights of the people insecure and of little value" including making "unequal and partial division of the State into districts for the election of representatives[.]"[395] Indeed, even as the Supreme Court in *Rucho* ruled that claims of partisan gerrymandering are nonjusticiable, the Court acknowledged that electoral districting problems in part animated the Framers' desire for the Elections Clause. And the Court squarely stated that "the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause."[396] The Court pointed specifically to the For the People Act of 2019 as an example of proposed legislation that would create such districting regulations and noted that the avenue for reform "remains open" in Congress.[397]

Along with redistricting reform, the For the People Act includes provisions related to methods of voter registration, early voting, campaign finance, restoration of eligibility to people with past convictions, and election security. Arguments that the Elections Clause is not broad enough to authorize these reforms would give the Framers and early members of Congress déjà vu. For example, the president of the Public Interest Legal Foundation testified that the Elections Clause "was only added" to the Constitution "when concerns were raised that the states would suffocate the power of the new government by refusing to establish procedures to elect federal officials" – a circumstance that "simply does not exist, and therefore

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[393] Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1370 (2015) ("[T]he single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process. This is not intended as a normative claim, but simply as a real-world fact of life.").

[394] Pew Research Center, *The Partisan Divide on Political Values Grows Even Wider* 7 (Oct. 5, 2017), https://www.people-press.org/wp-content/uploads/sites/4/2017/10/10-05-2017-Political-landscape-release-updt..pdf ("The gap between the political values of Democrats and Republicans is now larger than at any point in Pew Research Center surveys dating back to 1994, a continuation of a steep increase in the ideological divisions between the two parties over more than a decade.").

[395] *DHRC*, Ratification by the States, Vol. VI: Massachusetts, No. 3 at 1218 (Jan. 16, 1788).

[396] *Rucho*, 139 S. Ct. at 2508.

[397] *Id.*; *see* H. R. 1, 116th Cong., 1st Sess., §§ 2401, 2411 (2019).

should not justify a federal takeover of election procedures."[398] Not only does this argument reflect a very narrow slice of the historical record, but it has been advanced and defeated—repeatedly. The Framers of the Constitution declined to adopt Rutledge and Pinckney's proposed amendment to excise federal authority to alter state elections regulations. Then, during state ratification, six states tried and failed to amend the constitution to limit Congress's power to apply only when States entirely failed to enact elections regulations. The first Congress likewise tried and failed to amend the Constitution to grant elections authority only in instances of state default. Rather than adopt such a limited construction, Madison, the Framers, and early Congresses understood (sometimes to their chagrin) that the Elections Clause contained "words of great latitude" and that Congress's authority was *not* limited to circumstances in which states entirely refused to enact rules for congressional elections. The national self-preservation that the Elections Clause was intended to provide has *always* meant more than merely holding congressional elections.[399]

Partisan manipulation of district boundaries is just one tactic used to dilute the power of voters and suppress votes. Voters face myriad burdens and inconveniences, from strict voter identification laws and registration requirements, to aggressive voter roll purges and limited voting hours and locations. Framers who worried that States, if unrestricted, would situate polling places at inconvenient locations would be unsurprised by the rash of polling place closures since 2013, when the Supreme Court gutted the federal government's most potent tool for fighting race-based voter suppression – the preclearance requirement of the Voting Rights Act.[400]

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[398] Testimony of J. Christian Adams Before the U.S. House Judiciary Committee (Jan 29, 2019), https://docs.house.gov/meetings/JU/JU00/20190129/108824/HHRG-116-JU00-Wstate-AdamsJ-20190129-U1.pdf.

[399] *See, e.g.*, 1 ANNALS OF CONG. at 770 (1789) ("as much injury might result to the Union from improper regulations, as from a neglect or refusal to many any"); *see also* 27th Congress, 2nd Session, Cong. Globe app. 407 (1842) ("[T]he Government is almost as much dissolved by a vicious representation as by no representation. In the latter case, to be sure, the whole fabric is destroyed in the former, you preserve the show, the appearance, the form of our Government, but the spirit and lite are gone."); 41st Congress, 3rd Session, Cong. Globe 1283 (1871) ("Who does not know that if the State Legislature should choose to incumber the exercise of this power with inconvenient or impossible conditions, and if the national Congress had not the power to overrule or alter such conditions, the nation would perish?"); *Siebold*, 100 U.S. at 382 ("In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government.").

[400] *See* The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (Sept. 2019), http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf (finding 1,688 polling place closures between 2012 and 2018 in jurisdictions formally covered by the preclearance

Indeed, one essayist during the state ratification debates expressly warned that, without federal mediation, a State would "appoint[] a place for holding the elections, which would prevent some from attending, and burthen [sic] others with very great inconveniences."[401]

It is disheartening that abuse of state power over elections, partisan manipulation of district lines, and myriad forms of voter intimidation and suppression (precisely the harms the Framers hoped to avoid by drafting the Elections Clause into the Constitution) persist. But there is reason for optimism. The historical record of the Elections Clause—at the nation's founding, in early Congresses, and in the courts—demonstrates that Congress and states have the power to deliver on the promise of free and fair elections that the Framers intended.

formula of the Voting Rights Act); *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (invalidating the formula that determined which states and jurisdictions were covered by Section 5 of the VRA and thus are required to undergo preclearance, effectively ending the preclearance requirement).

[401] *DHRC*, Vol. V, Ratification by the States: Massachusetts, No. 2 at 738 (Jan. 17. 1788) (essay of Remarker, published in the Independent Chronicle).

ARTICLES

THE SPECTRUM OF CONGRESSIONAL AUTHORITY OVER ELECTIONS

FRANITA TOLSON*

ABSTRACT

Congress routinely fails to articulate the source of authority pursuant to which it enacts federal statutes. This oversight forces the Supreme Court to sustain the constitutionality of these regulations based on powers that find no mention in the legislative record. The shortcomings of the record have not prevented the Court from interpreting congressional power quite broadly when a federal statute can be sustained as a lawful exercise of authority pursuant to more than one substantive constitutional provision. In the context of elections, however, the Court has been decidedly more opportunistic about whether it will examine the constitutionality of federal law within the broader spectrum of congressional authority.

In Shelby County v. Holder, *for example, the Court held that section 4(b) of the Voting Rights Act of 1965 violated the equal sovereignty principle by forcing certain states to seek federal approval before implementing laws that they are otherwise constitutionally authorized to enact. Sections 4(b) and 5 suspended all changes to state election laws in covered jurisdictions, including nondiscriminatory voter qualification standards and procedural regulations that govern state elections. In prioritizing federalism over all other equally valid considerations, the Court ignored whether the Voting Rights Act was valid because congressional power could be derived, in part, from the Elections Clause. The Elections Clause gives Congress final policymaking authority over setting the times, places, and manner of federal elections. Unlike the Fourteenth*

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and Fifteenth Amendments, a context in which the Court imposes some federalism limitations on the exercise of federal power, the Clause allows Congress to legislate without regard for state sovereignty.

The unique nature of the Elections Clause highlights the importance of applying a theoretical framework to Congress's authority over elections that properly accounts for the presence of multiple, and sometimes conflicting, sources of federal power. Not only does the Clause allow the federal government to disregard state sovereignty, but the line between voter qualification standards, on one hand, and time, place, and manner regulations, on the other, is significantly more blurred than the caselaw indicates, resulting in the existence of hybrid regulations of uncertain constitutional mooring. This Article concludes that Congress's sovereign authority under the Elections Clause is broad enough to reach restrictive and oppressive voter qualification standards that affect federal elections, a category that the Court has held falls squarely within the province of state authority. The uncertainty surrounding the boundaries of these regulations, as well as the presence of multiple sources of constitutional authority, means that, in some limited instances, Congress can aggressively police state action under the Elections Clause to protect the fundamental right to vote.

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INTRODUCTION

The challenges posed by the hyper-partisan and racially charged nature of recent election cycles raise the same basic questions about the limits of state and federal authority to regulate elections that have plagued the American political system since the country's founding. Despite the pressing nature of this issue, there has been no systematic attempt to create a framework for understanding the division of authority between the two levels of government. Federal power to make or alter the times, places, and manner of federal elections, protect the right to vote, or remedy racial discrimination in voting is often in tension with the state's control over voter qualifications or over state elections more generally.

The Supreme Court has traditionally handled this tension by engaging in a very broad reading of federal power where, in their view, exigency warrants an expansive interpretation. For example, in *South Carolina v. Katzenbach*,[1] the Court upheld the preclearance provisions of the Voting Rights Act of 1965 (the "VRA"), which gave the federal government the power to veto discriminatory state voting laws in certain southern jurisdictions, as an appropriate exercise of Congress's enforcement authority under the Fifteenth Amendment.[2] Southern states had engaged in a persistent, century-long effort to undermine the voting rights of African-Americans, leading the Court to conclude that extraordinary efforts were temporarily necessary to dislodge a pattern of discrimination that had held firm despite federal efforts to bring case-by-case litigation.[3]

The *Katzenbach* Court highlighted that its interpretation of federal power was driven not only by text and structure, but also a deep sense of urgency stemming from the unprecedented violation of constitutional rights on a mass scale.[4] In recent cases, the Court has backtracked on this interpretation by searching for circumstances similar to those that initially warranted such "extraordinary" legislation. In *Shelby County v. Holder*,[5] the Court invalidated the coverage formula of section 4(b) of the VRA, which determined the jurisdictions subject to preclearance under section 5, effectively rendering the entire preclearance framework defunct until Congress can develop a replacement formula.[6]

[1] 383 U.S. 301 (1966).

[2] *Id.* at 308.

[3] *Id.* at 328.

[4] *Id.* at 334 (describing preclearance regime as "an uncommon exercise of congressional power" but noting that "the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate").

[5] 133 S. Ct. 2612 (2013).

[6] *Id.* at 2627-30; *see also* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 4-5, 120 Stat. 577, 580-81 (2006) (codified as amended in scattered sections of 52 U.S.C.).

Unsurprisingly, the Court's about-face with respect to the preclearance regime on the grounds that the exigency that justified its existence—virulent racism—no longer exists,[7] has created confusion about the *actual* scope of congressional power to regulate elections as a practical matter.

Using the Elections Clause as its focal point, this Article argues that the Court should interpret federal election laws, and their underlying legislative record, within the broader scope of authority that the U.S. Constitution delegates to Congress over elections.[8] The Elections Clause, which gives the states the power to "choose the Times, Places and Manner of . . . [federal] Elections," is power that the states exercise freely, so long as Congress does not assert its authority to "make or alter" state regulations.[9] In essence, Congress has a veto power over certain state electoral practices, a veto that is present in the VRA's suspension of regulations that govern federal elections in targeted states. Thus, to interpret broadly means that the Court credits the authority that Congress has across constitutional provisions—here, the Elections Clause and the Fourteenth and Fifteenth Amendments—in assessing the legislative record underlying voting rights legislation. This multi-clause analysis shows how the Elections Clause complicates the federalism narrative that scholars and courts embrace in

[7] *Shelby Cty.*, 133 S. Ct. at 2625 (citing increases in African-American voter participation to illustrate that preclearance requirements for selected states is no longer justified).

[8] There is no objective metric for assessing the appropriate level of deference that the Court should use in critiquing the legislative record underlying federal legislation. *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 150-51 (2001) (discussing partial invalidation of Americans with Disabilities Act ("ADA") in Bd. of Trs. of Ala. v. Garrett, 531 U.S. 356 (2001), and noting that "the legislative record may not have mattered much" yet "close scrutiny of the legislative record is necessary if the Justices are to maintain interpretive control, for otherwise Congress might be able to elude the Court's effort to cabin its activities"); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 34-35 (2003) (arguing that the Court's decisions involving Section 5 of Fourteenth Amendment are influenced by constitutional culture). Instead, the Court considers a series of factors in determining whether federal legislation is congruent and proportional. *See* City of Boerne v. Flores, 521 U.S. 507, 530-31 (1997) (comparing legislative record of VRA to Religious Freedom Restoration Act and determining latter "lacks examples of modern instances of generally applicable laws passed because of religious bigotry").

[9] The Elections Clause, in its entirety, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1. There are probably more election-related provisions of the Constitution than any other area. *See, e.g.*, *id.* § 2; *id.* § 4; *id.* § 5; *id.* art. II, § 1; *id.* art. IV, § 4; *id.* amend. XXII; *id.* amend. XIV, § 2; *id.* amend. XV; *id.* amend. XVII; *id.* amend. IXX; *id.* amend XXIII; *id.* amend. XXIV; *id.* amend. XXVI.

describing our election system because federalism is not a barrier to aggressive federal action under the Elections Clause seeking to protect the fundamental right to vote.[10]

Despite having substantial authority over elections, Congress has had difficulty responding to voting rights abuses because the Supreme Court has ignored its earlier precedent and become unduly formalistic in interpreting federal power, especially in light of the practical realities of election administration and the overlapping (and sometimes conflicting) authority over elections that Congress shares with the states.[11] This ambiguity has created substantial confusion about the level of deference that the Court should accord to Congress when reviewing the legislative record. It is uncontroversial that federal power is at its highest ebb when Congress seeks to regulate federal elections and at its lowest when it seeks to regulate state elections or nondiscriminatory voter qualification standards. But much of the controversy arises in the "gray" area, where federal election regulations can derive from more than one source of constitutional authority, leaving federal power ambiguous or uncertain, and otherwise permissible state laws can have a deleterious effect on federal elections, even if such laws are nondiscriminatory.[12] Instead of clarifying the "gray," the Court has simply deferred to the states on federalism grounds, even though, as this Article shows, such deference is unwarranted.[13]

[10] *See, e.g.*, Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 849-51 (2015) (discussing how the Elections Clause impacts balance between state and federal control of elections); Derek T. Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310, 310-12 (2014) (examining application of election clauses authorizing federal elections and delegating authority to states); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 753 (2016) ("[F]ederal election statutes implicate an unusual number of federalism relationships through all three levels of government."). *See also* Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2212 (2018) ("[B]oth the Supreme Court and legal scholars tend to discuss the Clause in federalism terms, characterizing the exercise of federal power as a rare and somewhat unwelcome intrusion on the states' relatively broad authority to legislate with respect to federal elections.").

[11] *See* Weinstein-Tull, *supra* note 10, at 780 ("[T]ension between the federal election statutes and . . . federalism principles may explain some of the widespread noncompliance with the statutes.").

[12] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress can regulate constitutional behavior in order to deter constitutional violations). *But see Shelby Cty.*, 133 S. Ct. at 2625 (criticizing Congress for regulating permissible state action in order to deter voting rights violations).

[13] *See Shelby Cty.*, 133 S. Ct. at 2627-30 (invalidating section 4(b) of the VRA based in part on tension between the VRA and traditional federalism principles).

From this perspective, the sin of *Shelby County* is not only the neutering of a significant provision of one of the most successful civil rights statutes in history, but also that it leaves a legacy of constitutional interpretation ignorant of the full spectrum of congressional authority in this area. The Court focused on the substantial federalism costs of the VRA, ignoring that the Act arguably could have been sustained based on some combination of the Elections Clause and the Fourteenth and Fifteenth Amendments.[14] The aggregate of these provisions was more than sufficient to justify the coverage formula based on the legislative record before the Court.[15]

Indeed, the Court's disregard of the Elections Clause was odd given that the term in which the Court decided *Shelby County* also featured a major Elections Clause case, *Arizona v. Inter Tribal Council of Arizona, Inc. (Arizona Inter Tribal)*,[16] which reaffirmed the broad scope of congressional power over federal elections.[17] By depriving states of the final policymaking authority that is the hallmark of sovereignty, the Clause is impervious to the federalism concerns that have constrained congressional action under the Reconstruction Amendments.[18] Unlike the Commerce Clause, there is no Eleventh Amendment

[14] *See, e.g.*, H.R. REP. NO. 89-439, at 6 (1965) ("The bill, as amended, is designed primarily to enforce the 15th amendment to the Constitution of the United States and is also designed to enforce the 14th amendment and article I, section 4.").

[15] *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1197-98 (2012) ("The Elections Clause, when combined with Congress's ability to enforce the mandates of the Fourteenth and Fifteenth Amendments, provides ample constitutional justification for the VRA.").

[16] 133 S. Ct. 2247 (2013).

[17] *Id.* at 2257 ("Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that . . . statutory text [based on that power] accurately communicates the scope of Congress's pre-emptive intent.").

[18] *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 160, 187 (2003) (upholding ban on soft money as valid use of Congress's authority under Elections Clause and rejecting argument that ban interfered with states' authority to regulate their elections). *Compare* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-83 (2000) (striking down provisions of the Age Discrimination in Employment Act ("ADEA") on grounds that evidence relied on by Congress was too anecdotal and too geographically narrow to justify extension of ADEA to all of states), *and* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 637-40 (1999) (accepting that state infringement of patents could violate Fourteenth Amendment, but invalidating Patent Remedy Act because Congress did not show that states had been engaging in this behavior), *with Ariz. Inter Tribal*, 133 S. Ct. at 2253 ("The Clause's substantive scope is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932))).

bar to abrogate state sovereign immunity under the Elections Clause.[19] Congress can also make law under the Clause, which includes the authority to legislate independent of any action on the part of the states and, arguably, to commandeer state officials in the course of administering federal elections.[20]

For these reasons, the VRA stands as a rare example of a law invalidated on federalism grounds that could have been sustained under multiple constitutional provisions including a source—the Elections Clause—that allows Congress to legislate independent of and without deference to state sovereignty.[21] Part of the challenge is that, in establishing the constitutional boundaries of federal power over elections, the Court is unclear about the interpretive significance of the fact that a statute derives from multiple sources of authority.[22] It has engaged this

[19] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74 (1996) ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."). Under the Elections Clause, Congress can abrogate state sovereign immunity because the Elections Clause implicates federal rights protected by both Article I, Section 2 and the Equal Protection Clause that do not predate the existence of the Union such that the states have some preexisting claim to state sovereignty. *Cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995) (rejecting the State's argument that it could add congressional qualifications because the "power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States").

[20] *See* Tolson, *supra* note 10, at 2218 ("[T]he text empowers Congress to engage in the quintessentially 'anti-'federalism action of displacing state law and commandeering state officials toward achieving this end.").

[21] The VRA has had its share of challenges over the years, but the Court has upheld the Act as a proper exercise of federal authority based on a number of rationales. And, until recently, the Act had managed to emerge relatively unscathed. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 158 (1980) ("[W]e hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment...."); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (upholding section 5 of the VRA, which required certain jurisdictions to "preclear" their voting laws with federal government because of their prior records of discrimination, as valid exercise of Congress's enforcement authority under Fifteenth Amendment). Likewise, *Oregon v. Mitchell*, 400 U.S. 112 (1970), held that Congress had exceeded the scope of its authority in lowering the voting age in local and state elections under the 1970 amendments to the VRA, but sustained the age reduction for federal elections as an appropriate use of congressional power under the Elections Clause and the Fourteenth Amendment. *Id.* at 125 ("Art. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4.").

[22] A non-exhaustive list of federal laws that derive from multiple sources of constitutional authority includes: Digital Millennium Copyright Act, Pub. L. 105-304, 122 Stat. 2860 (2018) (codified as amended in scattered sections of 17 U.S.C.), enacted under Copyright Clause and

issue in other contexts, most notably when dealing with constitutional rights,[23] but the Court has failed to act coherently when the multi-clause issue implicates the constitutional structure.

For example, laws abrogating the immunity of the states from suit under the Commerce Clause and the Fourteenth Amendment have faced difficulties after the Court held, in *Seminole Tribe of Florida v. Florida*,[24] that the Commerce Clause did not give Congress this authority.[25] Since *Seminole Tribe*, the Court has been wildly inconsistent in its approach to determining whether Congress has created a legislative record sufficient to justify similar laws under the Fourteenth Amendment alone.[26] Separate from the issue of abrogation, however, the Court has ignored that a legislative record showing states engaging in

Commerce Clause; Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (2018), enacted under Fourteenth Amendment and Commerce Clause; Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619, enacted under Fourteenth Amendment and Commerce Clause; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2018), enacted under Fourteenth Amendment and Commerce Clause; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5, enacted under Fourteenth Amendment, Commerce and Spending Clauses.

[23] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) (allowing petitioner alleging liability based on two weak constitutional claims to prevail if one claim is based on Free Exercise Clause of the First Amendment); Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 50-51 (2012) (discussing other examples in which the Court recognized "hybrid rights" derived from multiple sources of authority). The Court has also used this type of aggregation in the due process context. *See* Paul v. Davis, 424 U.S. 693, 694 (1976) (concluding that the right to reputation standing alone is insufficient to trigger due process but could if considered in conjunction with some other injury); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (holding injury to reputation plus ban on buying alcohol sufficient to trigger Due Process). The Court has also been liberal about engaging multiple constitutional provisions to accord protection on the grounds of sexual orientation, striking down laws discriminating against same-sex couples as a violation of equal protection, substantive due process, and federalism norms. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."); United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (holding Defense of Marriage Act unconstitutional as it "violates basic due process and equal protection principles"); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 750 (2011) (arguing that Lawrence v. Texas, 539 U.S. 558 (2003), which struck down Texas's sodomy law, is best understood as a product of substantive due process and equal protection).

[24] 517 U.S. 44 (1996).

[25] *Id.* at 74 (holding Eleventh Amendment bars Congress from enforcing remedial scheme against states that fail to negotiate in good faith).

[26] *See infra* Part I (discussing the Court's inconsistency regarding laws based on multiple sources of constitutional authority).

patterns of discrimination, which violates the mandates of the Fourteenth Amendment and impacts interstate commerce, strengthens the inference that federal legislation is necessary. Comparatively, the Elections Clause, standing alone, may be insufficient to support the full scope of the VRA, but evidence showing that states engaged in intentional discrimination in violation of the Fourteenth and Fifteenth Amendments becomes more compelling in light of the federal interest in the health and vitality of congressional elections that the Clause protects.[27]

Consistent with this insight, this Article presents a more comprehensive theory of federal power to regulate elections than currently offered in the legal scholarship and proceeds in three Parts. Part I describes the Court's inconsistent treatment of statutes enacted pursuant to multiple sources of constitutional authority in order to frame the unique problem presented by the Elections Clause. While the Court has acknowledged and resolved legal challenges to statutes implicating more than one constitutional provision, *Shelby County* stands as an outlier in an important respect. The Court's prior willingness to uphold a statute if it could be justified based on any legitimate use of constitutional authority apparently does not extend to the VRA, which implicates three potential sources of authority. The Court's obfuscation stems, in part, from the absence of a narrative in the caselaw about the legal significance of interpreting federal enforcement authority in the aggregate, based on all of the provisions from which such power derives.[28] Part I contends that the

[27] *See infra* Part II.

[28] Very few scholars have discussed this problem at length. For some terrific exceptions, see, for example, Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779, 780 (2018) (arguing that several of the rights-based constitutional provisions, when considered in the aggregate, establish a right to engage in recreational marijuana use); *see also* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1073-74 (2016) (arguing that combination analysis can be normatively desirable across cases because it "can sometimes operate to clarify, rather than confuse, the organization of judicial doctrine"); Porat & Posner, *supra* note 23, at 9 (arguing that courts should aggregate legal claims and their underlying factual information in determining defendant's liability). In an insightful article, Professor Michael Coenen details the Court's use of what he calls "combination analysis," or a willingness to evoke multiple constitutional provisions that have some independent effect on the outcome of the case, though the Court does not do so in any systematic way. Coenen, *supra*. Professor Coenen draws examples from those circumstances in which the Court explicitly relies on two or more provisions in its decision. *See id.* at 1101-09. In contrast, this Article's reference to multiple sources of authority underlying congressional action encompasses any constitutional provision that could arguably justify the law, even if the provision is not mentioned in the Court's opinion. It explicitly focuses on how this phenomena should influence the Court's review of the legislative record. The scholarship examining how this phenomenon manifests in the election law context is virtually nonexistent.

presence of multiple sources of authority justifies increased deference towards the legislative record. This approach gives full weight to the notion that Congress can both remedy and deter constitutional violations, two aims long recognized as legitimate in the caselaw.[29] The presence of additional sources of authority arguably gives Congress greater leeway on the deterrence side.

Given the lack of clarity in the caselaw, *Shelby County*'s ignorance of the Elections Clause is no surprise. The Court has never squarely confronted the relationship between the Clause, the Reconstruction Amendments, and the VRA in thinking about the scope of congressional enforcement authority, even while consistently expressing concerns about the impact of the VRA on the sovereignty of the states. Part II canvases the historical record to show that one plausible interpretation of the Elections Clause is that it is fundamentally about congressional sovereignty. During Reconstruction, the Court adopted a narrow interpretation of Congress's enforcement authority under the Fourteenth and Fifteenth Amendments, resisting the notion that these Amendments changed the fabric of our federal system.[30] But that Court expressed a surprising willingness to enforce Congress's broad authority under the Elections Clause, bucking the idea that all federal voting rights legislation enacted during this period was constrained by federalism.

The Supreme Court's broad view of federal power under the Elections Clause during Reconstruction followed an era in which Congress had been unwilling to read its authority broadly. During the Antebellum period, disputes over slavery and economic issues led Congress to abandon its conservative view of federal authority that defined the first half of the nineteenth century. Even when exercising its Elections Clause power in a limited fashion, however, Congress's deference to the states was dictated by politics, not law. Reconstruction saw a Congress willing to implement a complete code for federal elections through the Enforcement Acts in order to effectively address the racial discrimination and fraud that was pervasive in state and federal elections. Thus, the Elections Clause

[29] *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 208 n.1 (1980) (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive."); South Carolina v. Katzenbach, 383 U.S. 301, 303 (1966) (stating Congress is free to use appropriate means to enforce constitutional amendments).

[30] *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 556 (1876) ("[R]ight to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."); United States v. Reese, 92 U.S. 214, 221-22 (1876) (holding that the Fifteenth Amendment does not extend Congress's power to grant suffrage); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83 (1872) (stating that the adoption of the Fourteenth and Fifteenth Amendments did not change the balance of state and federal power).

broke free from Congress's self-imposed federalism constraints in order to fulfill its broader purpose of ensuring well-functioning federal elections.

Part III discusses the normative implications of an Elections Clause jurisprudence that resolves disputes from the baseline of congressional sovereignty. This Part focuses on hybrid, or mixed, regulations that implicate the procedural aspects of election administration and constitute prerequisites to voting. For example, voter registration stands as the quintessential hybrid regulation that is both procedural and inextricably linked to voter qualification standards, but the Court, with little explanation, has held that Congress can regulate voter registration under the Elections Clause.[31] When regulations like voter registration, or more controversially, the VRA, implicate both voter qualifications and the manner of federal elections, the Court should be predisposed to sustain federal power under the Elections Clause so that states cannot use their power over voter qualifications to undermine the legitimacy and health of federal elections. This approach places the constitutionality of the VRA in a new light by explicitly recognizing the line drawing problem that exists between voter qualification standards and manner regulations, on one hand, and state and federal power, on the other.

Part III discusses voter identification laws, proof-of-citizenship requirements, and the exclusion of African-Americans from the Democratic Party primary, all of which, like voter registration, implicates voter qualification standards and the times, places, and manner of federal elections. This Article concludes by proposing two limited instances in which Congress can directly regulate voter qualifications under the Elections Clause: when states implement voter qualification standards that unduly circumscribe the federal electorate, or, alternatively, fail to set or "under-legislate" with respect to voter qualifications for its own elections in order to achieve the same purpose. This proposal provides a theoretical framework grounded in the Clause's text, structure, and purpose that the Court can draw on in assessing the legislative record underlying federal voting rights legislation and to explain what is already occurring in practice: Congress's pedestrian, rather than "extraordinary," use of its Elections Clause authority to impose laws other than procedural regulations that apply to federal elections.[32]

[31] *See* Arizona v. Inter Tribal Council of Ariz., Inc. *(Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2253 (2013) (noting the "broad" scope of Elections Clause, which includes "regulations relating to 'registration'"); Cook v. Gralike, 531 U.S. 510, 527 (2001) (finding that Missouri's ballot annotation "unequivocally is not a time or place regulation," but showing less certainty as to whether it is a manner regulation).

[32] *See* Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 779 n.87 (2016) ("Although as a formal matter, the Elections Clause power involves congressional elections, as a practical matter Congress can

I. CONGRESSIONAL ENFORCEMENT POWER AND THE PROBLEMS POSED BY MULTIPLE SOURCES OF CONSTITUTIONAL AUTHORITY

The Supreme Court's caselaw is unclear about whether the scope of congressional authority to enforce and protect constitutional rights is broader—or alternatively, increased deference to the legislative record is warranted—when Congress enacts legislation pursuant to multiple sources of constitutional authority.[33] Authorization based on multiple constitutional provisions has, in some cases, proven to be the difference between invalidation and constitutionality for some federal statutes.[34] The paradigmatic example is the Affordable Care Act, which survived a constitutional challenge because the Court found that the Act, though an unlawful exercise of the commerce power, was a valid use of the taxing power.[35]

The Court also has not been shy about sustaining legislation where Congress has failed to specify the source of authority pursuant to which it is acting. In *Fullilove v. Klutznick*,[36] for example, the Court upheld an affirmative action program requiring that ten percent of federal funds granted for local public works be allocated to minority owned firms.[37] The Court found that the program was a constitutional exercise of federal power under the Spending Clause and the Commerce Clause, even though Congress did not rely on either provision in

leverage this power to cover all elections because states are loathe to run two separate elections processes.").

[33] *See* Coenen, *supra* note 28, at 1086-88 (discussing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and The Legal Tender Cases, 79 U.S. 457 (12 Wall.) (1870), as decisions that rest "on the combined effect of multiple enumerated powers" but noting that "[n]ot much has happened since then in the world of power/power combination analysis" because most decisions focus on one source of authority "as independently sufficient to sustain the federal enactment under review").

[34] For example, Congress enacted Title VII of the Civil Rights Act of 1964 pursuant to its authority under the Commerce Clause, but in 1972, extended the reach of the statute to authorize money damages against state governments under the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976) (explaining that Congress relied on Fourteenth Amendment to amend Title VII of Civil Rights Act of 1964). After the Court's decision in *Seminole Tribe*, if Congress had relied on the Commerce Clause alone, the Amendments would have been invalidated. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74 (1996) (holding that Congress cannot abrogate state sovereign immunity under Commerce Clause); *cf.* United States v. Morrison, 529 U.S. 598, 613 (1995) (invalidating 42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender motivated violence, on grounds that it was not a proper exercise of power under the Commerce Clause or Section 5 of Fourteenth Amendment).

[35] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563-66 (2012).

[36] 448 U.S. 448 (1980).

[37] *Id.* at 490.

enacting the law.[38] Similarly, in *Woods v. Cloyd W. Miller Co.*,[39] the Court upheld the Housing and Rent Act as a lawful exercise of the war power, inferring from "the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause."[40] Even though hostilities had ceased, the Court observed that, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."[41]

Uncertainty about the actual source of federal authority was on full display in *Jones v. Alfred H. Mayer*,[42] where the Court upheld 42 U.S.C. § 1982, which guaranteed all citizens the right to convey real and personal property, as a valid exercise of the Thirteenth Amendment.[43] Section 1982 was originally part of section 1 of the Civil Rights Act of 1866, and many then in Congress believed that the Act exceeded the scope of congressional authority under the Thirteenth Amendment.[44] While the Act was reauthorized after the passage of the Fourteenth Amendment, which provided sufficient justification for its provisions, there has never been any suggestion that *Jones* was wrongly decided because the Court focused on the Thirteenth Amendment instead of the Fourteenth.

Jones and the unusual historical circumstances surrounding § 1982 might also suggest that far-reaching and potentially controversial legislation can gain substantial legitimacy from the fact that Congress can draw on multiple sources of power. A prominent example of this is section 4(e) of the VRA, which prohibits literacy tests as a precondition for voting as applied to individuals from Puerto Rico who have completed at least the sixth grade. In *Katzenback v. Morgan*,[45] the Court upheld section 4(e) as an appropriate exercise of Congress's

[38] *See id.* at 473-76.

[39] 333 U.S. 138 (1948).

[40] *Id.* at 144.

[41] *Id.*; *see also* Wilson-Jones v. Caviness, 99 F.3d 203, 208 (6th Cir. 1996) ("A source of power has been held to justify an act of Congress even if Congress did not state that it rested the act on the particular source of power."); Ann Carey Juliano, *The More You Spend, The More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1120 (2001) (arguing that Title VII is lawful use of authority under the Spending Clause even though Congress originally enacted the provision under the Commerce Clause).

[42] 392 U.S. 409 (1968).

[43] *Id.* at 413.

[44] *Id.* at 455 (Harlan, J., dissenting) (presenting a comprehensive review of the legislative history suggesting that many in the Thirty-Ninth Congress believed that 1866 Civil Rights Act was unconstitutional).

[45] 384 U.S. 641 (1966).

authority to enforce the Fourteenth Amendment.[46] The Court sustained Congress's ban on literacy tests, even though an earlier court decision found these tests to be constitutional as a general matter, and Congress made no evidentiary findings that literacy tests were being used in a racially discriminatory manner.[47] As a practical matter, the Court might have been willing to defer to Congress because of the myriad provisions that the Court identified as potential sources of authority for section 4(e)—ranging from the treaty power to the Territorial Clause of Article III—even though Congress did not explicitly rely on any of these provisions in enacting the legislation.[48]

At the very least, *Katzenbach* illustrates that the presence of multiple sources of constitutional support has some relevance to the inquiry into the scope of congressional power, a position that received the Court's full-throated endorsement in the *Legal Tender Cases*[49] and *McCulloch v. Maryland*.[50] In this vein, the preclearance provisions of the Voting Rights Act of 1965 are not unique in the realm of federal laws that implicate more than one source of authority, a fact that should be a net positive in the face of any constitutional challenge. The Act was first authorized pursuant to Section 2 of the Fifteenth Amendment and later renewed and extended pursuant to Section 5 of the Fourteenth Amendment in 1970. Despite its mooring in various constitutional provisions, however, the Court has not been favorably disposed towards the VRA, and other laws similarly situated, because of federalism concerns.[51] The analytical framework

[46] *Id.* at 655-58 (concluding that New York's english literacy requirement for voters could discriminate against New York's large Puerto Rican community, but not requiring congressional findings that prove this proposition).

[47] Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 53-54 (1959) (holding that literacy tests are constitutional absent discriminatory intent).

[48] *Katzenbach*, 384 U.S. at 646 n.5 (stating that Court need not consider whether section 4(e) could be sustained under Territorial Clause).

[49] 79 U.S. (12 Wall.) 457, 534 (1870) (holding it is "allowable to group together any number of [enumerated powers] and infer from them all that the power claimed has been conferred").

[50] 17 U.S. (4 Wheat.) 316, 407-12 (1819) (finding that Congress's power to charter a bank stems from its "great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies" as supplemented by the Necessary and Proper Clause).

[51] For example, Congress enacted the Fair Housing Act (the "FHA") pursuant to the Commerce Clause and the Fourteenth Amendment, contexts in which the Court has imposed significant constraints on the exercise of federal power in the name of federalism. Recently, the Court held that plaintiffs could bring disparate impact claims under the FHA, over the vigorous dissent of four justices who, among other things, criticized the majority for giving a "nod" to federalism as a justification for its holding when, in the dissent's view, true adherence to federalism would leave the decision to the states of whether to establish disparate

of *City of Boerne v. Flores*,[52] which held that Congress can adopt only those remedies that are congruent and proportional to the harm to be addressed when acting pursuant to the Fourteenth Amendment, was intended to cabin federal power to only remedial fixes in order to protect state sovereignty.[53] In engaging in this analysis, the Court assessed the strength of the legislative record to determine if Congress was trying to address a pattern of unconstitutional behavior on the part of the states.[54] However, the Court, in later cases, has been inconsistent in deciding whether the presence of multiple sources of constitutional authorization affects the means/ends analysis required by *City of Boerne*.

For example, in *Coleman v. Court of Appeals of Maryland*,[55] the Court held that Congress could not abrogate state sovereign immunity under the self-care provision of the Family Medical Leave Act ("FMLA") because Congress had not established a record of discrimination on the basis of sex with respect to illness-related job loss.[56] This provision requires employers, including the state, to provide unpaid leave to employees with serious medical conditions. Ignoring evidence of the "well-documented pattern of workplace discrimination against pregnant women,"[57] *Coleman* sought to protect state sovereignty at all costs and raised the bar with respect to the degree of discrimination that Congress must show to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment.[58] While the question of abrogation turns on one provision—Section 5—the presence of additional sources of authority should nonetheless assuage the Court's concerns about federalism and, in turn, increase the deference the Court accords to the legislative record.

The *Coleman* decision stands in marked contrast to *Nevada Department of Human Resources v. Hibbs*,[59] a case in which the Court sustained the

impact liability. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2550 (2015) (5-4 decision) (Alito, J., dissenting).

[52] 521 U.S. 507 (1997).

[53] *Id.* at 508 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

[54] *Id.* at 530-32 (searching legislative history for patterns of religious discrimination to justify federal action).

[55] 566 U.S. 30 (2012).

[56] *Id.* at 33 (holding that lawsuits against states under the FMLA "are barred by the States' immunity as sovereigns in our federal system").

[57] *Id.* at 51 (Ginsburg, J., dissenting).

[58] *Compare* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003) (upholding FMLA's family leave provision under congruence and proportionality standard), *with Coleman*, 566 U.S. at 41 (requiring Congress to establish record of discrimination with respect to individual provisions of FMLA).

[59] 538 U.S. 721 (2003).

constitutionality of a provision of the FMLA that entitled employees to twelve weeks of paid leave to care for a family member.[60] In doing so, the Court viewed the legislative record much more generously than the Court in *Coleman*, deferring to the legislative evidence of gender disparities with respect to family leave.[61]

The Court has also been inconsistent with respect to the Americans with Disabilities Act ("ADA"), a statute that, like the FMLA, has the dubious distinction of being struck down in part, and upheld in part, based on the exact same legislative record. In *Board of Trustees of the University of Alabama v. Garrett*,[62] the Court invalidated portions of the ADA as an improper use of Congress's authority under Section 5.[63] Like the FMLA, the Court did not consider the significance of the Commerce Clause, presumably because it was laser focused on the issue of whether Congress had properly abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment instead of whether the presence of additional evidence of the impact of disability discrimination on interstate commerce strengthened the overall record.[64]

In contrast, *Tennessee v. Lane*[65] upheld Title II of the ADA because the Court found that Congress was able to establish a disparity with respect to how states administered services to the disabled with respect to the fundamental right to access the courts.[66] One notable difference between the two cases is that the *Lane*

[60] *Id.* at 737.

[61] *Id.* at 726-27 ("In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment to enforce that Amendment's guarantees. Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. Congress may, however, abrogate States' sovereign immunity through a valid exercise of its § 5 power, for 'the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.'" (footnote and citations omitted)).

[62] 531 U.S. 356 (2001).

[63] *Id.* at 374.

[64] *Cf.* Juliano, *supra* note 41, at 1127 n.136 ("If Congress enacted the ADEA solely pursuant to its Commerce Clause power, the Court held it would not have been a valid exercise of power as Article I powers 'do not include the power to subject States to suit at the hands of private individuals.' If the ADEA also was enacted pursuant to Congress' Fourteenth Amendment power to abrogate states' sovereign immunity, the question is whether the ADEA is appropriate legislation under the Fourteenth Amendment. The Court examined only the Fourteenth Amendment power." (citation omitted)).

[65] 541 U.S. 509 (2004).

[66] *Id.* at 515; *see also id.* at 542 (Rehnquist, C.J., dissenting) (arguing that under *Garrett* "brief anecdotes" of discrimination do not suffice for inquiry into whether Congress has "validly abrogated Eleventh Amendment immunity").

majority couched its discussion of the record within a framework that acknowledged "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce,"[67] but it is not clear that this acknowledgment of dual sources of authority had any effect on the outcome in the case.

Instead, it is more common for the Court to use the issue of state sovereign immunity as a wedge to undermine consideration of the full legislative record, generally ignoring that the Commerce Clause is still relevant to whether the remedy is congruent and proportional even if the Clause alone does not authorize Congress to abrogate state sovereign immunity.[68] The presence of discriminatory behavior by any state actor, intentional or otherwise, is a consideration independent of the issue of state sovereign immunity, and counsels in favor of viewing the statutory scheme and the underlying legislative record as a cohesive whole since Congress has the power to both "remedy and deter [constitutional] violations."[69]

In other words, a pattern of constitutional violations affecting interstate commerce should result in Congress having to adduce less evidence of unconstitutional discrimination than if proceeding based on the Fourteenth Amendment alone. Regardless of whether discrimination implicates the Commerce Clause or the Fourteenth Amendment, its presence across dimensions can signal the need for uniform federal action. As Justice Ginsburg argued in her *Coleman* dissent, the FMLA, by invoking Congress's power under both the Commerce Clause and the Fourteenth Amendment, "address[ed] the basic leave needs of all employees" while "providing special protection to

[67] *Id.* at 516 (majority opinion) (quoting 42 U.S.C. § 12101(b)(4) (2018)).

[68] *See* Coleman v. Court of Appeals of Md., 566 U.S. 30, 37-38 (2012) ("The self-care provision standing alone addresses sex discrimination and sex stereotyping; the provision is a necessary adjunct to the family-care provision sustained in *Hibbs*; and the provision eases the burden on single parents. But what the family-care provisions have to support them, the self-care provision lacks, namely, evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations."). *But see id.* at 58-59 (Ginsburg, J., dissenting) (noting that Congress made findings relevant to sex discrimination in violation of both the Fourteenth Amendment and the Commerce Clause in enacting FMLA).

[69] *Id.* at 45 ("In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." (citation omitted)). *But see* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368-69 (2001) (ignoring evidence of discrimination by local governments in assessing the legislative record underlying the ADA because "[i]t would make no sense to consider constitutional violations on their part . . . when only the States are the beneficiaries of the Eleventh Amendment").

women.[70] There is little doubt that, but for the issue of state sovereign immunity, Congress could enact this legislation under the Commerce Clause given the implications for the national labor market. Instead, the Court has tried to reconcile cases like *Hibbs* and *Lane*, which sustained Section 5 legislation, and *Coleman* and *Garrett*, which invalidated it, by searching the legislative record for evidence that a fundamental right is implicated or for discrimination that is specific to the remedy that Congress has adopted, ignoring that discrimination and rights do not exist in a vacuum.

Lane, unlike *Garrett*, evoked the right to access the courts rather than sustaining the legislation as a remedy to address disability discrimination, which the Court subjects to rational basis review.[71] But the legislative record established that disability discrimination has a pervasive and undeniable impact on interstate commerce.[72] Likewise, *Coleman* looked for evidence that there was discrimination specific to the taking of self-care leave, and ignored other arguably probative evidence of gender disparities in family-care leave that had been sufficient to justify federal action in *Hibbs*.[73] The inability of women to take self-care leave as state employees has significant consequences for the remaining provisions of the FMLA, the broader labor market, and for gender equality more generally.[74] As one commentator observed, "by weakening the

[70] *Coleman*, 566 U.S. at 58 (Ginsburg, J., dissenting) (quoting H.R. REP. NO. 102-135, pt. 1, at 27 (1991)).

[71] *See Lane*, 541 U.S. at 522, 533-34 (2004).

[72] *Garrett*, 531 U.S. at 377 (Breyer, J., dissenting). As Justice Breyer wrote:

> Congress compiled a vast legislative record documenting "massive, society-wide discrimination" against persons with disabilities. In addition to the information presented at 13 congressional hearings, and its own prior experience gathered over 40 years during which it contemplated and enacted considerable similar legislation, Congress created a special task force to assess the need for comprehensive legislation.

Id. (citations omitted); *see also* James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discriminaton Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 162 (2000) (defending Title I of the ADA as a constitutional use of Congress's commerce authority because the legislative record shows "discrimination to be continuing and pervasive, with the result that the disabled occupy an economically inferior position in society and that billions of dollars are lost to their dependency and non-productivity").

[73] *Coleman*, 566 U.S. at 37 (noting self-care provision "addresses sex discrimination and sex stereotyping" and that "provision is a necessary adjunct to the family-care provision sustained in *Hibbs*" but still finding self-care provision lacks supporting evidence of "pattern of state constitutional violations").

[74] As Justice Ginsburg argued in her *Coleman* dissent, the self-care provision was an integral part of the FMLA regulatory regime because it helped counter stereotypes that would undermine implementation of the statute if it only provided for parental and family-care leave alone. *Id.* at 62 (Ginsburg, J., dissenting).

self-care provision, it is likely that women, who still perform the vast majority of family care, will be taking leave disproportionally and will consequently become, in the eyes of employers, less attractive employees to hire and promote, further relegating them to second-class workers."[75]

Thus, the Court's analysis is incomplete at best if it ignores that the underlying right or protected class, the pattern of state action in the area, and the proposed remedy have implications for interstate commerce that matter in federal attempts to address unconstitutional discrimination by the states. Ignoring the Commerce Clause imposes a significant burden on Congress when it seeks to enact legislation pursuant to Section 5, and this move makes little sense given that Congress can also use its authority under the Clause to enforce the equality norms of the Fourteenth Amendment so long as the behavior has a substantial economic effect on interstate commerce.[76]

As this caselaw illustrates, there is no guarantee that the Court will properly entertain arguments that it should be more deferential to the congressional record simply because the discriminatory behavior implicates more than one constitutional provision.[77] This remains true even though the Court has been willing to engage in a more comprehensive, multi-clause analysis of state power.[78] The presence of multiple sources of congressional power to justify a federal law is nonetheless germane in determining whether a remedy is appropriate under *City of Boerne*.[79] For its part, *City of Boerne* cited the VRA as

[75] Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407, 433 (2012).

[76] *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (explaining that Congress acted within its Commerce Clause power to apply "coverage of Title II [forbidding discrimination in places of public accommodation] only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce"); Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (concluding that the Civil Rights Act of 1964 was within Congress's Commerce Clause powers).

[77] Even Justice Scalia, an enduring critic of expansive federal authority, suggested that federal power is broader when Congress can point to an additional source of authority to support its legislation. *See* Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) ("[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.").

[78] *See* Alden v. Maine, 527 U.S. 706, 713 (1999) (finding that the Constitution contains a conception of state sovereign immunity that derives not only from the Tenth and Eleventh Amendments but from the constitutional structure).

[79] *See* City of Boerne v. Flores, 521 U.S. 507 (1997). At the very least, the presence of an additional source of power arguably expands the universe of means that Congress can employ in furthering the ends of the statute. *Cf. Gonzales*, 545 U.S. at 38 (Scalia, J., concurring) ("As the Court said in the *Shreveport Rate Cases*, the Necessary and Proper Clause does not give

an appropriate use of congressional power under the Fourteenth Amendment, but ignored that Congress had also enacted the Act pursuant to the Fifteenth.[80] Unlike the Fourteenth Amendment, the Fifteenth Amendment creates a right to vote free of racial discrimination and can serve as the predicate for far reaching congressional legislation designed to ferret out such discrimination. It is unclear if *City of Boerne* also applies to the Fifteenth Amendment, which has not perfectly paralleled the Fourteenth Amendment with respect to its development in the caselaw. For example, the Court initially enforced the Fifteenth Amendment against both private individuals and the states,[81] eschewing the federalism concerns that had limited the reach of the Fourteenth to state action. But the Court later imposed a state action requirement on the Fifteenth Amendment in 1903, decades after it had done the same for the Fourteenth Amendment in the *Civil Rights Cases*.[82] The nonparallel evolution of the Fourteenth and Fifteenth Amendments illustrates the difficulties that arise when multiple sources of constitutional authority are at issue in a very sharp way, even without consideration of the Elections Clause.

Ultimately, *Shelby County* accorded no weight to the fact that authority for the VRA rested on both the Fourteenth and Fifteenth Amendments.[83] The Court relegated its discussion of the Fourteenth Amendment to a mere footnote with little explanation in the body of the decision about how either Amendment resolved the constitutional issues present in the case.[84] Instead, the Court contended that section 4(b) failed both rational basis review[85] and the standard

'Congress . . . the authority to regulate the internal commerce of a State, as such,' but it does allow Congress 'to take all measures necessary or appropriate to' the effective regulation of the interstate market, 'although intrastate transactions . . . may thereby be controlled.'" (citations omitted)).

[80] *City of Boerne*, 521 U.S. at 532-33 (discussing Congress's enforcement power to enact VRA).

[81] *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884) (explaining that the Fifteenth Amendment confers a right to vote free of racial discrimination and limits the power of states).

[82] *Compare* James v. Bowman, 190 U.S. 127, 136-39 (1903) (explaining that the Fifteenth Amendment is similar to the Fourteenth Amendment), *with* The Civil Rights Cases, 109 U.S. 3, 13 (1883) (holding that the Fourteenth Amendment only reaches discriminatory state action).

[83] In its grant of certiorari, the Court acknowledged that the preclearance regime is based on dual sources of constitutional authority, but otherwise ignored the implications of this fact in assessing the regime's constitutionality. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2629 (2013) (discussing only Fifteenth Amendment), *cert. granted,* 568 U.S. 1006 (2012) (acknowledging Fourteenth and Fifteenth Amendments in grant of certiorari).

[84] *See id.* at 2622 n.1.

[85] *See id.* at 2625 (explaining that section 4(b) was rational "in both practice and theory" when adopted, but is now irrational).

derived from *Northwest Austin Municipal Utility District Number One v. Holder*[86] ("*NAMUDNO*") which "guides [its] review under both [the Fourteenth and Fifteenth] Amendments."[87] *NAMUDNO*, however, did not articulate a standard of review under these provisions.[88] Pursuant to this (non)standard, the Court in *Shelby County* held that section 4(b) violated the Constitution's principle of equal sovereignty, which requires that Congress build a record sufficient to justify legislation that distinguishes between the sovereign states.[89] In other words, it was constitutionally suspect to subject mostly southern jurisdictions, but not the northern states, to the preclearance requirement without showing a pattern of intentional discrimination by the southern states.

In punting on the standard of review, the Court also disregarded amicus briefs filed in the case that offered a full range of constitutional alternatives that could have saved the VRA. One brief, in particular, argued that the Act could be sustained as a constitutional exercise of Congress's authority under the Fourteenth and Fifteenth Amendments as well as the Elections Clause, an argument bolstered by the Court's broad reading of federal power under the Clause in the *Arizona Inter Tribal* case, decided eleven days earlier.[90]

In *Arizona Inter Tribal*, the Court held that congressional power under the Elections Clause is paramount over the times, places, and manner of federal

[86] 557 U.S. 193 (2009).

[87] *Shelby Cty.*, 133 S. Ct. at 2622 n.1.

[88] *See NAMUDNO*, 557 U.S. at 204 ("The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. . . . That question has been extensively briefed in this case, but we need not resolve it. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test [congruent and proportional or rational basis]." (citations omitted)).

[89] *Shelby Cty.*, 133 S. Ct. at 2623-24 (explaining that VRA departs from "these basic principles" of equal sovereignty).

[90] *See, e.g.*, Brief of Gabriel Chin et al. as Amici Curiae Supporting Respondents at 4, Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96) ("The Fourteenth and Fifteenth Amendments are not and have never been the *sole* source of Congress' authority for Section 5. Section 5 concerns elections not only for state officials, but also for federal officials. The Elections Clause, U.S. Const. art I, § 4, cl. 1, provides distinct, clear authority for Congress to enact Section 5's pre-clearance procedures for state laws concerning federal elections."). For a detailed discussion of the federalism issues presented by the VRA, see Tolson, *supra* note 15, at 1198 ("The [VRA] represents an appropriate use of congressional power to alter or modify state electoral schemes that govern federal elections and implicate the constitutional right to vote."). *See also* Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 927 (2010) (arguing that VRA is "not nearly as intrusive as is generally assumed" and rather its "relative sensitivity to local autonomy and to the promotion of political participation by governmental and nongovernmental actors contributed to its phenomenal success").

elections, but instead of looking to this provision as a potential source of authority for the VRA, *Shelby County* cited the case in passing without any meaningful analysis.[91] In reality, *Arizona Inter Tribal* is so much more, sustaining broad federal authority even when faced with a non-frivolous argument that the National Voter Registration Act of 1993 ("NVRA") conflicted with the State's authority to enforce its voter qualifications.[92] At issue in the case was an Arizona law that required individuals to present documentary proof of citizenship in order to register to vote in state and federal elections.[93] The plaintiffs sued, arguing that the Arizona proof-of-citizenship requirement conflicted with the NVRA's uniform federal form used to register voters for federal elections that only required affirmation of citizenship status, not documentary proof.[94] The Court held that the NVRA required states to "accept and use" the federal form as a "complete and sufficient registration application," and preempted the Arizona law that would require additional documentation.[95] Notably, dissenters in the case took the position that the NVRA interfered with the State's power to enforce its proof-of-citizenship requirement.[96] As Justice Thomas argued, states have the sole authority to set voter qualifications and the practical effect of preempting the Arizona law is to deprive Arizona of the ability to determine if its voter qualification standards are met.[97]

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[91] *Shelby Cty.*, 133 S. Ct. at 2224 (citing Arizon v. Inter Tribal Council of Ariz., Inc. *(Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2253-54, 2257-59 (2013), for the proposition that "the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives" but noting states possess "broad powers to determine the conditions under which the right of suffrage may be exercised" (quoting Carrington v. Rash, 380 U.S. 89, 91 (1965))).

[92] *Ariz. Inter Tribal*, 133 S. Ct. at 2252.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 2254, 2257 ("We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate . . . .").

[96] *Id.* at 2262 (Thomas, J., dissenting).

[97] *Id.* at 2262, 2264 ("[B]oth the plain text and the history of the Voter Qualifications Clause, U.S. Const., art. I, § 2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied. To avoid substantial constitutional problems created by interpreting § 1973gg-4(a)(1) to permit Congress to effectively countermand this authority, I would construe the law as only requiring Arizona to accept and use the form as part of its voter registration process, leaving the State free to request whatever additional information it determines is necessary to ensure that voters meet the qualifications it has the constitutional authority to establish. Under this interpretation, Arizona did 'accept and use' the federal form.").

The *Arizona Inter Tribal* case presents a question that is both intriguing and has profound implications for the Court's approach to cases that not only implicate both state and federal power, but also squarely frames the issues presented by the multi-clause nature of Congress's authority over elections: how should the Court approach federal regulations that fall in the gray area between time, place, and manner regulations (where congressional power is paramount) and voter qualification standards (where federal power is much more limited)?[98] As Justice Alito argued in dissent, the majority's reading of the Elections Clause could substantially impair state control over voter qualifications, not only for federal elections, but for state and local elections, which substantially increases the federalism costs of the NVRA.[99]

The argument that the NVRA interferes with the states' control over voter qualifications looms because the Court has not definitively resolved the tension present in this area of concurrent regulation. The majority recognized the risks presented by Justices Thomas and Alito, but denied that the question was properly presented in the case.[100] Nonetheless, the question persists as to the extent to which the federalism concerns that have so limited the Reconstruction Amendments constrain the federal power under the Elections Clause. To put the question in practical terms: when can Congress aggregate its Elections Clause authority with its power under the Reconstruction Amendments to enact "hybrid" regulations that plainly interfere with the state's control over voter qualification standards? Like the *Shelby County* case, the majority and the dissent in *Arizona Inter Tribal* suggest that the answer to this question is never absent a record of intentional racial discrimination, although the justices disagree in the latter case about the extent to which the NVRA intrudes on the states. In reality, the answer to this question is significantly more complicated than either the majority or the dissenters appreciate, and lies in the tortured history of the Elections Clause and the Reconstruction Amendments.

[98] *See id.* at 2263 ("Congress has no role in setting voter qualifications, or determining whether they are satisfied, aside from the powers conferred by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which are not at issue here. This power is instead expressly reposed in the States.").

[99] *Id.* at 2272 (Alito, J., dissenting) ("[T]he Elections Clause's default rule helps to protect the States' authority to regulate state and local elections. As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections.").

[100] *Id.* at 2258-59 (majority opinion) (noting that because the statute "provides another means by which Arizona may obtain information needed for enforcement" the Court does not have to "determine whether Arizona's interpretation . . . is at least a possible" reading).

II. RETHINKING THE EVOLUTION OF ELECTIONS CLAUSE "FEDERALISM"

The Supreme Court's perception that states retain sovereignty under the Elections Clause that must be protected from federal overreaching is a relic of a history that has been grossly misunderstood and misinterpreted. This misunderstanding is precisely why the Court has been able to ignore how the Elections Clause complicates the calculus surrounding whether Congress has established a legislative record sufficient to justify federal voting rights legislation. Since the founding, Congress has used its "make or alter" authority sparingly, leading the regulation of federal elections to become, over time, a government function traditionally left to the states. Additionally, the relatively small field of Elections Clause cases over the last century have contributed to this view that states have default sovereign authority that courts must acknowledge in the course of determining the scope of Congress's authority under the Clause. But the Waite Court, which took the first crack at defining the Clause's meaning and scope in a systematic way, deliberately interpreted the Clause in a manner that freed it from the federalism constraints that had come to define the Reconstruction Amendments.[101] This approach corroborated Congress's view, on the eve of the Civil War, that the Elections Clause is an expansive and far-reaching source of federal authority.

This Part shows the evolution of the Clause from one in which Congress unilaterally imposed federalism constraints during the Antebellum era to a provision that vindicated the broad Reconstruction-era legislation that were clear affronts to state sovereignty. The historical record reinforces the anti-federalism, pro-federal power narrative of the Elections Clause by showing that: (1) Congress exercised its independent authority to "make law" in the pre-Civil War era, even when the assertion of this power was controversial, and (2) the Court's jurisprudence on the Reconstruction Amendments and the Elections Clause during the late nineteenth century explicitly distanced the Clause from the federalism pathologies that had limited the reach of the Reconstruction Amendments.

A. *Making Law: Congress's Authority over Federal Elections in the Pre-Civil War Era*

In the Antebellum era, Congress's commitment to a political system in which a winner is chosen from a process legitimized by clear rules and a definitive outcome generally trumped any desire to use electoral disputes as a vehicle for asserting the primacy of federal law. Even in situations in which state procedures were not ideal, Congress still deferred to state authority to promote these broader

[101] *See* Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2389-91 (2003) (discussing Waite Court's decision in *Ex parte Yarbrough*).

values. Early in the country's history, deference to state law, or more accurately, Congress's self-imposed "federalism" constraints, brought coherence and administrative ease to a system in which multiple states had de facto control over federal elections.[102] But as this Section shows, Congress had to weigh in and reassert the primacy of federal law on occasion, negating any inference that the states were truly sovereign.

Many disputes over the scope of federal authority under the Elections Clause are memorialized in the historical record because of the House's authority, under Article I, Section 5, to judge the "elections, returns and qualifications of its own members."[103] The contested elections presented opportunities for Congress to probe the scope of both state and federal authority in this area.[104] Prior to the Civil War, Congress believed that its authority under the Clause permitted, at a minimum, federal intervention if the states failed to enact legislation governing the times, places, and manner of federal elections, or if state legislation was inadequate.[105] Congress took a broader view of its authority under the Clause in

[102] That Congress would be conservative and reserved in regulating federal elections is consistent with at least some views of federal power under the Clause at the country's founding. *See* Tolson, *supra* note 15, at 1224-25 (discussing proposals in Massachusetts and New Hampshire that would limit Congress's power under Elections Clause to only those situations in which states failed to call for congressional elections or where state legislation endangered rights otherwise protected by Constitution); *see also* RATIFICATION OF THE CONSTITUTION BY THE STATE OF NEW YORK (July 26, 1788), *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870, at 197 (1894) [hereinafter DOCUMENTARY HISTORY] (stating "Congress shall not make or alter any Regulation in any State respecting the times places and manner of holding Elections for Senators or Representatives, unless the Legislature of such State shall neglect or refuse to make Laws or Regulations for the purpose, or from any circumstance be incapable of making the same; and then only until the Legislature of such State shall make provision in the premises . . . ."); RATIFICATION OF THE CONSTITUTION, BY THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS (May 29, 1790), *reprinted in* DOCUMENTARY HISTORY, *supra*, at 315 (1894) (same).

[103] U.S. CONST. art. I, § 5.

[104] *See* Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 589 (2015) ("Congress can examine qualifications of its own members and probably those of presidential candidates. For states, however, their roles of evaluation would look slightly different: it would occur through the context of ballot access.").

[105] JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 232 (John M. Gould ed., 14th ed. 1896) ("The legislature of each State prescribes the times, places, and manner of holding elections, subject, however, to the interference and control of Congress, which is permitted them for the sake of their own preservation, and which, it is to be presumed, they will not be disposed to exercise, except when any state shall neglect or refuse to make adequate provision for the purpose."). Congress did not think that its authority under the Clause extended to calling a new election even in the face of obvious fraud or disenfranchisement by the state.

the wake of the sharp partisan conflict that emerged during the 1830s and early 1840s thanks to the development of clearly defined and organized political parties—the Democrats and the Whigs.[106] At the time, the American political system was dominated by disagreements over slavery and economic issues, i.e., patronage, at the state and local level.[107] Electoral fraud was also rampant,[108] and Congress deducted a number of fraudulent votes from the total ballots cast in very close races.[109] Nevertheless, election disputes that necessitated a strong

See, e.g., *Featherstone v. Cate: Hearing Before H. Comm. on Elections*, 51st Cong. (1889), *reprinted in* CHESTER A. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789-1901, at 441, 441-42 (1901) [hereinafter ROWELL, ELECTION CASES]. Congress can, however, declare a seat vacant. *See Bowen v. De Large: Hearing Before H. Comm. on Elections*, 42d Cong. (1871), *reprinted in* ROWELL, ELECTION CASES, *supra*, at 282, 282 ("[I]t was impossible to determine who was elected, and the committee unanimously recommended that the seat be declared vacant."). Congress has exercised this extraordinary power rarely. *See infra* Section II.A.2 (explaining factors that led to Congress's willingness to exert more federal power over state elections).

[106] *See* ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 43-44 (2013) ("By the election of 1840, Whig and Democrat organizations were fighting on an even basis in almost every state. By 1840, nearly 80 percent of the states had a competitive two-party system, compared to only 10 percent in 1824."); RICHARD P. MCCORMICK, THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA 341 (1966) ("In 1840, for the first time, two parties that were truly national in scope contested for the presidency.").

[107] *See* Scott C. James, *Patronage Regimes and American Party Development from 'The Age of Jackson' to the Progressive Era*, 36 BRIT. J. POL. SCI. 39, 42 (2006) ("Since party policies are 'public goods'—that is, once enacted, no supporter can be excluded from enjoying their benefits—labour contributions to the party campaign should have been under-supplied. The answer of course was patronage—well-paid public jobs—a selective incentive with the power to induce participation in the otherwise profitless process of electioneering."); Peter Levine, *State Legislative Parties in the Jacksonian Era: New Jersey, 1829-1844*, 62 J. AM. HIST. 591, 600 (1975) ("Patronage and its control were critical links between legislative parties and state party organizations.").

[108] *See, e.g.*, *Rutherford v. Morgan: Hearing Before H. Comm. on Elections*, 5th Cong. (1797), *reprinted in* ROWELL, ELECTION CASES, *supra* note 105, at 48, 48 (arguing that Morgan's election should be vacated because "money was promised by [General Morgan] or his friends for 'meat, drink, wagon hire, and other acts of bribery and corruption,' with the result that the freedom and purity of the election was greatly interfered with by disorder and carousals").

[109] *See, e.g.*, *Chapman v. Ferguson: Hearing Before H. Comm. on Elections*, 35th Cong. (1859), *reprinted in* D.W. BARTLETT, CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM 1834 TO 1865, INCLUSIVE 267, 267-68, 270 (1865) [hereinafter BARTLETT, CONTESTED ELECTIONS] (adding votes cast for "Judge Ferguson" instead of "Fenner Ferguson" to contestant's vote total and rejecting entire precinct's vote where there were "numerous

showing of federal power were relatively rare, and this period is best defined by Congress's deferential posture towards the states with respect to the regulation of federal elections. Even the extreme case—where Congress set aside an election in its entirety—usually occurred if the election "was conducted in an irregular manner" contrary to state law.[110] By the mid-nineteenth century, however, the manipulation of electoral rules for partisan gain led Congress to be more assertive in exercising its authority over federal elections, forced by circumstances to loosen, and ultimately discard, its self-imposed federalism constraints.

1. Federalism as a Political Constraint During the Antebellum Era

In the first Congress, Representative William Smith survived an election challenge after his opponent claimed that Smith had not been a citizen for seven years and therefore was ineligible to keep his seat. Smith, who had been abroad studying law and was later shipwrecked for a year, was able to prevail because of "the tacit recognition of Mr. Smith's citizenship by the people and legislature of the State."[111]

This case set an early precedent in the House of deferring to state law in exercising Congress's power under Article I, Section 5 to judge its members' "elections, returns and qualifications" as well as its concomitant authority under the Elections Clause to regulate the procedure of federal elections. For example, in Barney v. McCreery, a contested election arising during the tenth Congress, the contestant, Barney, argued that the sitting Maryland congressman, McCreery, did not have the qualifications necessary to be seated.[112] Barney contended that McCreery was not "an inhabitant of his district at the time of his election," nor had he "resided therein twelve calendar months immediately before" in accordance with Maryland law.[113] McCreery moved his family to their second home in the summer months and lived in Washington, D.C. during the winter when Congress was in session.[114] The House Committee on Elections

evidences of illegalities and frauds practiced"); *Howard v. Cooper*: *Hearing Before H. Comm. on Elections* 36th Cong. (1860), *reprinted in* ROWELL, ELECTION CASES, *supra* note 105, at 161, 161 (noting issue of illegal and fraudulent votes).

[110] *See, e.g.*, *Taliaferro v. Hungerford: Hearing Before H. Comm. on Elections*, 13th Cong. (1813), *reprinted in* ROWELL, ELECTION CASES, *supra* note 105, at 63, 64 (finding election was illegal and should be set aside).

[111] *Ramsay v. Smith: Hearing Before H. Comm. on Elections*, 1st Cong. (1789), *reprinted in* ROWELL, ELECTION CASES, *supra* note 105, at 37, 37.

[112] *Barney v. McCreery: Hearing Before H. Comm. on Elections*, 10th Cong. (1807), *reprinted in* ROWELL, ELECTION CASES, *supra* note 105, at 56, 56 (noting that "seat was contested on the ground that [McCreery] was not a resident of the city").

[113] 17 ANNALS OF CONG. 871 (1807).

[114] *Id.*

found that McCreery was entitled to his seat because the state legislature had no authority to prescribe the qualifications of Representatives.[115] In making this finding, however, the Committee took a very narrow view of its authority under the Elections Clause, arguing that federal intervention is warranted only when states abuse their power:

> The Federal Constitution indeed provisionally delegates to the State Legislature the authority of directing the time, place, and manner of holding elections at the discretion of Congress. It is not necessary nor convenient that the time, place, and manner of holding elections should be uniform, therefore nothing but abuses or usurpations of power by the States, can ever excite or justify Congress in assuming the exercise of it, which, however, they may do at discretion.[116]

Similarly, in an 1804 election dispute over a Pennsylvania House seat that became vacant after the representative resigned, the House Committee on Elections noted that there was no state law to regulate how these vacancies should be filled.[117] Although the Committee was of the opinion that the state legislature should fill the vacancy, the House seated John Hoge, who won a special election that the Governor scheduled on very little notice.[118] Congress did not intervene, even though it considered Hoge's election less than ideal, because the state was able to fill the seat with a legitimate candidate quickly and with minimum disruption.[119] This case is an early example of Congress's willingness to defer to the states, even where there is a legislative vacuum that could be filled by federal legislation, if disputes are resolved in a reasonable and timely manner.[120]

These very sedate uses of Congress's power stand in marked contrast to its decision, in 1842, to implement the most intrusive piece of federal legislation up to that point. Tame by today's standards, the 1842 Apportionment Act was the

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[115] *See* U.S. Term Limits v. Thornton, 514 U.S. 779, 816-17 (1995) (examining President Thomas Jefferson's letter to Joseph Cabell discussing this contested election outcome with approval because, in Jefferson's words, "to add new qualifications to those of the Constitution would be as much an alteration as to detract from them").

[116] 17 ANNALS OF CONG. 874 (1807).

[117] *Hoge: Hearing Before H. Comm. on Elections*, 8th Cong. (1804), *reprinted in* ROWELL, ELECTION CASES, *supra* note 105, at 52, 52.

[118] *Id.* at 53 ("[Y]et, considering the special circumstances connected with the election of John Hoge, and particularly that the election took place on the day fixed by the State legislature for the appointment of electors for the State of Pennsylvania, the committee are of opinion that John Hoge is entitled to a seat in this House.").

[119] *Id.*

[120] *See* Tolson, *supra* note 10, at 2246 (arguing that the Elections Clause privileges the values of finality and ease of administration).

most controversial exercise of Congress's authority under the Elections Clause in the pre-Civil War era, and represented an effort by the Whigs to cement their congressional majority through partisan election legislation.[121] The 1842 Act required states to elect their congressional representatives from single member districts.[122] It read in pertinent part:

> *And be it further enacted*, That in every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts, composed of contiguous territory, equal in number to the number of Representatives to which said State may be entitled; no one district electing more than one Representative.[123]

The 1842 Act preempted the laws of those states that elected their representatives at-large, which was ten out of the then-existing twenty-six states.[124] Even though most states elected their representatives from districts, the federal law mandating such elections triggered significant outrage and allegations of federal overreaching.[125] As Professor Erik Engstrom observed:

> By outlawing the general ticket, Whigs were trying to pick up extra seats—or, at the least—minimize the potential loss of seats that the new apportionment promised. In addition, Whigs had the opportunity to make such a change. For the only time in their brief history, Whigs had control of both Congress and the presidency.[126]

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[121] *See* ENGSTROM, *supra* note 106, at 51 ("Whigs saw districting as a way to stave off complete electoral disaster.").

[122] Apportionment Act of 1842, ch. 47, 5 Stat. 491 (1842).

[123] CONG. GLOBE, 27th Cong., 2d Sess. 348 (1842).

[124] ROSEMARIE ZAGARRI, THE POLITICS OF SIZE 129 (1987) (discussing the effect of 1842 Act on at-large states); *see also* Nicolas Flores, A History of One-Winner Districts for Congress (unpublished thesis, Stanford University) (on file with author).

[125] CONG. GLOBE, 27th Cong., 2d Sess. 348 (1842) (statement of Rep. Clifford) (suggesting that Congress can only exercise its power pursuant to Article I, Section 4 if states "by design or accident" fail to elect representatives). To understand the outrage, consider that in 1800, Representative John Nicholas introduced a *constitutional amendment* to require that representatives be elected from districts, but this proposal was rejected. 6 ANNALS OF CONG. 785 (1800) (proposing each state be divided into representative districts). The Whigs then imposed a single member district requirement through a federal statute.

[126] ENGSTROM, *supra* note 106, at 43-44; *see also* ZAGARRI, *supra* note 124, at 126-27 ("As a direct result of the electoral procedure used, small states sent more politically unified delegations to Congress than did large states. . . . With few exceptions, the large-state congressional delegations [utlilizing the district system] tended to be more politically divided . . . . When [small states] did vote as a bloc, they exercised an influence disproportionate to their numbers in the lower house.").

Besides the obvious partisan gamesmanship, the 1842 Act generated controversy because it not only mandated a particular electoral scheme for congressional elections, but it also reduced the number of representatives in the House.[127] Thus, the ratio selected by Congress for apportioning seats could mean the difference between an open seat and two incumbents facing off in the same district.

Congress's decision to institute single member districts for congressional elections in 1842, and not during prior eras in which the party in power could have cemented electoral gains, may reflect either the political boldness of the Whigs, or a more substantial shift in the political landscape.[128] While many representatives, including some Whigs, believed that federal authority did not extend to intervening in state electoral processes in this manner,[129] over the course of the next decade, it would become clear that it was politics and custom—not the Constitution itself—that dictated this limited view of federal power.[130]

[127] *See* H.R. REP. NO. 12, at 3 (1911) (discussing the 1842 reapportionment, which reduced house membership by seventeen, as an exception to general rule that apportionment increases House membership).

[128] *Compare* ENGSTROM, *supra* note 106, at 48 (arguing that the Whigs, which was the party in power at the time, tended to fare better under single member districting schemes), *with* ZAGARRI, *supra* note 124, at 130 ("What differentiated the 1842 conflict from previous debates was that several small states that still elected by general ticket came to support the districting measure.").

[129] CONG. GLOBE, 27th Cong., 2d Sess. 436 (1842) (statement of Sen. McRoberts) (arguing that the Framers "would hardly think it possible that this could be the same General Government which [they] assisted to frame fifty-three years ago. . . . Congress assumes to dictate to the Legislatures of the States what they *shall* do in regard to their election laws"); *see also Davison v. Gilbert: Hearing Before H. Comm. on Elections*, 56th Cong. (1901), *reprinted in* ROWELL, ELECTION CASES, *supra* note 105, at 603, 604 (noting "[t]he best opinion seems to be that the Constitution does not mean that under all circumstances Congress shall have power to divide the States into districts" but only when "the State itself, for some reason, has failed or refused to make such provision itself").

[130] *Ex parte* Yarbrough, 110 U.S. 651, 662 (1884) (arguing that Congress's broad authority under Elections Clause is being challenged "only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted"). Early in the country's history, some elected officials argued that at-large elections were constitutionally mandated, but this view was never universally adopted given that others argued the Constitution delegated to the states the authority to decide the method by which congressional representatives are elected. *See* ZAGARRI, *supra* note 124, at 109-11 (discussing constitutional debate between proponents of at-large and district elections). The use of at-large and district elections varied by state until 1842 when the principle of district elections became firmly ensconced in our political system. *See id.* at 131 ("Although the 1842 act expired within ten

Notably, during the twenty-eighth Congress, the House had to determine whether representatives from the four states that held at-large elections in violation of the 1842 Act could still take their seats.[131] This controversy brought the issue of whether states had complete constitutional freedom to choose the manner of congressional redistricting front and center.[132] As the majority report from the House Committee on Elections described the dispute, "There is not only a conflict of law [between the state laws and the 1842 Act], but a conflict of right, of power, of sovereignty, between the Federal Government and four of the independent States of this Union."[133] Framing the 1842 Act as implicating issues of federalism as opposed to a naked partisan grab by the ruling party was likely deliberate. Despite the redistricting, the Whigs suffered massive losses in the 1844 elections.[134] Democrats, now back in power, did not want to relinquish the new authority that Congress had gained from the partisan move by congressional Whigs. The Committee, now composed primarily of Democrats, reaffirmed that federal authority over redistricting is paramount and provided a detailed blueprint for congressional intervention that had been absent from these disputes:

> Under the Constitution the State legislatures are *required* to prescribe the times, places, and manner of holding elections for Senators and Representatives, but Congress is *permitted* at any time to "make or alter such regulations." The State legislatures have an imperative duty in this matter, but they are intrusted with an unlimited discretion in the manner of its performance. But—[t]he privilege allowed Congress of altering State regulations or of making new ones, if not in terms is certainly in spirit and design dependent and contingent. If the legislatures of the States fail or refuse to act in the premises or act in such a manner as will be subversive of the rights of the people and the principles of the Constitution, then this conservative power interposes, and, upon the principle of self-preservation,

years, the principle of district elections had been firmly established. The legal tradition for the method had won approval. Districting laws were passed in 1862, 1872, and throughout the early years of the twentieth century.").

[131] *See Members Elected by General Ticket:Hearing Before H. Comm. on Elections*, 28th Cong. (1843), *reprinted in* ROWELL, ELECTION CASES, *supra* note 105, at 117, 117-20 (debating whether representatives from Georgia, Mississippi, Missouri, and New Hampshire could take their seats).

[132] *See id.* at 118 (noting that the issue was whether the federal government or the states have freedom in determining the manner of elections).

[133] *Id.* at 117.

[134] ENGSTROM, *supra* note 106, at 54 (noting House representation of Whigs "plummeted from 59 percent to 36 percent").

authorizes Congress to do that which the State legislatures ought to have done.[135]

While the Committee's approach was certainly less deferential than that of past Congresses, the Committee rejected the broader conceptions of its Elections Clause power that would eventually become commonplace. The Committee argued that not only is Congress precluded from commandeering state officials and state law under the Elections Clause,[136] but "its legislation must be complete to that extent, so as to execute itself without the intervention of the State legislatures, and the residue must be left to the States to be exercised according to their discretion under the Constitution."[137]

The Committee's view of federal power under the Elections Clause can be summed up as: a strong anti-commandeering stance, combined with a very narrow conception of the congressional role ("If the legislatures of the States fail or refuse to act . . ."), but an inexplicably broad view of federal power once action is warranted, i.e., federal law must completely displace state election regulations. Arguably, the Democrats wanted to impose principled limitations on the exercise of federal power to protect the slaveholding states, which had been concerned about *any* broad interpretation of federal power,[138] while simultaneously taking advantage of their majority status by reaffirming the more expansive interpretation of federal authority embraced by the Whigs through the 1842 Act.

The cognitive dissonance of this position led to a somewhat confused and ultimately untenable interpretation of the Elections Clause. When faced with the decision in 1844 of whether to seat representatives elected in violation of federal law or to exclude them (and by implication subordinate state power to federal authority), Congress adopted a compromise position. The Committee concluded that the provision of the 1842 Act mandating single member districts was invalid because it "[did] not provide the districts in which the election [was] to be held or furnish any of the necessary regulations."[139] In other words, when Congress seeks to intervene, it must implement broader legislation than the 1842 Act by providing a complete code for federal elections, which, in this case, would have included drawing the congressional districts for those states that adhered to at-

[135] *Members Elected by General Ticket*, *supra* note 131, at 117, 118.

[136] *Id.* (noting that "the Constitution gives to Congress no power to command the States").

[137] *Id.* at 119.

[138] ROBERT PIERCE FORBES, THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA 21 (2007) ("If the Constitution empowered Congress to build roads and canals, warned one [Republican], it could 'with more propriety' be invoked to 'free all the slaves in the U.S.'").

[139] *Members Elected by General Ticket*, *supra* note 131, at 117, 118.

large elections. The full House agreed with the Committee's report and seated the representatives elected at-large in violation of federal law.[140]

The compromise position endorsed by the twenty-eighth Congress conflicted with the views of earlier Committees, which denied that Congress had the power under the Elections Clause to determine "[w]hether the subdivision of representative power within any State, if there be a subdivision, be equal or unequal, or fairly or unfairly made" because "Congress can not know and has no authority to inquire."[141] The twenty-eighth Congress's view of federal power was arguably more intrusive of state sovereignty than simply mandating single member districts because it eliminated any role for the states in the regulation of federal elections. Because that particular Congress was dominated by pro-slavery Democrats, this was likely unintentional and a product of political opportunism.

While Congress's all-or-nothing approach embraced a broader reading of federal power in some respects, it did not completely displace the self-imposed federalism limits at odds with the text and purpose of the Clause.[142] First, the

[140] *See Phelps and Cavanaugh: Hearing Before H. Comm. on Elections*, 35th Cong. (1857), *reprinted in* ROWELL, ELECTION CASES, *supra* note 105, at 154, 155 ("The fact that the election was by general ticket did not invalidate it, as the second section of the apportionment act of 1842 only applied to that apportionment, and even where it applied the House had refused to recognize or enforce it.").

[141] *Davison v. Gilbert*, *supra* note 129, at 603, 605. Compare the temerity of the 1842 Act with the aggression of the Apportionment Act of 1872, where Congress not only consolidated the timing of congressional and presidential elections and, in the process, overturned the laws of twenty states that held these elections at separate times, *see* Erik J. Engstrom & Samuel Kernell, *Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840-1940*, 49 AM. J. POL. SCI. 531, 535 (2005), but Congress also threatened to implement Section 2 of the Fourteenth Amendment, which would reduce a state's delegation in the House for abridging the right to vote. *See* George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 114-16 (1961) (noting that Section 2 of Fourteenth Amendment received considerable discussion during debates over the 1872 Act).

[142] Members Elected by General Ticket, 28th Cong. (1843), *in* ROWELL, ELECTION CASES, *supra* note 105, at 117, 120 ("The Constitution itself, from which the legislatures derive their authority, commands them to enact regulations; and if Congress so exercises its authority to alter State regulations as to render further legislation necessary before the laws as altered can form a complete and practicable system, the command for the enactment of such legislation comes not from Congress, but from the Constitution. The law, then, not being contrary to the Constitution, is valid and binding in all the States . . . ."). This is contrary to how Congress's authority was viewed in the post-Civil War era. *See Ex parte* Siebold, 100 U.S 371, 383 (1879) ("If Congress does not interfere [with state election regulations], of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words [of the

Committee's argument that Congress must provide a full regulatory scheme for federal elections, capable of being executed without further state legislation, was arguably a procedural hurdle designed to protect the regulatory authority of the states.[143] This requirement was in tension with Congress's authority, under the Clause, to "alter" state regulations.[144] As the minority report recognized:

> Congress has power to *alter* State regulations, and it is upon this power that the validity of the second section of the apportionment act rests. No State can prevent or circumscribe the action of Congress in this respect. Congress may alter the State regulations to any extent it chooses, leaving those parts not altered still in force.[145]

The minority view would play a central role in validating the scope of Reconstruction era voting rights legislation.[146]

Second, the Committee failed to appreciate that the affected states also recognized the supremacy of federal law in this context, and was relying solely on political capital to resist the requirement of single member districts.[147] Three of the outlier states—Mississippi, Missouri, and New Hampshire—switched to single member districts in 1846 while under Democratic control.[148] Erik Engstrom has argued that these switches occurred because the "Democrats in the holdout states likely discerned that national political tides had turned against them and, fearing that their delegations would not be seated, preemptively

Constitution] to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them."). And it is also contrary to how the Court views federal power today. *See* United States v. Windsor, 133 S. Ct. 2675, 2689-91 (2013) (noting the "general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of mechanisms and means to adopt").

[143] *See* sources cited *supra* note 129.

[144] *Members Elected by General Ticket*, *supra* note 131, at 117, 119 (arguing in the minority report that "the constitutionality of this Congressional alteration would not depend on the fact that the other portions of the State regulations were so constructed that with this alteration a complete system, capable of being executed without further legislation, would remain. A law is constitutional if it is not contrary to the Constitution, and the constitutionality of a law of Congress can not depend on the forms of State laws.").

[145] *Id.*

[146] *See, e.g.*, *Ex parte* Yarbrough, 110 U.S. 651, 660-61 (1884) (discussing favorably Congress's various exercises of authority under Elections Clause including the enactment of the 1842 Act).

[147] ENGSTROM, *supra* note 106, at 55 (noting that Democrats adopted single-member districts when they viewed them as politically advantageous).

[148] *Id.*

switched to districts."[149] The single member district requirement arguably breached the political norms of the day, hence most of the objections to the 1842 Act, but it is not clear that the states, even those that resisted the change from at-large to single member districts, seriously questioned Congress's constitutional authority to institute this mandate.[150] By 1846, only four years after the Act was implemented, the minority report challenging those representatives elected at-large had, for all practical purposes, attained majority status.

The Committee's diminished and somewhat misleading conception of congressional power was not all in vain, however. The decade before the Civil War would bear out an important aspect of the Committee's theory about federal power surrounding the enactment of the 1842 Act. Notably, the Committee's assertion that Congress could intervene in federal elections where states "act in such a manner as will be subversive to the rights of the people and the principles of the Constitution" was especially path breaking because it left the door open for the broad and significantly less formalistic approach to interpreting Congress's power under the Clause that became dominant by 1860.[151]

2. A Broader Interpretation of Congressional Authority: The Need for a Stronger Central Government on the Eve of the Civil War

Congress's state protective stance with respect to the regulation of federal elections did not last, and conflicts over slavery, the Kansas-Nebraska Act, and later, the Supreme Court's decision in *Dred Scott v. Sandford*,[152] all pushed Congress towards a broader reading of its authority than in the preceding decades. The Kansas-Nebraska Act was especially important in this regard, as it allowed the people in those territories to decide whether they wanted to be slave or free states, and this decision had a consequential effect on the balance of power in Congress.[153]

A series of violent confrontations over slavery in the State of Kansas and neighboring Missouri in 1854 required Congress to weigh in on the legitimacy

[149] *Id.* (discussing why districting took hold under Democrats despite their success under general-ticket elections).

[150] Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 884.

[151] *Members Elected by General Ticket*, *supra* note 131, at 118.

[152] 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[153] *See* John B. Gates, *Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court, 1837-1964*, 31 AM. J. POL. SCI. 259, 264-65 (1987) (discussing how the Kansas-Nebraska Act and *Dred Scott* decision resulted in a restructuring of the political parties); Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV 393, 403 (2012) ("The Kansas-Nebraska Act . . . allowed the residents of Kansas and Nebraska to vote on whether or not they wanted slavery[.]").

of delegates elected to Congress from Kansas. Slave state Missouri, already surrounded on two sides by free states, had a vested interest in ensuring that Kansas entered the union as a slave state in order to prevent Missouri slaves from having another free state into which they could escape. Missouri slaveowners, led by U.S. Senator "Bourbon" Dave Atchinson, decided to challenge the entire notion of popular sovereignty underlying the Kansas-Nebraska Act by capturing the political apparatus in Kansas and pushing a pro-slavery agenda.[154] As historian William W. Freehling observed:

> In the first Kansas election, called to select a nonvoting delegate to the U.S. Congress in late November 1854, Bourbon Dave taught Missourians how to preclude any antislavery threat. Campaigning in western Missouri rather than in eastern Kansas, he told his constituents that "when you reside within one day's journey of the territory, and when your peace, your quiet, and your property depend upon your action, you can, without exertion," spend a day in Kansas and "vote in favor of your institutions." Atchinson asked for 500 one-day Kansans.
>
> He received more than three times that number. On voting day, some 1700 one-day Kansans cast ballots, as opposed to only 1100 permanent Kansans.[155]

The next Kansas election selected territorial legislators, and Missouri voters once again overwhelmed the balloting. Kansas, which at the time only had 2,905 eligible voters who were permanent residents, had 4,968 one-day Kansans (from Missouri) and 1,210 permanent Kansans participate in the election.[156] Violence between anti-slavery and pro-slavery forces would follow for the next two years. The political fallout of "bleeding Kansas" would lead Democrats, who had retaken control of the House in 1856, to assert their authority in much the same way as the Whigs had in 1842—by using Congress's authority under both Article I, Section 5 and the Elections Clause to strengthen federal oversight of House elections, a reflection of the party's sharp divide over the slavery issue.[157]

A special congressional committee investigated the Kansas congressional election in the wake of the violence and determined that "[n]o law exists in Kansas for the election of a delegate to Congress . . . and no territorial law for such an election can be enacted, for the plain reason that the law-making power

[154] WILLIAM W. FREEHLING, THE ROAD TO DISUNION, VOLUME II: SECESSIONISTS TRIUMPH, 1854-1861, at 80-81 (2007).

[155] *Id.*

[156] *Id.* at 82-83 (discussing plague of one-day Kansas in 1855 election).

[157] *See* DAVID M. POTTER, THE IMPENDING CRISIS: 1848-1861, at 238-40 (1976) (discussing Democrats' retaking of House in 1846 and continued division on issue of slavery).

of that Territory has been subverted by usurpation."[158] The committee observed that "[i]t is undoubtedly competent for the Congress of the United States to enact a law under which a legal election of a delegate from Kansas could be effected."[159] Alternatively, if Congress refused to enact this law, it could accept the candidate who received the most votes, and disregard that the election was governed by laws enacted by a legislature that was an "illegally constituted body, [that] had no power to pass valid laws, and their enactments are, therefore, null and void."[160] However, the full Committee on Elections decided that the election, as conducted under rules adopted by the state legislature, could not stand because "[t]o admit the legality of the so-called territorial legislature of Kansas would be to sanction fraud, violence, and perjury . . . ."[161]

Congress's willingness to both set aside the election and call into question the constitutional legitimacy of the state government represented a more expansive view of federal power than, for example, that embraced by the eighth Congress, which deferred to a state legislature that filled a vacancy through a procedurally problematic special election, or the twenty-second Congress, which denied that it could weigh in on whether the representative power of a state is "fairly or unfairly made."[162] Perhaps emboldened (or disheartened) by the dispute over the seating of the Kansas delegation, the House began to more assertively frame its authority to "alter" regulations pursuant to the Elections Clause as a failsafe triggered when states have clearly overstepped their constitutional authority and subverted the rights of the people. And this approach, contrary to the twenty-eighth Congress's assertion that federal power was limited to providing a full regulatory alternative to state law, represented the broadest presentation of federal power under the Clause to date: that Congress could expressly and explicitly invalidate contrary state pronouncements without any requirement that it replace the state's regulatory framework in its entirety.[163]

For example, Lyman Trumbull, who would go on to become a prominent conservative Republican during Reconstruction, was the subject of an election challenge in 1856 after he won the seat in the eighth congressional district of

[158] *Reeder v. Whitfield: Hearing Before H. Comm. on Elections*, 34th Cong. (1856), *reprinted in* BARTLETT, CONTESTED ELECTIONS, *supra* note 109, at 185, 203.

[159] *Id.*

[160] *Id.* at 202.

[161] *Reeder v. Whitfield: Hearing Before H. Comm. on Elections*, 34th Cong. (1856), *reprinted in* BARTLETT, CONTESTED ELECTIONS, *supra* note 109, at 215, 216.

[162] *See supra* notes 117-19, 141 and accompanying text.

[163] *Cf. Barney v. McCreery*, *supra* note 112, at 56, 56-57 (invalidating state election law without dictating replacement provisions).

Illinois.[164] His opponent claimed that Trumbull, then a state supreme court judge, violated an Illinois law that provided that "[t]he judges of the supreme and circuit courts shall not be eligible to any other office of public trust or profit in this State, or the United States, during the term for which they are elected, nor for one year thereafter."[165]

In rejecting this challenge, the House Committee on Elections treated the Illinois law as an impermissible attempt to add to the list of congressional qualifications:

> [I]t is equally clear that a State of the Union has not the power to superadd qualifications to those prescribed by the Constitution for representatives, to take away from "*the people of the several States*" the right given to them by the Constitution to choose, "*every second year*," as their representative in Congress, ANY PERSON who has the required age, citizenship, and residence.[166]

In finding that Trumbull was entitled to his seat, the Committee viewed the Illinois law as an affront not only to the people's authority under Article I, Section 2, but also to congressional power under the Elections Clause:

> By the plain letter of the Constitution Congress may prescribe the *time*, *place*, and *manner* of holding elections for representatives; and at such *time* and *place*, and in the *manner* thus prescribed, every second year, the people of each State may choose as representative in Congress *any person* having the qualifications enumerated in that Constitution. The power attempted to be asserted by the State of Illinois in the cases before us is in direct contravention of the letter, as also of the spirit, true intent, and meaning of these provisions of the federal Constitution, and absolutely subversive of the rights of the people under that Constitution.[167]

Similar to its refusal to seat the Kansas delegation, Congress was willing to use its authority under the Elections Clause to invalidate state law outright. Disputes over slavery forced Congress to be aggressive in using its authority under both Article I, Section 5 and the Elections Clause to intervene in state electoral processes, and the pattern of intervention that emerged in the 1850s was predictive of the centralization of federal power that would occur over the

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[164] *See Fouke v. Trumbull: Hearing Before H. Comm. on Elections*, 34th Cong. (1856), *reprinted in* BARTLETT, CONTESTED ELECTIONS, *supra* note 109, at 167, 167.

[165] *Id.*

[166] *Id.* at 168.

[167] *Id.* at 169 (finding that votes given to Trumbull not void "because they were given by electors having the qualifications prescribed by the Constitution of the United States, and at the time and place and in the manner prescribed by law"). Article I, Section 2 of the Constitution provides that the qualifications for federal electors should be the same as the electors for the most numerous branch of the state legislature. *See* U.S. CONST. art. I, § 2.

next two decades. During this unprecedented period of federal lawmaking, Congress would reconceptualize its authority under the Clause and challenge the dominance of state power over federal elections.[168]

B. *Protecting the Primacy of Federal Law: The Reconstruction Amendments and the Rise of Congressional Sovereignty*

The Civil War and Reconstruction brought Congress's new, more expansive approach to the Elections Clause full circle. Emancipation necessitated oversight of both state and federal elections in order to incorporate a new category of citizens—African-Americans—into the American political system. Reconstruction represented a complete reworking of both American democracy and preexisting conceptions of individual rights, and as such, presents a prime opportunity to contrast the non-federalism of the Elections Clause with constitutional provisions that were concerned with preserving some aspects of state sovereignty over elections, namely, the Fourteenth and Fifteenth Amendments.[169] Under the Supreme Court's nascent and emerging jurisprudence on the Fourteenth and Fifteenth Amendments, the Court limited Congress's power to intervene in state electoral processes to situations in which the state failed in their duty to protect civil rights, or there was discrimination based on race.[170] This Section, which draws on the Enforcement Acts of 1870 and 1871, shows that the Elections Clause was not similarly constrained.

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[168] During the Civil War and Reconstruction, there was also a greater willingness by presidents to staff the civil service with party loyalists than in the Antebellum period, further proof that Congress—with its "electorally vulnerable" Republican majority—utilized both patronage and long dormant constitutional provisions to cement its authority. *See* James, *supra* note 107, at 47 ("[I]t seems reasonable to conclude that the deepening civil service reform pressures of the post-Civil War Era placed few practical constraints on presidents seeking to replace opposition appointees with party loyalists.").

[169] *See, e.g.*, Shelby Cty. v. Lynch, 799 F.3d 1173, 1181 (D.C. Cir. 2015) (punting on question of whether defendant properly read Reconstruction Amendments as "reflect[ing] guarantees to individuals and states alike: to individuals, to be free from discrimination; and to states, to be free from unwarranted regulation"). *But see id.* at 1189 (Tatel, J., concurring) ("That Congress may enforce the Amendments only by 'appropriate' legislation, the County insists, means that the enforcement provisions guarantee 'the constitutional right of sovereign States . . . to regulate state and local elections as they see fit.' But this claim finds no support in the constitutional text." (citations omitted)).

[170] *See, e.g.*, United States v. Reese, 92 U.S. 214, 218 (1876) ("It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere . . . .").

1. Congress's View of its Authority in the Post-Civil War Era: Sovereign, Not Autonomous, Power

The scholarly literature generally does not treat the Reconstruction era as a high point for sustained and meaningful voting rights enforcement.[171] Instead, much of the literature focuses on the Supreme Court's very narrow interpretations of the Fourteenth and Fifteenth Amendments, ignoring Congress's reliance on the Elections Clause as an alternative source of authority to justify the breadth of its Reconstruction era legislation. In enacting the Enforcement Acts of 1870 and 1871, Congress relied on the Reconstruction Amendments and the Elections Clause to defend this legislation.[172] The congressional debates surrounding the Acts confirm: (1) that Congress legislated under the Elections Clause in a piecemeal fashion, contrary to its earlier position that it was limited to enacting a full regulatory regime for federal elections, and (2) that Congress used this power to significantly circumscribe state authority over federal elections.

On Monday, February 21, 1870, less than three weeks after the ratification of the Fifteenth Amendment, Representative John Bingham introduced House Bill 1293 to "enforce the right of citizens of the United States to vote in the several States of this Union who have hitherto been denied that right, on account of race, color, or previous condition of servitude."[173] Although framed as an effort to enforce the mandates of the Fifteenth Amendment, it was clear from the scope of the bill, the debates over its language, and the law's final form that the Enforcement Act of 1870 went beyond prohibiting abridgments or denials of the right to vote on the basis of race.[174]

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[171] *See, e.g.*, Katz, *supra* note 101, at 2350-51 (2003) (discussing *Reese* and *Cruikshank*, but not *Clark* and *Siebold*, to argue how Reconstruction-era Court cases "indisputably hindered ongoing federal efforts to enforce the newly ratified Fourteenth and Fifteenth Amendments"). For a recent exception, see PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 88 (2011) (asserting that "[f]ederal rights enforcement remained alive after *Cruikshank*").

[172] *Compare* Apportionment Act of 1842, ch. 47, 5 Stat. 491 (requiring single-member districts), *with* Enforcement Act of 1870, ch. 114, 16 Stat. 140 (instituting regime of federal oversight for congressional elections), *and* Enforcement Act of 1871, ch. 99, 16 Stat. 433 (same).

[173] CONG. GLOBE, 41st Cong., 2d Sess. 1458-59 (1870).

[174] *See, e.g.*, Richard M. Valelly, *Partisan Entrepreneurship and Policy Windows*, *in* FORMATIVE ACTS 126, 130 (Steven Skowronek ed., 2007) (describing the Enforcement Acts of 1870 and 1871 and the Immigration and Naturalization Act of 1870 as a reaction to "the largest fraud ever devised in American electoral history—the production by Tammany Hall of sixty thousand naturalization papers a month before the 1868 elections in New York state, which tainted 16 percent of the state's presidential vote").

The Senate version, which Congress ultimately enacted, was more expansive than its counterpart in the House, and sought to enforce provisions of the Fourteenth and the Fifteenth Amendments as well as the Elections Clause.[175] Section 19 stated that "if at any election for representative or delegate in the Congress of the United States any person shall knowingly personate and vote, or attempt to vote, in the name of any person, whether living, dead, or fictitious . . . such person shall be deemed guilty of a crime . . . ."[176] Section 20 extended these protections to "any registration of voters for an election for representative or delegate in the Congress of the United States" and provides criminal penalties if "any person shall knowingly personate and register, or attempt to register, in the name of any person . . . ."[177] Section 21 likewise provided that the ballot itself can be used as prima facie evidence that a person voted unlawfully in violation of the Act so long as representatives for Congress are present on the ballot.[178] These provisions policed voter fraud in federal elections and fell well outside the province of the Fifteenth Amendment.

The Enforcement Act of 1871 similarly provided for federal oversight of congressional elections, and was arguably more far-reaching, and intrusive of state sovereignty than any prior federal election legislation. Not only does the 1871 Act reiterate the criminal penalties in the 1870 Act for those who commit voter fraud,[179] the 1871 Act also instituted a system of federal oversight for congressional elections. For example, section 2 of the 1871 Act allowed federal judges to appoint two election supervisors, one from each of the major political parties, to oversee congressional elections in areas with a population of at least twenty thousand people.[180] Section 4 required that the supervisors be present "at

[175] CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870) (statement of Rep. Bingham) ("[T]he Senate amendment contained various provisions for the enforcement of certain sections of the fourteenth article of the amendments to the Constitution. It contained also a provision authorizing the President of the United States to employ the [military] at his discretion, in elections. . . . And it contained further, a provision giving jurisdiction to the district and circuit courts of the United States, concurrently with the State courts, in all contested elections, save elections of members of Congress and elections of members of the State Legislatures.").

[176] Enforcement Act of 1870, ch. 114, § 19, 16 Stat. 140, 144.

[177] *Id.* § 20.

[178] *Id.* § 21. Many in Congress argued that federal legislation to enfranchise African-Americans had to be enacted concurrently with legislation to eliminate fraud in federal elections, otherwise all of this effort would be for naught. The Elections Clause allowed Congress to supplement its efforts under the Fourteenth and Fifteenth Amendment to ensure broad enfranchisement in federal elections. *See infra* Section II.B.2.

[179] Enforcement Act of 1871, ch. 99, § 10, 16 Stat. 433, 436.

[180] *Id.* § 2 ("[W]henever in any city or town having upward of twenty thousand inhabitants, there shall be two citizens . . . of different political parties . . . who shall be designated as supervisors of election.").

all times and places fixed for the registration of voters"[181] in order to comply with section 13, which allowed federal judges to "require of the supervisors of election, where necessary, lists of the persons who may register and vote . . . and to cause the names of those upon any such list whose right to register or vote shall be honestly doubted to be verified by proper inquiry and examination . . . ."[182] Appointment of these new federal supervisors, overseeing the election process from registration to certification of the winner, was unlike anything previously enacted by Congress, and the intrusion on state sovereignty was deliberate and intentional.[183]

The breadth of the Acts illustrated that fraud had become inextricably intertwined with disenfranchising African-Americans and suppressing support for the Republican Party.[184] And it was not clear that the Fourteenth and Fifteenth Amendments, as then interpreted, were broad enough to address this problem. Opponents argued, for example, that the bill was unconstitutional because regulations such as voter registration and poll taxes do not fall within the scope of the Fifteenth Amendment since these requirements are "applicable alike to citizens of all colors, races, and conditions . . . ."[185] Other representatives did not limit themselves to attacking the 1870 Act as beyond the terms of the Fifteenth Amendment, arguing that it exceeded the scope of other constitutional provisions upon which its constitutionality could be based.[186] What sounded the alarm loudest among Democrats was that the Enforcement Acts reflected a structural shift over the regulation of federal elections from the states to the federal government, grounded in constitutional provisions that predated the Civil War but long had been a source of underutilized federal power.

[181] *Id.* § 4.

[182] *Id.* § 13.

[183] *See* Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 463 (2015) (discussing fraud in northern states).

[184] XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910, at 68 (1997) ("Although the primary object of the Enforcement Act of May 31, 1870, was to protect southern black voters from Klan terrorism, several sections of the act also dealt with fraudulent practices in northern elections. True, the Fifteenth Amendment neither addressed election fraud nor specifically authorized Congress to provide legislation to correct it. But the reality that northern fraud could hurt the party as much as southern black disenfranchisement, and eventually hurt the whole system of congressional elections, alarmed Republicans.").

[185] CONG. GLOBE, 41st Cong., 2d Sess. 3872 (1870) (statement of Rep. Kerr).

[186] *Id.* at 3876 (comments of Rep. Potter) ("Many of [the Enforcement Act of 1870's] provisions relate neither to the time, place, nor manner of holding elections, in respect of which Congress is entitled to legislate by the fourth section of the Constitution, nor to the denial or abridgment of suffrage on account of race, color, or previous condition of servitude as to which legislation is authorized by the fifteenth amendment . . . .").

Representative John Bingham, in defending the substitution of the House bill with the more expansive Senate version, argued:

> [No] thoughtful man of this House, fully advised of the nature of the provisions, can doubt for one moment their necessity and constitutionality.
>
> While the general power of the States to "regulate," in the language of the Constitution, the election of Representatives to Congress is conceded by all who have ever read that instrument, it must at the same time be admitted that by the very same clause the power is conferred upon Congress to make regulations for the election of members of Congress, or to alter the regulations which have been or may hereafter be made in that behalf by the States. The amendments proposed to prevent fraudulent registration or fraudulent voting, in so far as I am advised, do not alter any of the existing regulations of the States touching registration; they are but a simple exercise of the power expressly conferred on the Congress of the United States to regulate elections of members and Delegates to Congress.[187]

Bingham's statements represented the position of many in Congress that state action was not a prerequisite before Congress could act pursuant to the Elections Clause, a requirement that could potentially undermine the success of African-American enfranchisement and the political fortunes of the Republican Party.

But the Supreme Court expressed overt hostility to much of the civil rights legislation that explicitly relied on the Fifteenth Amendment as predicate authority. The Court ignored that many in Congress sought to justify these laws through sources, other than the Reconstruction Amendments, that allowed Congress to legislate with little regard for state sovereignty. For example, in *United States v. Reese*,[188] the Court invalidated section 4 of the Enforcement Act of 1870, finding that the statute exceeded the scope of the Fifteenth Amendment because it criminalized the actions of state officials for any discriminatory denial of the ballot, rather than just race-based denials.[189] Similarly, in *United States v. Cruikshank*,[190] the Court dismissed an indictment against the defendant election inspectors because "the intent of the defendants was [not] to prevent these parties from exercising their right to vote on account of their race . . . ."[191] This conclusion assumed that Congress is limited to preventing denials of the ballot

[187] *Id.* at 3871-72 (comments of Rep. Bingham).

[188] 92 U.S. 214 (1876).

[189] *Id.* at 221 (holding that section 4 was general in its terms and could not be construed as limited to race-based discrimination).

[190] 92 U.S. 542 (1876).

[191] *Id.* at 556 ("The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.").

only on this ground in order to avoid unduly intruding on the states' authority over voter qualifications. But, as the next Section shows, the Court surprisingly agreed with Congress that its authority under the Elections Clause, unlike the Fourteenth and Fifteenth Amendments, is broad and unencumbered by federalism concerns.

2. Loosening the Constraints of Federalism During Reconstruction and Redemption

Prior to Reconstruction, there was not much mention of the Elections Clause in the Supreme Court's jurisprudence, much less any thorough analysis of the meaning of its terms.[192] The absence of substantial precedent meant that there was a risk that the Court would interpret the Clause's provisions narrowly, especially since Congress had declined to read the Clause broadly until right before the Civil War.[193] In addition, the Court had resisted any notion that the Reconstruction Amendments changed the balance of power between the states and the federal government, and could have easily applied this same reasoning to the Elections Clause.[194] In the *Slaughter-House Cases*[195] and the *Civil Rights Cases*,[196] the Court denied that the Fourteenth Amendment fundamentally altered our system of federalism by shifting the responsibility of protecting civil rights from the states to the federal government.[197] These cases did not deal with

[192] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 614 (1857) (Curtis, J., dissenting) (referencing the Elections Clause in brief discussion of the meaning of "regulate"), *superseded by constitutional amendment,* U.S. CONST. amend. XIV; Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 586 (1842) (making passing reference to Elections Clause). Indeed, adding the Elections Clause to this analysis complicates the overly simplistic view of the Reconstruction-era Court as state friendly, or alternatively, overtly hostile to congressional power. *See* BRANDWEIN, *supra* note 171, at 53 (noting failure of most legal literature to recognize the Reconstruction-era Court's stated willingness to hold states accountable for failing to satisfy constitutional requirements under the Reconstruction Amendments); Gates, *supra* note 153, at 264 ("From 1837 to 1860 the Court struck down 17 state policies, or less than one statute a year. On the other hand, between 1860 and 1878 the Court declared 58 state policies unconstitutional, or more than three each year.").

[193] *See supra* Section II.A.

[194] *Cf. Reese*, 92 U.S. at 214 (making no mention of Elections Clause in analysis).

[195] 83 U.S. (16 Wall.) 36 (1872).

[196] 109 U.S. 3 (1883).

[197] *See id.* at 24 ("[H]is redress is to be sought under the laws of the State; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment."); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77 (declaring it was not "purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge

elections—the *Slaughter-House Cases* interpreted the scope of the Privileges and Immunities Clause of the Fourteenth Amendment and the *Civil Rights Cases* resolved the constitutionality of the Civil Rights Act of 1875, which prohibited discrimination in places of public accomodation. But when read in light of the Fifteenth Amendment's limitation to race-based voting denials, these cases, holding that there must be state action or state neglect in protecting civil rights before Congress could legislate pursuant to the Fourteenth Amendment, were also a threat to broad voting rights enforcement efforts.[198]

Despite this jurisprudence, a reality in which the Elections Clause would be narrowly interpreted never materialized. Since the Elections Clause was a part of the original Constitution and explicitly delegated to Congress substantial authority over federal elections, cases litigated under the Clause provide a nice counterpoint to those decided under the Reconstruction Acts, which did not contain such explicit language and consequently were not viewed as liberally.

Two cases, in particular, are especially instructive here. In *Ex parte Clarke*,[199] an election judge violated state law by opening a previously sealed poll book before turning it over to the county clerk.[200] The defendant in *Ex parte Siebold*[201] was also an election judge, but he was prosecuted under state law for stuffing the ballot box.[202] Other defendants were also indicted, and had committed a range of violations from ballot box stuffing to turning away voters at the polls.[203] The issue before the Court in both cases was whether Congress had the authority to make the violation of a state election statute a federal offense since the violations occurred in the context of a federal election.[204]

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the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government").

[198] *See The Civil Rights Cases*, 109 U.S. at 24; *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77.

[199] 100 U.S. 399 (1879).

[200] State law provided:

> That, after canvassing the votes in the manner aforesaid, the judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the Court of Common Pleas of the county wherein the return is to be made; and the poll-book, thus sealed and directed, shall be conveyed by one of the judges (to be determined by lot if they cannot agree otherwise) to the clerk of the Court of Common Pleas of the county, at his office, within two days from the day of the election . . . .

Id. at 401-02.

[201] 100 U.S. 371 (1879).

[202] *Id.* at 379.

[203] *Id.* at 377-79 (enumerating charges against other various defendants).

[204] *Id.* at 382 (addressing the contention that Congress has "no constitutional power to make partial regulations intended to be carried out in conjunction with regulations made by the States").

Section 5515 of the revised statutes, which was originally section 22 of the Enforcement Act of 1870, did not define the substantive offenses that violated its terms, instead incorporating state law and other federal laws by reference.[205] In defending this regime of concurrent state and federal regulation over congressional elections, the Court noted that Congress could act pursuant to the Elections Clause without invoking the usual concerns about state sovereignty present in other contexts.[206] Like in *Arizona Inter Tribal* over a century later, the Court in *Ex parte Siebold* recognized that Congress can make its own regulations pursuant to the Clause, and where its regulations conflict with state law, federal law "necessarily supersedes" state law because "the power of Congress over the subject is paramount."[207] The Court further observed that Congress could choose not to act, leading to regulations that are "made wholly by the State . . . ."[208] But Congress's "make or alter" authority does not prohibit state and federal law from co-existing, and while this might require a certain level of cooperation on the part of the two governments, the Court was clear that this cooperation occurs at the prerogative of Congress.[209]

As the Court noted, no deference to state sovereignty is ever warranted under the Elections Clause because "[n]o clashing [of jurisdictions and conflict of rules] can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature."[210] In other words, federal law is always paramount. The Court's disregard of state sovereignty, unusual given the controversy over the Reconstruction Amendments, was tied to the explicit language of the Elections Clause ("make or alter") that contemplated a concurrent regime of election regulation where, unlike the Fourteenth Amendment, Congress's authority to

[205] U.S. REV. STAT. § 5515 (2d ed. 1878); Enforcement Act of 1870, ch. 114, § 22, 16 Stat. 140, 145 (punishing election officers who violate, "neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof").

[206] *Siebold*, 100 U.S. at 392 ("[W]e think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State.").

[207] *Id.* at 384.

[208] *Id.* at 383.

[209] *Id.* at 386 ("The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.").

[210] *Id.* at 384.

enact "appropriate" legislation is significantly less ambiguous.[211] Under the Clause, Congress can act at any time in supplementing or displacing state law, can incorporate state law by reference, and has both civil and criminal authority.[212]

In contrast, the dissenters in *Ex parte Siebold* and *Ex parte Clarke* applied the same federalism restrictions to the Clause that had stymied enforcement of the Fourteenth Amendment. In dissent, Justice Field denied that there could be federal incorporation of state law offenses because such incorporation would extend both the power of Congress and the jurisdiction of the courts and, by implication, intrude on the sovereignty of the states.[213] This critique misunderstood Congress's authority to "make or alter" state regulations, which arguably includes the ability to enact a criminal code as it relates to federal elections, even if such regulations derive solely from state law.

Indeed, the "no incorporation by reference" argument proves too much. As *Minor v. Happersett*[214] recognized, the right to vote is a creature of state law that

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[211] *See* FRANITA TOLSON, A PROMISE UNFULFILLED: SECTION 2 OF THE FOURTEENTH AMENDMENT AND THE FUTURE OF THE RIGHT TO VOTE (forthcoming 2020).

[212] *See* Valelly, *supra* note 174, at 131 (calling Court's decisions in *Clarke* and *Siebold* "stunning" by finding the "regulatory jailing of state and local elections officials . . . perfectly constitutional," which the Court accomplished by relying on "a centralizing and muscular reading of Article I, Section 4").

[213] *Ex parte* Clarke, 100 U.S. 399, 408 (1879) (Field, J., dissenting). As Justice Field argued:

> There is no doubt that Congress may adopt a law of a State, but in that case the adopted law must be enforced as a law of the United States. Here there is no pretence of such adoption. In the case from Ohio it is for the violation of a State law, not a law of the United States, that the indictment was found. The judicial power of the United States does not extend to a case of that kind . . . . The judicial power thus defined may be applied to new cases as they arise under the Constitution and laws of the United States, but it cannot be enlarged by Congress so as to embrace cases not enumerated in the Constitution . . . . To authorize a criminal prosecution in the Federal courts for an offence against a law of a State is to extend the judicial power of the United States to a case not arising under the Constitution or laws of the United States.

Id. Notably, Justice Field's arguments echoed those made by his older brother, David Dudley Field, a lawyer who also argued that the Enforcement Acts were unconstitutionally broad. *See* David Dudley Field, *Centralization in the Federal Government*, 132 N. AM. REV. 407, 412-13 (1881) (arguing that Enforcement Acts "are in themselves a displacement of State power far beyond anything written in the early days of the Constitution . . . [and] the theory on which they rest would, if carried out to its logical results, lead to the practical absorption in the central government of all the chief functions of sovereignty"). David Dudley Field's criticism was consistent with those of many Democrats who, during the debates over the Enforcement Acts, voiced concerns about the scope of Congress's authority to enforce the Fourteenth and Fifteenth Amendments.

[214] 88 U.S. (21 Wall.) 162 (1874).

is incorporated by reference into the Constitution because of the general rule that federal law does not create voters.[215] Requiring Congress to articulate with specificity each crime that comes within the purview of section 5515, instead of allowing that body to incorporate state law by reference, was arguably Justice Field's attempt to impose procedural hurdles—no different from a state action requirement, a presumption against preemption, or a clear statement rule—to limit the scope of federal law.[216] Instead of recognizing the Clause's unique structure, Justice Field analyzed it in the same terms as the Reconstruction Amendments, suggesting that section 5515 impermissibly commandeered state law and state officials.[217]

Fundamentally, the question of whether the Elections Clause is a federalism provision goes to the heart of the disagreement between the dissenters and the majority in all of these cases. Similar to Justice Alito's objection to the Court's reading of the NVRA in *Arizona Inter Tribal*,[218] Justice Field questioned the impact of section 5515 on *state* elections because of that provision's influence on the validity and scope of state regulations.[219] This concern is valid only if the

[215] *Id.* at 171 ("The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters."); *see also Clarke*, 100 U.S. at 421 (Field, J., dissenting) ("The act of Congress is not changed in terms with the changing laws of the State; but its penalty is to be shifted with the shifting humors of the State legislatures. I cannot think that such primitive legislation is valid, which varies, not by direction of the Federal legislators, upon new knowledge or larger experience, but by the direction of some external authority which makes the same act lawful in one State and criminal in another, not according to the views of Congress as to its propriety, but to those of another body.").

[216] *Cf.* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2670 (2015) ("The Arizona Legislature urges that the first part of the Elections Clause, vesting power to regulate congressional elections in State 'Legislature[s],' precludes Congress from allowing a State to redistrict without the involvement of its representative body, even if Congress independently could enact the same redistricting plan under its plenary authority to 'make or alter' the State's plan.").

[217] *Clarke*, 100 U.S. at 409 (Field, J., dissenting) ("The act of Congress asserts a power inconsistent with, and destructive of, the independence of the States. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty is essential to that independence. If the Federal government can punish a violation of the laws of the State, it may punish obedience to them, and graduate the punishment according to its own judgment of their propriety and wisdom. It may thus exercise a control over the legislation of the States subversive of all their reserved rights.").

[218] *See supra* note 99 and accompanying text.

[219] *Clarke*, 100 U.S. at 412-13 (Field, J., dissenting) ("So far as the election of State officers and the registration of voters for their election are concerned, the Federal government has confessedly no authority to interfere. And yet the supervision of and interference with the

Elections Clause preserves a decisive role for state authority that would constitutionally require Congress to consider the impact of any federal regulations on state elections, and there is no reason to believe that the Clause contains any such requirement.[220] To read the Clause in this manner would not only deny Congress the sovereignty to which it is rightly entitled given the Clause's "make or alter" language, it would also prioritize state sovereignty over federal power.[221]

Federalism is also the distinguishing factor between the Fourteenth and Fifteenth Amendment cases of *Cruikshank* and *Reese* and the Elections Clause cases of *Ex parte Clarke* and *Ex parte Siebold*, all of which engage in views of congressional power that at first seem diametrically opposed. In reality, any differences stem from the fact that the first subset of cases dealt with Amendments that sought to maintain some sort of federalism balance with respect to voter qualifications, and the later cases eschew state sovereignty altogether with respect to election administration.[222]

State regulations, sanctioned by the act of Congress, when representatives to Congress are voted for, amount practically to a supervision of and an interference with the election of State officers, and constitute a plain encroachment upon the rights of the States, which is well calculated to create irritation towards the Federal government, and disturb the harmony that all good and patriotic men should desire to exist between it and the State governments.").

[220] *Cf.* Weinstein-Tull, *supra* note 10, at 765 (discussing Ninth Circuit decision that upheld the NVRA as a proper exercise of congressional power under the Elections Clause but expressed concern that the burden on California's sovereignty was of "constitutional concern" (citing Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1412-13, 1415 (9th Cir. 1995))).

[221] *Ex parte* Siebold, 100 U.S. 371, 391-92 (1879) ("The more general reason assigned, to wit, that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and State governments in the election of representatives. It is at most an argument *ab inconveniente*. There is nothing in the Constitution to forbid such co-operation in this case.").

[222] As the *Cruikshank* Court observed:

> [T]he right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.

United States v. Cruikshank, 92 U.S. 542, 555-56 (1876); *cf.* United States v. Harris, 106 U.S. 629, 639 (1883) (emphasizing federalism principles inherent in Fourteenth Amendment and stating that "when . . . the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress").

Cases interpreting the scope of the Fifteenth Amendment are instructive of this point. In *Ex parte Yarbrough*,[223] the Supreme Court sustained portions of the Enforcement Act because the Fifteenth Amendment explicitly shifted the responsibility for ensuring that individuals exercise the right to vote free of racial discrimination from the states to the federal government.[224] Just as there are no federalism concerns when Congress seeks to protect a right created by the Constitution, there are no federalism concerns when Congress acts pursuant to a provision that gives it the authority to displace state law or make its own laws.[225] However, when Congress seeks to protect the right to vote in the absence of racial discrimination, as was the case with its ill-fated attempt at issue in *Reese*, then federalism once again becomes a decisive factor that cuts against the exercise of federal authority unless, as the next Part shows, a specific set of circumstances trigger Congress's authority to protect the right to vote under the Elections Clause.

III. ESCHEWING STATE SOVEREIGNTY: THE REACH OF THE ELECTIONS CLAUSE AFTER *ARIZONA INTER TRIBAL*

In thinking about the full spectrum of congressional authority over elections, the Supreme Court must be careful to avoid applying the federalism framework

[223] 110 U.S. 651 (1884).

[224] *Id.* at 664 ("The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States.").

[225] *Id.* at 666 ("[W]hile it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself."). Unlike the Fourteenth Amendment, there is no state action requirement under the Fifteenth Amendment. *See* BRANDWEIN, *supra* note 171, at 93 ("[T]he doctrine of state action/neglect applied only to the Fourteenth Amendment . . . [and] exempted the Fifteenth Amendment from state action neglect rules."). But this doctrine has been limited based on federalism concerns by restricting Congress's power to enacting only legislation that is explicitly limited to race-based denials of the ballot, *see* United States v. Reese, 92 U.S. 214, 218 (1876) (emphasizing that Fifteenth Amendment does not grant Congress "authority to impose penalties for every wrongful refusal to receive the vote," but is limited to when discrimination is based on "race, color, or previous condition of servitude"), or if facially neutral, voting laws that are motivated by discriminatory purpose, *see* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2627 (2013) (describing "substantial federalism costs" of Congressional intrusion into elections via the Fifteenth Amendment).

of the Reconstruction Amendments to the Elections Clause, which can have significant, and pernicious, effects on voting rights enforcement efforts. Importing federalism into this context makes Congress's enforcement authority appear more narrow than it actually is, impacting the Court's review of the legislative record underlying laws like the VRA. Despite this risk, the Court has attempted to create a firm boundary between time, place, and manner regulations, on one hand, and voter qualification standards, on the other, in an attempt to preserve separate regulatory spheres for the states and the federal government over federal elections. In *Arizona Inter Tribal*, for example, the Court deployed the Administrative Procedure Act ("APA") and a broad interpretation of state power under the Voter Qualifications Clause of Article I to engage in, what is, functionally, field preemption with respect to voter qualifications, stating:

> Prescribing voting qualifications . . . "forms no part of the power to be conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." . . . Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.[226]

Given that the Court ultimately determined that Arizona's documentary proof-of-citizenship requirement was preempted by the NVRA, this passage represented a surprising turn in a decision that, at least initially, had reaffirmed the sovereignty of Congress over federal elections. Notably, the Court declined to apply the presumption against preemption to exercises of federal power under the Elections Clause, where the Court would have deferred to the state law unless Congress expressed a clear and unambiguous intent to preempt state law. In the Court's view, the presumption was not appropriate because every exercise of federal authority under the Clause is a preemption of state law.[227] Nonetheless, the Court's resort to the APA illustrated that its statement about the presumption against preemption was not intended to vindicate federal authority. Instead, the Court used the APA to safeguard the state's governing prerogatives by urging Arizona to utilize the administrative process to protect its authority over voter qualifications.[228] This is a course of action that is actually more protective of

[226] Arizona v. Inter Tribal Council of Ariz., Inc. *(Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2258-59 (2013) (citation omitted).

[227] *Id.* at 2256 ("Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent.").

[228] *Id.* at 2260.

state power than applying the presumption against preemption because the presumption can be defeated.[229]

States thus have an opportunity, through administrative proceedings, to show that Congress has interfered with their discrete policymaking enclave over voter qualifications when Congress exercises its authority to "make or alter" election regulations.[230] It does not matter if manner regulations often bleed into voter qualification standards, as is the case with Arizona's documentary proof-of-citizenship requirement that was a prerequisite to registering to vote in federal elections.[231] The dual sovereignty framework employed by the Court is not equipped to address the blurring of the categories and the Court instead relied on other means—here the APA—to maintain the boundary. The overlap between voter qualification standards and time, place, and manner regulations, and judicial attempts to keep the categories separate, will likely become more of an issue for federal voting rights laws as the federalism limits of the Fourteenth and Fifteenth Amendments become more pronounced in the caselaw.

Federalism limits notwithstanding, one of the enduring lessons of *Shelby County* is that the Fourteenth and Fifteenth Amendments cannot do all of the

[229] *See, e.g.*, Kobach v. U.S. Election Assistance Comm'n, 6 F. Supp. 3d 1252, 1256-57 (D. Kan. 2014), *rev'd*, 772 F.3d 1183 (10th Cir. 2014).

[230] *Ariz. Inter Tribal*, 133 S. Ct. at 2260 ("Arizona may, however, request anew that the [Election Assistance Commission's ("EAC")] include such a requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC's decision under the Administrative Procedure Act."). Nor can Congress interfere with this authority pursuant to the Fourteenth and Fifteenth Amendments without sufficient justification. *See generally* Shelby Cty. v. Holder, 133 S. Ct. 2613 (2013).

[231] *Ariz. Inter Tribal*, 133 S. Ct. at 2260 ("Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form."); *see also id.* at 2262 (Thomas, J., dissenting) (arguing that "both the plain text and the history of the Voter Qualifications Clause, U.S. Const., Art. I, § 2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied"). *But see* Robert A. Maurer, *Congressional and State Control of Elections Under the Constitution*, 16 GEO. L.J. 314, 317-18 (1928) ("That the power to regulate the 'manner' of holding such elections is complete and far-reaching is illustrated in the Elective Franchise Statutes, commonly known as the Enforcement Acts of 1870 and 1871 . . . . Congress may determine what is necessary to secure a free, fair and honest vote and the proper conduct of the elections. It may, for these ends, provide the officers who shall conduct the Congressional elections and make return of the results, provide for security of life and limb to the voter, protect the act of voting, the place of voting and the man who votes, from personal violence or intimidation and the election itself from corruption and fraud.").

work when it comes to protecting the integrity of the ballot.[232] The Elections Clause is important, not only as an additional source of federal power that can be deployed for this purpose, but also because its scope and structure give Congress considerable flexibility. For example, the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"),[233] enacted pursuant to the Elections Clause, created a uniform federal ballot specifically for use by a category of voters overlooked by state law—military personnel—and the law incorporated state voter qualification standards to determine which personnel were entitled to vote.[234]

The earliest attempts to protect military voters revealed that the source of authority pursuant to which Congress could enfranchise these individuals would be a point of contention.[235] The Supreme Court had not decided *Harper v. Virginia State Board of Elections*,[236] so voting was not yet a fundamental right

[232] *Compare* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 113 (2013) ("Instead of the limited race-driven use of equal protection and the Fifteenth Amendment, there is untested room for expansion of congressional intervention under the Elections Clause."), *with* Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. FORUM 19, 20 (2013) ("[T]he benefits of congressional interventions under the Elections Clause should not prompt us to abandon the Fifteenth Amendment.").

[233] 52 U.S.C. §§ 20301-20311 (2018). In the House report, representatives argued that they could impose this uniform requirement on the states because of their authority under the Elections Clause. *See Uniformed and Overseas Citizens Absentee Voting: Hearing on H.R. 4393 Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 99th Cong. 66 (1986) (statement of Rep. William Thomas) [hereinafter *UOCAVA Hearings*] ("But my concern is that one possible solution is viewed as having the Federal Government impose a degree of uniformity on the States, which then makes it easier to explain what the State procedure is because they're all the same. My concern is that if the States want to structure their election procedure differently, I think they have every right to. In fact, I don't think, beyond certain requirements, that we ought to get into the 'who' aspect of the voting. But time, place, and manner, to a very great degree, we have that ability under the Constitution.").

[234] 52 U.S.C. § 20310 (defining eligible voters as those who, notwithstanding their absence, would otherwise be qualified to vote in last place in which they resided).

[235] In 1942, Congress used its war powers to adopt the Soldier Voting Act of 1942, which required states to allow active military personnel to vote in federal elections regardless of the voter qualification standards of their home states. *See* KEVIN J. COLEMAN, CONG. RESEARCH SERV., RS20764, THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES 1-2 (2015). In 1944, reluctant to rely on its war power as the conflict was nearing its end, Congress amended the 1942 Act to recommend, but not require, that military voters be allowed to participate in federal elections. *Id.* at 2. In 1955, Congress adopted the Federal Voting Assistance Act, but this law similarly recommended, but did not require, states to allow military personnel to register and vote absentee. *See* Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584.

[236] 383 U.S. 663 (1966).

under the Equal Protection Clause;[237] there was no record of racial discrimination in voting such that the Fifteenth Amendment was implicated;[238] nor had the Court decided that state laws prohibiting military personnel from voting were unconstitutional.[239] In 1952, President Harry Truman wrote a letter to Congress, which recognized the difficulties of enacting a uniform federal regime for overseas voting, but noted that Congress had the authority to act since the states had shirked their duty:

> I agree with the committee that, in spite of the obvious difficulties in the use of the Federal ballot, the Congress should not shrink from accepting its responsibility and exercising its constitutional powers to give soldiers the right to vote where the States fail to do so. Of course, if prompt action is taken by the States, as it should be, it may be possible to avoid the use of a Federal ballot altogether. . . . Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954.[240]

Over thirty years after Truman's letter, some states still did not provide for absentee voting in the manner UOCAVA later required.[241] As applied to those states, UOCAVA incorporated state voter qualification standards, allowing only those members of the military qualified to vote under their respective state laws

[237] *See* Franita Tolson, *Offering a New Vision for Equal Protection: The Story of* Harper v. Virginia State Board of Elections, *in* ELECTION LAW STORIES 63, 64 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

[238] *See* Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 53-54 (1959) (holding that literacy test requirement for voting was not racially discriminatory).

[239] *Compare* Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (finding Tennessee's durational residence laws unconstitutional), *with* Tullier v. Giordano, 265 F.2d 1, 4 (5th Cir. 1959) (dismissing voter's lawsuit against parish for failing to register him to vote because the denial "[did] not constitute such 'purposeful discrimination between persons or classes of persons' as would amount to a denial of the equal protection of the laws").

[240] *UOCAVA Hearings*, *supra* note 233, at 56 (letter from President Truman to House Committee on Elections, March 22, 1952).

[241] *See id.* at 71 (letter from Col. Charles C. Partridge to Rep. Al Swift) (noting that "most counties in most states fall short of the 35-day standard which the Department of Defense has recommended as representing the *minimum* time necessary for an absentee ballot to go from a local election official to an overseas voter and back"); *id.* at 60 (article by Jody Powell, *Fight Waged to Guarantee the Right to Vote*, DALL. TIMES HERALD, Nov. 12, 1983) ("State election laws in most of the 50 states can, and do, deprive many Americans who are serving their country of the right to help select its government. The culprit is the way absentee ballots are handled. Most states send them out so late and require them to be returned so early that voting is a practical impossibility for Americans stationed overseas . . . .").

to utilize the federal absentee ballot.[242] For those states that had mechanisms in place for absentee military voting, the statute did not displace these regimes.[243] The practical effect of UOCAVA, through its incorporation of state voter qualification standards for a category of voters overlooked or insufficiently protected by state law, was to create a new category of voters for purposes of federal elections.[244] As a result, UOCAVA "made" law in some states and "altered" it in others, but more importantly, UOCAVA created a voter qualification standard for federal elections, illustrating that the states' authority under Article I, Section 2 cannot be completely segregated from federal power.[245]

[242] 52 U.S.C. § 20302(a)(2) (2018) (requiring states to accept absentee ballots from "otherwise valid" military voters).

[243] *Id.* § 20303(g) ("A State is not required to permit the use of the Federal write-in absentee ballot, if, on and after August 28th, 1986, the State has in effect a law providing that – (1) a State absentee ballot is required to be available to any voter . . . at least 90 days before the . . . election . . . involved; and (2) a State absentee ballot is required to be available to any voter . . . as soon as the official list of candidates . . . is complete."); *see also UOCAVA Hearings*, *supra* note 233, at 90 (testimony of John Pearson, Office of the Secretary of State, Washington) ("As I mentioned earlier in my testimony, we enthusiastically support any efforts that you can make to ensure that service to one's country does not result in an inability to participate in the decisionmaking process. We would ask, however, that Congress keep in mind that some States, such as ours, have already taken steps in this area and that these State efforts should not be superseded by Federal law that might be more restrictive in nature."); *id.* at 80 (testimony of Julia Tashjian, Secretary of State, Connecticut) ("[W]e question the necessity for the imposition of a Federal write-in ballot in States which, like Connecticut, make write-in absentee ballots available to their overseas electors well before the availability of regular absentee ballots. The imposition of an additional early write-in ballot in Connecticut will invite confusion and add to the complexity of administering the absentee voting process.").

[244] *Cf.* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 170 (1874) (holding that there are no voters of federal creation).

[245] Professor Brian Kalt recently wrote that UOCAVA is unconstitutional as it applies to permanent expatriates, persuasively arguing that the statute exceeds the scope of Congress's authority under the Fourteenth Amendment. *See* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 442 (2016). In contrast, this analysis focuses on the statute as it applies to military personal who would otherwise be eligible to vote under the laws of their home state, which does not raise the same constitutional concerns as extending the right to vote to individuals who have no intention of returning to the United States. Arguably, the latter application of UOCAVA stretches federal power well beyond the Elections Clause, where federalism concerns do not hold sway so long as Congress is acting within its prescribed authority.

As the debate over UOCAVA shows, states often used their authority under the Clause to circumscribe the electorate, sometimes deliberately and, other times, through oversight. The remainder of this Part builds on this insight to show that an overly formalistic distinction between voter qualification standards and procedural regulations is not only ahistorical, but also impossible to maintain. Thus, the Court's concern in *Shelby County* that the VRA's preclearance regime impermissibly reaches nondiscriminatory voter qualification standards is somewhat misplaced given that the Court ignored another source of power, the Elections Clause, which permits such action by Congress in some limited circumstances.[246] This Part concludes by describing those instances in which it is within Congress's authority under the Clause to reach voter qualification standards, specifically where states fail to set voter qualifications for federal elections, or alternatively, seek to purposely circumscribe the electorate. The Court can then, in turn, assess the legislative record in light of these considerations.

A. *The Artificial Boundary Between Manner Regulations and Voter Qualification Standards*

This Section argues that, with respect to hybrid regulations—or regulations that implicate both voter qualifications and the manner of federal elections—the Supreme Court should read federal power broadly because it is difficult, if not impossible, to completely insulate voter qualification standards from federal authority under the Elections Clause.[247] The *Arizona Inter Tribal* analysis

[246] In *Shelby County*, the Court did not explore whether Congress built a legislative record demonstrating that some states have adopted regulations designed to purposely circumscribe the electorate, but voter identification laws and other election regulations enacted in some jurisdictions formerly covered by section 5 would arguably meet this threshold. *See* Tolson, *supra* note 10, at 2226-29 (discussing voting laws in North Carolina and Texas).

[247] *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 122 (1970) (arguing that congressional power under the Elections Clause is broad enough to reach voter qualifications because "[s]urely no voter *qualification* was more important to the Framers than the *geographical qualification* embodied in the concept of congressional districts" and "[t]here can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal elections"). *Compare* Dewitt v. Foley, No. 10-CV-510, 1992 U.S. Dist. LEXIS 14571, at *21 (N.D. Cal. Sept. 11, 1992), *aff'd*, 507 U.S. 901 (1993) ("The requirement that voters reside within the congressional district in which they vote is therefore properly understood as a restriction on the 'place' or 'manner' of election, which both Congress and the state legislature are empowered to prescribe."), *with* Carrington v. Rash, 380 U.S. 89, 91 (1965) ("Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the

proceeded as if the proof-of-citizenship requirement was part of a voter registration procedure that could, but did not necessarily have to, implicate voter qualifications over which Congress lacked constitutional authority.[248] In contrast, Justice Thomas, in dissent, considered voter registration to be a voter qualification standard governed by Article I, Section 2.[249] Notably, the majority referenced *Smiley* v. *Holm*,[250] which contains important language recognizing that Congress, pursuant to the Elections Clause, can implement "a complete code for congressional elections," including manner regulations, that govern:

> notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[251]

Justice Thomas, however, dismissed *Smiley*'s treatment of voter registration as a manner regulation as "dicta,"[252] and noted that the "Framers did not intend to leave voter qualifications to Congress."[253]

Justice Thomas's critique misses the point. Even if this language is dicta, *Smiley*, which rejected a congressional redistricting plan implemented without the governor's approval as required by state law, explicitly recognized that Congress can enact legislation that is necessary "to enforce the fundamental right involved."[254] By definition, this view of federal power renders the line

exercise of the franchise. Indeed, '[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.'" (alteration in original) (citations omitted)).

[248] Arizona v. Inter Tribal Council of Ariz., Inc. *(Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2258-59 (2013) (noting that prescribing voter qualifications is outside bounds of congressional power but explaining that Arizona had alternative means under statute to dictate qualification requirements).

[249] *Id.* at 2270 (Thomas, J., dissenting); *see also* Franita Tolson, *Congressional Authority to Protect Voting Rights After* Shelby County *and* Arizona Inter Tribal, 13 ELECTION L.J. 322, 323 n.6 (2014) (arguing that the current Supreme Court would not consider voter identification standards to be "manner" regulations despite a non-frivolous claim that Congress could regulate voter qualifications under the Elections Clause); William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 43-45 (making similar argument based on the Guarantee Clause of Article IV).

[250] 285 U.S. 355 (1932).

[251] *Id.* at 366.

[252] *Ariz. Inter Tribal*, 133 S. Ct. at 2268 (Thomas, J., dissenting).

[253] *Id.* at 2263.

[254] *Smiley*, 285 U.S. at 366.

between manner regulations and voter qualification standards unclear where both are implicated. And this has been the case, historically. In a comprehensive review of founding era sources discussing the "manner" of elections, Professor Robert Natelson observed that "English, Scottish, and Irish sources used the phrase 'manner of election' to encompass the times, places, and mechanics of voting; legislative districting; provisions for registration lists; the qualifications of electors and elected; strictures against election-day misconduct; and the rules of decision (majority, plurality, or lot)."[255] Professor Natelson further concluded that "Americans ascribed the same general content to the phrase 'manner of election' as the English, Irish, and Scots did."[256] While it is clear that the Framers did not intend to give Congress plenary control over voter qualifications under the Clause,[257] these sources highlight the significant overlap between manner regulations and voter qualification standards at the country's founding such that the boundary between the two was not readily apparent.

The Court's caselaw has similarly recognized the difficulty with policing this area. In *Minor v. Happersett*, for example, the Court held that the right to vote was not a privilege or immunity of citizenship protected by the Fourteenth Amendment, but denied that this interpretation of the Fourteenth Amendment affected, or even implicated, congressional authority under the Elections

[255] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (2010). In his summary of the evidence, Professor Natelson noted that American, English, Irish, and Scottish lawmakers defined "manner of election" in largely the same way, encompassing factors such as elector and candidate qualifications, time of elections, terms of office, place of elections, rules for elections, mechanics of voting, election dispute procedures and regulation of election day misconduct. *Id.* at 17-18.

[256] *Id.* at 13-14 (discussing the 1721 South Carolina election code that "described 'the Manner and Form of electing Members' to the lower house of the colonial assembly as including the qualifications of office-holders and the freedom of voters from civil process on election days,'" and the 1780 Massachusetts Constitution which "described the 'manner' by mandating the time of the election . . . property and age qualifications of electors, a notice of election, and who would serve as election judges"); *see also id.* at 16 ("State election laws adopted after Independence employed 'manner of election' and its variants in the same general way. The 'mode of holding elections' in a 1777 New York statute provided for public notice at least ten days before election in each county for elections for governor, lieutenant-governor, and senate. It specified the places for election, the supervising officers and election judges, times of notice, returns of poll lists, declaration of winner, and some voter qualifications.").

[257] *See id.* at 20 (explaining that "[t]he constitutional language governing congressional elections differed from usual eighteenth-century 'manner of election' provisions" because the Constitutions lists "qualifications, times, and places separately from 'Manner'" and describes "the residuum as 'the Manner of *holding* Elections").

Clause.[258] Unlike *Arizona Inter Tribal*, which unrealistically attempted to place voter qualifications beyond the reach of the Clause, the *Minor* Court resisted the urge to read its terms in this way. As the Court observed:

> It is not necessary to inquire whether this power of supervision thus given to Congress [under the Elections Clause] is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.[259]

"[U]ntil Congress acts" suggests that the Court reserved judgment on this issue, but by 1884, the Court definitively resolved whether Congress can protect the right to vote through its authority under the Elections Clause. In *Ex parte Yarbrough*, the Court sustained an indictment under the 1870 Enforcement Act against individual defendants who conspired against an African-American citizen "in the exercise of his right to vote for a member of the Congress of the United States . . . on account of his race, color, and previous condition of servitude . . . ."[260] The Court held that the Fifteenth Amendment "gives no affirmative right to the colored man to vote," suggesting that this provision standing alone is insufficient support for the Act, but ultimately concluded that "it is easy to see that under some circumstances it may operate as the immediate source of a right to vote."[261] Those circumstances are present where Congress is exercising its authority under the Elections Clause, as it was in *Yarbrough*, to regulate national elections.[262]

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[258] *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1874) (stating that Congress may make or alter regulations of time, place, or manner of elections notwithstanding holding); *see also* McPherson v. Blacker, 146 U.S. 1, 39 (1892) (holding that the Reconstruction Amendments did not alter the balance of power between states and federal government such that states who allowed their citizens to vote for electors at the time of the ratification of these Amendments had surrendered their power under Article II to appoint electors permanently).

[259] *Minor*, 88 U.S. (21 Wall.) at 171.

[260] *Ex parte* Yarbrough, 110 U.S. 651, 657 (1884); *see also* Valelly, *supra* note 174, at 133 (noting that the *Yarbrough* Court, in holding that Congress has ample authority to protect federal elections under Elections Clause, "*strengthened* Fifteenth Amendment enforcement by fusing it to the congressional regulatory power contained in Article I").

[261] *Yarbrough*, 110 U.S. at 665.

[262] *Id.* at 662 (upholding sections 5508 and 5520 of the 1870 Enforcement Act as a lawful exercise of Congress's power under the Elections Clause, the Fifteenth Amendment, and the Necessary and Proper Clause because Congress "must have the power to protect the elections on which its existence depends from violence and corruption"); *see also* Valelly, *supra* note 174, at 135 ("[A] *unanimous* Court ruled that in order to protect the electoral processes that made it a national representative assembly, Congress could protect the right to vote of any citizen, Black or white.").

In addition to recognizing that Congress could, in some instances, protect the right to vote from private interference through the Elections Clause, *Yarbrough* and another case, *In re Coy*,[263] also held that Congress's authority under the Elections Clause is not diminished simply because a federal regulation may affect state and local elections.[264] Federal law made it a crime for any election official to "violate or refuse to comply with his duty" at "any election for representative or delegate in Congress," but the defendant election inspectors argued they could not be indicted under federal law because they were tampering with the returns in order to taint state and local elections, not the House election.[265] The Court found this argument "manifestly contrary to common sense" because "[t]he manifest purpose of both systems of legislation is to remove the ballot-box as well as the certifications of the votes cast from all possible opportunity of falsification, forgery, or destruction."[266]

Despite caselaw embracing a pragmatic view of Congress's authority under the Clause, the Court retreated from enforcing constitutional protections for the right to vote in the late nineteenth and early twentieth centuries, which meant that state legislatures and complicit lower courts took the lead in reaffirming a narrow role for federal power in this area. For example, the 1890 Mississippi constitution, which disenfranchised a large segment of the state's African-American and white populations,[267] was not successfully challenged until 1965 because of a fundamental misunderstanding about the scope of the state's authority over voter qualifications. In the 1950s and 1960s, Mississippi amended its state constitution to add several prerequisites to voting, including a more

[263] 127 U.S. 731 (1888).

[264] *See id.* at 752 (stating that federal government may regulate Congressional elections, regardless of state and local elections taking place); *Yarbrough*, 110 U.S. at 662 (stating that no federal powers are "annulled because an election for state officers is held at the same time and place").

[265] *Coy*, 127 U.S. at 749-50, 753.

[266] *Id.* at 755; *see also* Valelly, *supra* note 174, at 135-36 (arguing that the Court rejected the claim because "during the elections the state and local elections officials had, for all intents and purposes, become officers of the United States and were subject to the jurisdiction of the United States").

[267] *See* United States v. Mississippi, 380 U.S. 128, 132 (1965) ("Section 244 of that constitution established a new prerequisite for voting: that a person otherwise qualified be able to read any section of the Mississippi Constitution, *or* understand the same when read to him, *or* give a reasonable interpretation thereof. This new requirement, coupled with the fact that until about 1952 Negroes were not eligible to vote in the primary election of the Democratic Party . . . worked so well in keeping Negroes from voting . . . that by 1899 the percentage of qualified voters in the State who were Negroes had declined from over 50% to about 9%, and by 1954 only about 5% of the Negroes of voting age in Mississippi were registered.").

stringent literacy qualification and a requirement of "good moral character."[268] A three judge court in *United States v. Mississippi*[269] found that the federal government did not have standing to challenge these provisions because Article I, Section 2, together with the Seventeenth and Twenty-Fourth Amendments, established that "the Congress of the nation and the people have affirmed in this century that the power to establish or change the qualifications of electors for federal officials can be accomplished by constitutional amendment alone."[270] In other words, the court treated the Seventeenth and Twenty-Fourth Amendments as not only reaffirmations of state control over voter qualifications, but also as express limitations on federal power.[271]

It was not until the Court began to affirmatively police the political sphere again in the mid-twentieth century that the Elections Clause experienced a rebirth,[272] but most cases still failed to delineate between voter qualification standards and manner regulations in determining the scope of federal power. For example, in *Crawford v. Marion County Election Board*,[273] the Court assumed that voter identification laws are voter qualifications rationally related to the right to vote because they "protect[] the integrity and reliability of the electoral process."[274] The Court then declined to apply strict scrutiny and upheld Indiana's voter identification law.[275] Despite treating voter identification laws as voter qualification standards, the Court identified these laws as one method that states can use to comply with the restrictions placed upon them by the NVRA and the Help America Vote Act, both of which are procedural regulations enacted by Congress pursuant to the Elections Clause.[276] While the Court somewhat cavalierly moved between categories in defending the constitutionality of voter

[268] *Id.* at 132-33.

[269] 229 F. Supp. 925 (D. Miss. 1964), *rev'd*, 380 U.S. 128 (1965).

[270] *Id.* at 947.

[271] *Id. But see* Newberry v. United States, 256 U.S. 232, 252 (1921) ("As finally submitted and adopted the [Seventeenth] Amendment does not undertake to modify Art. I, § 4, the source of congressional power to regulate the times, places and manner of holding elections. That section remains 'intact and applicable both to the election of Representatives and Senators.'" (quoting 46 CONG. REC. 848 (1911))).

[272] *See* Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (upholding the 1970 amendments to the VRA under the Elections Clause).

[273] 553 U.S. 181 (2008).

[274] *Id.* at 191.

[275] *See id.* at 202-03.

[276] *Id.* at 192 ("Two recently enacted federal statutes have made it necessary for States to reexamine their election procedures. Both contain provisions consistent with a State's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote.").

identification laws, its lack of clarity is a potential hazard for any federal legislation under the Elections Clause that could reach voter identification laws.

The lack of clarity between these two categories also abounds because many lawsuits over discriminatory voting schemes have involved joint challenges to voter qualification standards and procedural regulations. States enacted laws to further racial discrimination in voting without distinguishing between the two types of regulations. In *United States v. Louisiana*,[277] for example, the government challenged two state laws, one statutory (literacy test) and the other constitutional (moral fitness requirement) that together disenfranchised most African-Americans in the state.[278] In the post-Reconstruction era, the African-American vote often was decisive in resolving electoral disputes between the wealthy white planter class and white yeoman farmers.[279] To neutralize their power, Louisiana adopted a grandfather clause, exempting illiterate white voters registered prior to January 1, 1867 from its new qualifications.[280] The state then required all other voters to undergo new registration, thus cementing the newly enacted, discriminatory voter qualification standards.[281]

While these two provisions implicate voter qualifications and voter registration, respectively, to analyze each provision in isolation would ignore that, like most post-Reconstruction era state constitutions, Louisiana utilized both types of laws in order to disenfranchise their prospective voters. In striking down these regulations, the district court did not focus on the source from which state authority derived; instead, the court viewed federal power comprehensively, noting that the Elections Clause ("an affirmative grant of power to the United States") and the Fourteenth and Fifteenth Amendments ("mandates expressly prohibiting discriminatory state action") "deny plenary

[277] 225 F. Supp. 353 (E.D. La. 1963).

[278] Article VIII, section 1(d) of the state constitution provided in pertinent part that:

> He [a voter] shall be a person of good character and reputation, attached to the principles of the Constitution of the United States and of the State of Louisiana, and shall be able to understand and give a reasonable interpretation of any section of either Constitution when read to him by the registrar, and he must be well disposed to the good order and the happiness of the State of Louisiana and of the United States and must understand the duties and obligations of citizenship under a republican form of government.

Id. at 357-58 (alteration in original) (emphasis omitted).

[279] *Id.* at 369-70 (emphasizing the influence of the African-American vote in 1892 and 1896 gubernatorial elections).

[280] *Id.* at 373.

[281] *Id.* at 374 ("To make the disenfranchisement effective, the legislature directed a complete new registration of all voters. Registration rolls before and after the adoption of the [1898] Constitution show the prompt effect the grandfather clause had on Negro voters.").

and exclusive power to the States to determine voting requirements and give special protection to a citizen against discrimination in the electoral process."[282]

The Court's aggressive posture towards these regimes in the mid-twentieth century (including, notably, the invalidation of the all-white Democratic primary) led to some creativity among states in crafting both procedural laws and voter qualification standards that circumscribe the reach of the electorate, but under the guise of enforcing the state's power over voter qualifications.[283] In 1956, the Association of Citizens' Councils published a pamphlet, "Voter Qualification Laws in Louisiana – The Key to Victory in the Segregation Struggle," which advocated both the purging of the voter rolls and strict application of a constitutional interpretation test.[284] Similarly, Alabama adopted the "Boswell" amendment in 1946, which allowed only individuals who could understand a provision of the U.S. Constitution to register to vote.[285] In *Davis v. Schnell*,[286] a three judge court struck down the Boswell amendment on the grounds that it violated the Fifteenth Amendment because it was enacted with a discriminatory purpose; thus the question of the state's authority under the Elections Clause was never before the court.[287] But *Davis* shows that Alabama, like Louisiana, used procedural (voter registration) and voter qualification standards (literacy tests) to circumscribe the electorate, implicating the Elections Clause.

For this reason, the VRA, enacted in 1965 to address widespread racial discrimination in voting, had to be broad enough to reach procedural regulations and voter qualification standards, even those facially neutral laws enacted as a part of a comprehensive scheme of disenfranchisement that may or may not have the requisite discriminatory intent. Because of its scope, the VRA cannot be justified based on the Fourteenth and Fifteenth Amendments alone. While discriminatory voter qualification standards triggered coverage under section 4(b), the suspension of new voting laws applied to all changes, not just those changes that were racially discriminatory, procedural, or applied to the

[282] *Id.* at 358; *see also id.* at 360-61 ("Nothing in the language or history of the Tenth Amendment gives the State exclusive sovereignty over the election processes against the Federal government's otherwise constitutional exercise of a power. . . . The totality of implied powers these sections grant to Congress are full authority for Congress to enact the Civil Rights Act [of 1960] or other appropriate legislation to regulate elections (including registration) under Article I, Section 4, and to protect the integrity of the electoral process under the Fourteenth and Fifteenth Amendments.").

[283] *Id.* at 378-79 (detailing efforts in 1950s by white Association of Citizens' Councils to purge African-Americans from voter rolls).

[284] *Id.* at 378.

[285] *See* Davis v. Schnell, 81 F. Supp. 872, 874 (D. Ala. 1949).

[286] 81 F. Supp. 872 (D. Ala. 1949).

[287] *Id.* at 880 (examining history of Boswell amendment).

qualification of voters. Congress recognized that states routinely relied on their control over voter qualifications and their autonomy over the times, places, and manner of federal election in order to further racial discrimination in voting through facially neutral regulations. Congress therefore crafted the preclearance regime of sections 4(b) and 5 very broadly to capture discrimination writ large, and in doing so, recognized that any boundaries between time, place, and manner regulations, and voter qualification standards, respectively, were mere parchment barriers.[288]

B. *Voter Qualification Standards as Manner Regulations: A Blueprint for Federal Intervention*

Historically, states have used their authority over state elections and voter qualifications to discourage voter turnout in federal elections.[289] This misuse of power reveals the clear danger of imposing a dual sovereignty framework on the Elections Clause, a framework that places voter qualifications squarely within the province of state governments and potentially leads to voter apathy and broad disenfranchisement in federal elections. This is the danger of *Shelby County* as precedent—the decision imposes a rigid barrier between state and federal authority that undermines Congress's authority under the Elections Clause, which is an unarticulated, but still justifiable, source of authority for the VRA.

Given this insight, the key takeaway from *Arizona Inter Tribal* is not its broad reading of congressional power under the Elections Clause. Prior cases had already referred to Congress's authority under the Clause as paramount.[290] *Arizona Inter Tribal* is of vital importance because the Court treated state law as presumptively valid, even in finding that federal law preempted this particular iteration of the Arizona proof-of-citizenship requirement.[291] This illegitimate nod to state power is contrary to the Clause's structure and purpose, which would forbid Arizona's proof-of-citizenship law if its effect on the federal electorate is

[288] *See* Tolson, *supra* note 15, at 1203-07 (defending preclearance regime as constitutional exercise of Congress's authority under Elections Clause).

[289] *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2624-25 (2013) (noting the wide disparity between white and minority voter registration before enactment of the VRA).

[290] *See, e.g.*, *Ex parte* Siebold, 100 U.S. 371, 384 (1880) (indicating that no deference to state sovereignty is necessary because federal law is "paramount").

[291] *See* Arizona v. Inter Tribal Council of Ariz., Inc. *(Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2258-59 (2013) ("Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications. If, but for Arizona's interpretation of the 'accept and use' provision, the State would be precluded from obtaining information necessary for enforcement, we would have to determine whether Arizona's interpretation, though plainly not the best reading, is at least a possible one.").

deleterious and render unnecessary any demonstration that the federal law interferes with the state's ability to enforce its voter qualification standard. Arguably, Congress can intervene when a state voter qualification standard has significant implications for participation and turn out in federal elections, as in the case of voter identification laws and proof-of-citizenship requirements.[292] Congress can also regulate when states have "under-legislated" with respect to voter qualifications in order to purposely circumscribe the electorate, as was the case with the all-white Democratic primary. This Section discusses each of these contentions in turn.

1. State Law Undermines Turnout and Participation in Federal Elections

The prior sections argued that it is difficult to police the boundary between voter qualification standards and manner regulations because of the uncertainty surrounding the definition of these terms. As this Section shows, this problem is actual, not simply theoretical, and has real world effects on turnout and participation in federal elections. For example, one could argue that voter identification laws are more like manner regulations than voter qualification standards, and Congress can prevent the state from prioritizing its interest in ensuring the integrity of the electoral process over a prospective voter's right to cast a ballot through its authority under the Elections Clause.[293] Requiring that a voter show identification to prevent fraud or to ensure the integrity of the

[292] This Article does not argue that the Elections Clause gives Congress plenary authority over voter qualifications. For example, states can still enact proof-of-citizenship and voter identification requirements for federal elections if they produce empirical evidence that these requirements are necessary to further their regulatory interests and Congress has not barred these restrictions. *See* Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 162 (2015) ("Under heightened scrutiny, the Court would strike down restrictive regulations that are not supported by empirical evidence, or that do not directly respond to a problem in the state's electoral system."). Nor does the theory advocated herein disturb the Court's holding in *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970), which stated that Congress cannot lower the voting age in state and local elections from twenty-one to eighteen when legislating under the Elections Clause. The Court focused on whether there was any evidence that restricting the electorate to those over twenty-one disproportionately affected racial minorities, *id.*, but there was also no evidence that the age restriction kept a substantial portion of the population from voting in federal elections. Instead, this approach is analytically similar to the Court's Commerce Clause cases, where it has held that Congress can reach noneconomic, intrastate activity where the failure to do so could undermine a lawful regulation of interstate commerce. *See* Gonzalez v. Raich, 254 U.S. 1, 22 (2005) (holding that Congress may regulate "purely intrastate activity" affecting interstate commerce).

[293] *See* Tolson, *supra* note 10, at 2269 (arguing that the Court must "conced[e] the sovereignty that Congress has under the [Elections] Clause, which may, in some limited instances, permissibly interfere with state control over voter qualifications").

electoral process aligns more with regulating the mechanics of the actual election, as opposed to functioning as a voter qualification standard that determines whether a person is qualified to vote (such as age or residency requirements). As Professor Derek Muller argued, unlike voter qualification standards that are "tethered to some concept of who may participate in the political process," voter identification laws are better seen as a "means of enforcing qualifications" because they lack a clear link to the state's determination of who can participate.[294] Yet defining these laws as voter qualification standards, despite this definitional uncertainty, would place this category firmly beyond the reach of federal law regardless of its overall impact on voter participation.[295]

Less clear are proof-of-citizenship requirements, which are an unusual mix of voter qualification standards and election procedure. They implicate questions of whether a voter is qualified to cast a ballot in the first instance and also whether the voter has presented sufficient evidence of citizenship such that they can register to vote. Given their hybrid nature, these laws illustrate that the Elections Clause can and should reach voter qualification standards if states adopt stringent proof-of-citizenship requirements that undermine turnout and participation in federal elections. There is a sufficient nexus between proof-of-citizenship requirements as voter qualification standards and proof-of-citizenship requirements as voter registration/manner regulations that arguably justifies this view of congressional authority.

In recent years, states have enacted proof-of-citizenship requirements under the guise of preventing non-citizen voting, but the effect of these regulations has been to depress turnout among individuals who can legally cast a ballot.[296] *Arizona Inter Tribal* punted on the question of whether the NVRA interfered with Arizona's authority to enforce its voter qualifications, inviting Arizona to submit a request to the Election Assistance Commission ("EAC") to include proof-of-citizenship requirements as a part of the federal voter registration form's state-specific instructions.[297]

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[294] Muller, *supra* note 10, at 316 n.82 ("Voter registration and voter identification, then, are less qualifications and more means of enforcing qualifications.").

[295] *See Ariz. Inter Tribal*, 133 S. Ct. at 2258-59 (noting that a federal statute precluding a state from enacting voting qualifications would be constitutionally questionable). *But see Mitchell*, 400 U.S. at 122 (referring to the single-member district requirement for congressional elections as a voter qualification standard).

[296] BRENNAN CTR. FOR JUSTICE, NYU SCH. OF LAW, VOTING RIGHTS & ELECTIONS SERIES: PROOF OF CITIZENSHIP 1 (Sept. 12, 2006), http://www.brennancenter.org/sites/default/files/analysis/Proof%20of%20Cistizenship.pdf [https://perma.cc/9TRG-DPXB] (indicating that proof-of-citizenship requirements disenfranchise many eligible voters).

[297] *Ariz. Inter Tribal*, 133 S. Ct. at 2260.

Two days later, Arizona did exactly as the Court recommended, and not even a year later, found itself in litigation again—this time with the State of Kansas as a co-plaintiff—requesting judicial review of the EAC's decision to decline the states' request that the proof-of-citizenship requirement be added to the federal voter registration form.[298] Citing to the constitutional issues expressed in *Arizona Inter Tribal*, the district court found that the EAC's decision to deny the states' requested instructions interfered with the states' authority to enforce their voter qualification standards.[299] The court held that the EAC had a "nondiscretionary duty" to update the federal form to reflect each state's law.[300] This finding prioritized the states' control of voter qualifications over Congress's sovereign authority to regulate the times, places, and manner of federal elections, which it had exercised in enacting the NVRA.

The district court's approach in *Kobach v. United States Election Assistance Commission*[301] of making a hard delineation between voter qualifications and manner regulations was substantively no different from the Supreme Court's decision to treat state law as presumptively valid in *Arizona Inter Tribal*. The district court explicitly viewed proof-of-citizenship requirements as voter qualification standards (and any state laws within that category as presumptively valid), whereas the NVRA, in the court's view, implicated Congress's broad authority to regulate voter registration for federal elections; thus, the Kansas statute raised no preemption concerns because it addressed a different subject than the federal statute.[302] But the district court's opinion left the door open for the subversion of federal elections through the disenfranchisement of legal voters. Eight months later, the Court of Appeals for the Tenth Circuit reversed and remanded, applying *Chevron* deference to the EAC's decision and holding it to be final and valid.[303]

Although reversed on appeal, the district court's decision in *Kobach* highlighted a key tension between the State's control over voter qualification and Congress's sovereignty over the administration of federal elections, a tension that has continued to haunt later proceedings in the case. After litigating its proof-of-citizenship requirement in 2014 and 2015, Kansas—along with

[298] *See* Kobach v. U.S. Election Assistance Comm'n, 6 F. Supp. 3d 1252, 1256-57 (D. Kan.), *rev'd*, 772 F.3d 1183 (10th Cir. 2014).

[299] *Id.* at 1263 ("Here, the EAC's decision to deny the states' requested instructions has precluded the states from obtaining proof of citizenship that the states have deemed necessary to enforce voter qualifications.").

[300] *Id.* at 1271.

[301] 6 F. Supp. 3d 1252 (D. Kan.), *rev'd*, 772 F. 3d 1183 (10th Cir. 2014).

[302] *Id.* at 1267 ("It is clear that the text of the NVRA does not address the same subject as the states' laws—documentary proof of citizenship.").

[303] Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1190-94 (10th Cir. 2014).

Alabama and Georgia—once again requested the EAC to add this requirement to the federal form's state-specific instructions.[304] Surprisingly, the EAC's new executive director, Brian Newby, unilaterally and without the input of the EAC commissioners, approved the modifications.[305] Residents and organizations in these states filed suit, seeking declaratory and injunctive relief, and the district court held that the EAC's grant of the states' requests constituted final agency action.[306]

On appeal, the Court of Appeals for the D.C. Circuit reversed Director Newby's decision.[307] While the court acknowledged that its decision would not affect proof-of-citizenship requirements that apply to state and local elections, the court recognized that these requirements made it extremely difficult for organizations to register voters for federal elections as well.[308] The court explained:

> [The League of Women Voters] held registration drives both in formal venues, like naturalization ceremonies, and a wide variety of informal ones, like shopping malls, community festivals, and even bus stops. But the Kansas proof-of-citizenship requirement *substantially limited* the ability of the Kansas League to successfully register voters because (1) often potential voters didn't have citizenship documents with them, (2) even if they did, the League didn't have equipment to copy those documents, and (3) some potential voters balked at the idea of allowing the League's volunteers to copy their sensitive citizenship documents (and members of the League echoed those concerns). Predictably, the number of voters successfully registered at League drives plummeted.[309]

Recognizing the sovereignty that Congress retains under the Elections Clause can help resolve issues that arise when a state's election regulations blur the lines between qualification standards and procedural regulations, and this recognition

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[304] League of Women Voters of U.S. v. Newby, 195 F. Supp. 3d 80, 85-86 (D.D.C. 2016), *rev'd*, 838 F. 3d 1 (D.C. Cir. 2016).

[305] *Id.* at 86 (indicating that Newby approved the states' requests before EAC commissioners formally considered or voted on the requests).

[306] *Id.* at 88-95 (holding that, per requirements for preliminary injunctive relief, the organizations failed to demonstrate irreparable harm).

[307] League of Women Voters of U.S. v. Newby, 838 F.3d 1, 14 (D.C. Cir. 2016).

[308] *Id.* at 8. To understand how these difficulties were exacerbated, see *Belenky v. Kobach*, No. 2013CV1331, 2016 WL 8293871, at *5-6 (D. Kan. Jan. 15, 2016), which held that Kansas law required qualified federal form applicants to be registered for all elections, and *Kobach v. U.S. Election Assistance Commission*, 6 F. Supp. 3d 1252, 1257 (D. Kan.), *rev'd*, 772 F.3d 1183 (10th Cir. 2014), which allowed the state proof-of-citizenship requirements to be used with the federal form.

[309] *Newby*, 838 F.3d at 8 (emphasis added).

places a finger on the scale in favor of broad enfranchisement in federal elections. Consistent with this reasoning, the appellate court held that it was the EAC's job to determine whether the documentary proof-of-citizenship requirement was necessary, and it was within the EAC's discretion whether to defer to the State's declaration of noncitizen voting as sufficient evidence to justify its law.[310] The court implicitly acknowledged that proof-of-citizenship requirements carry a substantial risk of disenfranchisement at all levels, such that the EAC can require the State to come forward with actual proof of significant noncitizen voting to justify the regulation.[311]

The concern about broad disenfranchisement was also present in the parallel proceeding before the Tenth Circuit over whether the NVRA preempted Kansas's proof-of-citizenship requirement, and the Tenth Circuit's decision is best understood as the vindication of federal authority over a contrary state voter qualification standard that would suppress voter turnout.[312] The issue before the court was whether section 5 of the NVRA, which provides that the state motor voter form "may require only the minimum amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process," interfered with Kansas's ability to enforce its documentary proof-of-citizenship requirement.[313]

Kansas, like Arizona, required documents such as a birth certificate or a passport to prove citizenship, whereas the NVRA required only that voters attest to their citizenship status.[314] The court held that "attestation under penalty of perjury is the *presumptive* minimum amount of information necessary for state election officials to carry out their eligibility-assessment and registration duties."[315] Should state officials need more information, "the presumption ordinarily can be rebutted (i.e., overcome) only by a factual showing that substantial numbers of noncitizens have successfully registered to vote under the NVRA's attestation requirement."[316] While the court did not definitively resolve whether the proof-of-citizenship requirement is a voter qualification standard or a procedural regulation, focusing instead on the fact that voter registration falls

[310] *Id.* at 11.

[311] *Id.* at 12-14.

[312] While *Arizona Inter Tribal* involved a facial challenge to the NVRA, the Tenth Circuit case involved an as-applied challenge.

[313] Fish v. Kobach, 840 F.3d 710, 716 (10th Cir. 2016) (upholding district court order granting the plaintiff's motion for a preliminary injunction against enforcement of Kansas's documentary proof-of-citizenship law).

[314] *Id.* at 717.

[315] *Id.* at 716-17.

[316] *Id.* at 717.

within the ambit of Congress's power under the Elections Clause, the court recognized that federal authority under the Clause has to be read in light of its broad purpose: protection against the states' refusal to conduct federal elections, "effectively terminating the national government."[317] Depressing turnout in federal elections can have a similar deleterious effect.

The Tenth Circuit's view of the NVRA citizenship requirement as a baseline from which states cannot deviate without providing proof that change is needed reflected the concern, also embodied in *League of Women Voters of U.S. v. Newby*,[318] about the impact of voter qualification standards on the viability and health of federal elections. Thus, the NVRA can properly reach proof-of-citizenship requirements, even if such requirements are found to be voter qualification standards, because these requirements are not only inexplicably intertwined with voter registration, but they can drive down voter turnout in federal elections, triggering Congress's Elections Clause authority.

2. The "Under-Legislation" of Voter Qualification Standards

As illustrated by UOCAVA, Congress arguably has reserve power to set voter qualifications under both Article I, Section 2 and the Elections Clause in order to guard against the possibility that states will refuse to regulate with respect to federal elections. In *Oregon v. Mitchell*,[319] for example, the Court upheld the 1970 amendments to the VRA that lowered the voting age in national elections from twenty-one to eighteen.[320] Age is arguably a voter qualification standard, but the justices engaged in a broad reading of federal power to sustain the provision. For example, Justice Black, writing for himself on this point, argued that "the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed it advisable to do so."[321] Four other Justices argued that the Equal Protection Clause would sustain the extension of the franchise to eighteen-year-olds even though the record was devoid of any evidence of racial discrimination in voting or impermissible motivation on the

[317] *Id.* at 724. On remand, the district court held a bench trial and determined that the Kansas proof-of-citizenship law violated the NVRA. *See* Fish v. Kobach, 309 F. Supp. 3d 1048, 1113 (D. Kan. 2018).

[318] 838 F.3d 1 (D.C. 2016).

[319] 400 U.S. 112 (1970).

[320] *Id.* at 120.

[321] *Id.* at 119 (arguing that Elections Clause and Necessary and Proper Clause gave Congress authority to set voter qualifications for federal elections).

part of the states.[322] *Arizona Inter Tribal* is in tension with *Mitchell*,[323] creating uncertainty about how far congressional authority extends when states not only fail to act on voter qualifications, but more commonly, "under-legislate" in determining who can participate.[324]

Treating voter qualification standards as manner regulations in some limited instances can mitigate this problem, and this approach has an analytical parallel in the Supreme Court's long history with the all-white primary. The use of procedural regulations to increase the effectiveness of discriminatory voter qualification standards was common in the pre-VRA South,[325] but the extent to which the Elections Clause played a role in dismantling these systems has been overlooked in the legal literature. Part of this oversight is because the all-white primary, invalidated under the Fourteenth and Fifteenth Amendments, was the primary mechanism through which states used under-legislation as a tactic to facilitate racial discrimination in voting. While determining who can participate

[322] *See, e.g.*, *id.* at 143 (Douglas, J., concurring in part and dissenting in part) (noting "election inequalities created by state laws and based on factors other than race may violate the Equal Protection Clause . . . .").

[323] *See* Arizona v. Inter Tribal Council of Ariz., Inc. *(Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2258 n.8 (2013) ("In *Mitchell*, the judgment of the Court was that Congress could compel the States to permit 18-year-olds to vote in federal elections. Of the five Justices who concurred in that outcome, only Justice Black was of the view that congressional power to prescribe this age qualification derived from the Elections Clause, while four Justices relied on the Fourteenth Amendment. That result, which lacked a majority rationale, is of minimal precedential value here." (citations omitted)). However, the *Arizona Inter Tribal* majority overlooked that *Mitchell* also endorsed an interpretation of the Fourteenth Amendment that many members of the Court are unlikely to support today.

[324] This Section focuses on the "White Primary Cases," *see* discussion *infra* 327-346, as the paradigmatic example of under-legislation, but under-legislation generally includes any circumstance in which the state legislature either fails to define a key term with respect to voter qualifications, or delegates the responsibility for defining the term to a third party. After Reconstruction, for example, states would delegate significant authority to election registrars in order to facilitate private discrimination through under-legislation. *See* Tolson, *supra* note 183, at 464-65. A famous modern day example would be the Florida Supreme Court's failure to define the "intent of the voter" standard that governed the recount during the 2000 presidential election. *See* Gore v. Harris, 772 So. 2d 1243, 1254-55 (Fla.), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

[325] United States v. Louisiana, 225 F. Supp. 353, 381-82 (E.D. La. 1963) ("The decision to enforce the interpretation test more than thirty years after its adoption was accompanied, in almost every parish where the test has been used, by a wholesale purge of Negro voters or by periodic registration so that Negro voters were required to re-register *after* the test came into use. Citizen Council members challenged the registration of large numbers of Negro voters on the ground that they had not satisfied all of the requirements of the Louisiana voter qualification laws at the time they registered.").

in the primary falls firmly within the voter qualification camp, there was an interconnectedness between the use of election procedure and voter qualification standards to disenfranchise African-Americans during this time period.[326]

In the "White Primary Cases," the Supreme Court invalidated a succession of Texas laws that prohibited African-American voters from participating in the Democratic Party's primary. The 1923 version of the law stated, "[i]n no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas."[327] The Court, in *Nixon v. Herndon*,[328] struck the law down as a facially discriminatory effort by the state to disenfranchise African-Americans on the basis of race in violation of the Fourteenth Amendment.[329] *Herndon*'s promise of rigorous judicial enforcement proved to be illusory, however.

In *Newberry v. United States*,[330] the Court reversed the convictions of defendants who had violated the Federal Corrupt Practices Act ("FCPA") on the ground that Congress's authority under the Elections Clause did not extend to enacting legislation that applied to party primaries.[331] Similarly, in *Grovey v. Townsend*,[332] the Supreme Court upheld a Texas Democratic Party resolution that limited membership to whites on the grounds that there was no direct state action that ran afoul of the Fourteenth and Fifteenth Amendments.[333] The Court

[326] *See id.* at 377 ("The white primary not only effectively kept Negroes from voting in the only election that had any significance in the Louisiana electoral process but it also correspondingly depressed Negro registration to insignificantly low numbers.").

[327] 1923 Tex. Gen. Laws 74.

[328] 273 U.S. 536 (1927).

[329] *Id.* at 540-41 ("We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth."); *see also* Nixon v. Condon, 286 U.S. 73, 89 (1932) ("The Fourteenth Amendment, adopted as it was with special solitude for the equal protection of the members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.").

[330] 256 U.S. 232 (1921).

[331] *Id.* at 258. The FCPA provided, in pertinent part that, "No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides . . . ." Federal Corrupt Practices Act, 2 U.S.C. §§ 241-248, *repealed by* Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101-30126 (2018); *Newberry*, 256 U.S. at 243. The FCPA tracked the Enforcement Act of 1870 by incorporating state law by reference.

[332] 295 U.S. 45 (1935).

[333] *Id.* at 55 ("We find no ground for the holding that the respondent has in obedience to the mandate of the law of Texas discriminated against the petitioner or denied him any right guaranteed by the Fourteenth and Fifteenth Amendments.").

refused to intervene even though it was clear that the resolution was an instance of under-legislation, or where the state left a gap in its regulatory regime in order to delegate to the party the responsibility of furthering discrimination.

The *Grovey* Court's focus on the state action requirement was not that surprising in light of *Newberry*. While earlier cases placed significant weight on the fact that Congress enjoyed substantial authority to protect rights created by the Constitution,[334] the *Newberry* Court found "no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from [the Elections Clause]."[335] The Court's about-face from *Herndon* to *Newberry* can be explained only in federalism terms. Under a conservative interpretation of *Newberry*, the State's failure to police the primary process could justify federal action. Instead, the Court goes further in protecting state authority and the autonomy of the political parties by finding that Congress has no power to regulate party primaries at all.[336]

In the years following *Grovey* and *Newberry*, the Court recognized that its position ignored the practical reality that African-Americans were being disenfranchised indirectly through the party primary process and that the State was complicit in this disenfranchisement. In *United States v. Classic*,[337] the Court sustained the indictment of election commissioners who altered election returns in a primary election, and in doing so, upheld the constitutionality of federal criminal laws enacted pursuant to Congress's authority under the Elections Clause and the Necessary and Proper Clause that prohibited anyone acting under color of state law from depriving an individual of any "rights,

[334] *See Ex parte* Clarke, 100 U.S. 399, 404 (1880); *Ex parte* Siebold, 100 U.S. 371, 383 (1880). Chief Justice White criticized the majority for this switch in his dissent in *Newberry*, noting that, without the Elections Clause, states do not have any authority to regulate the times, places, and manner of federal elections. 256 U.S. at 261-62 (White, C.J., dissenting) ("[I]t follows that the state power to create primaries as to United States Senators depended upon the grant [the Elections Clause] for its existence. It also follows that, as the conferring of the power on the States and the reservation of the authority in Congress to regulate were absolutely coterminous . . . it results that nothing is possible of being done under the former which is not subjected to the limitation imposed by the latter.").

[335] *Newberry*, 256 U.S. at 249.

[336] *Id.* at 258 ("We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the State and infringe upon liberties reserved to the people.").

[337] 313 U.S. 299 (1941).

privileges, and immunities secured and protected by the Constitution and laws of the United States."[338] The Court found that the commissioners interfered with the right to vote "at the only stage of the election procedure when their choice is of significance . . . ."[339] This case also corroborated that Congress's authority to regulate party primaries under Article I and the Elections Clause is not only broader than it is under the Fourteenth and Fifteenth Amendments, but also that there is no state action requirement:

> While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."
>
> Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.[340]

In the Court's view, the Elections Clause and the Necessary and Proper Clause extended federal authority to party primaries and ensured that voters qualified under state law could cast their ballot.[341] Thus, states still have the primary role of choosing voter qualifications, but the Court is clear that, with respect to policing the procedure of elections, state control over voter qualifications exists only to the extent that Congress has not exercised its powers pursuant to the Elections and Necessary and Proper Clauses.[342] *Classic*, and its holding that the primary is an integral part of the election for selecting congressman, opened the door for a successful challenge to the all-white primary, but did so with significant help from the Elections Clause.

Two of the later White Primary Cases highlight, in rather dramatic fashion, that federal power in this area should be viewed comprehensively. *Smith v.*

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[338] *Id.* at 309-10.

[339] *Id.* at 314.

[340] *Id.* at 315 (citations omitted).

[341] *Id.* at 325. Notably, the Court introduced the idea that the right to vote has independent federal significance separate from its regulation by the states. For more on this point, see generally TOLSON, *supra* note 211.

[342] *Classic*, 313 U.S. at 315.

Allwright,[343] which held that the Democratic Party's practice of excluding African-Americans from their primary violated the Fifteenth Amendment,[344] and *Terry v. Adams*,[345] which extended *Smith*'s broad reading of federal power to primaries conducted by a county political organization,[346] illustrate the difficulty of creating a firm boundary between manner regulations and voter qualification standards: the problem of circumvention. Under-legislation by the State with respect to voter qualifications is often intended to circumvent the restrictions of the Fourteenth and Fifteenth Amendments and use private organizations to promote racial discrimination.[347] But key to federal power being able to reach these discriminatory regulations was a judicial recognition that Congress could regulate party primaries under the Elections Clause.

As a result, any analysis that ignores the broad spectrum of congressional authority over elections is woefully inadequate. Enforcing a rigid boundary between voter qualification standards and time, place, and manner regulations has had real world consequences beyond the all-white Democratic primary for much of the twentieth century. For example, in 1965, less than one percent of African-Americans were registered to vote in Dallas County, Alabama, even though African-Americans constituted half of the county population. The registration office was open only two days a month, and the registrars would arrive late, leave early, and take long lunches, making the process of registering to vote difficult, if not impossible. In addition to literacy tests and other discriminatory voter qualification standards, the difficulty of registering to vote—which is a manner regulation under the Clause—arguably contributed to the low percentage of African-Americans in the county capable of exercising their right to vote. Federalism theory, with its state-centric focus, would promote a theory of elections that walls off voter qualification standards, ignoring that these regulations, in conjunction with time, place, and manner laws, can unduly affect the health of federal elections and undermine the strength of the right to vote.

CONCLUSION

The VRA is a permissible exercise of federal power, justifiable pursuant to the Fourteenth and Fifteenth Amendments and the Elections Clause.

[343] 321 U.S. 649 (1944).

[344] *Id.* at 766 ("Here we are applying . . . the well established principle of the Fifteenth Amendment, forbidding the abridgment by a state of a citizen's right to vote.").

[345] 345 U.S. 461 (1953).

[346] *Id.* at 462.

[347] Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 429 (2014) ("The Court found that the anti-circumvention norm justified abrogating the First Amendment rights of a private association because the state was using the Democratic Party to circumvent the protections of the Fourteenth and Fifteenth Amendments.").

Nonetheless, battles over the legitimacy and scope of the VRA, and its impact on the states' authority over elections, have been hard fought and extensively litigated, the apotheosis of which has been the recent invalidation of section 4(b) of the Act in *Shelby County*. But these federalism battles are not why the VRA is unique among statutes; instead, these battles illustrate a deeper, and more problematic, pathology surrounding the relationship between federalism and elections in the Supreme Court's caselaw.

The Court's commitment to federalism means that even those constitutional provisions that eschew federalism are at risk of being narrowed in the name of state sovereignty. With respect to the Reconstruction Amendments, in particular, it is conceptually difficult to present a framework for congressional power that limits Congress to enacting only remedial legislation if such legislation is also premised on the Elections Clause, which is not limited by the same federalism concerns as other provisions.

This Article illustrates that any federalism concerns can be overcome if federal action derives from more than one source of constitutional authority. Although the scope of federal power is often ambiguous or uncertain in these circumstances, it arguably gives Congress greater power than when proceeding under one provision alone. In addition, the boundary between voter qualification standards and manner regulations is fluid enough that the overlap between the two should not stand as a barrier to federal intervention. Indeed, states have routinely used the ambiguity of this regulatory space to undermine the health and legitimacy of federal elections. If the Court credits the full range of congressional power in this area—by analyzing the legislative record in light of Congress's authority under the Elections Clause as well as the Fourteenth and Fifteenth Amendments—the federalism justifications touted by the *Shelby County* Court become significantly less compelling.

ELECTION LAW "FEDERALISM" AND THE LIMITS OF THE ANTIDISCRIMINATION FRAMEWORK

FRANITA TOLSON*

ABSTRACT

If the United States Supreme Court conceived of the right to vote as an active entitlement that safeguards other fundamental rights rather than as a passive privilege that permits courts to prioritize state sovereignty over broad enfranchisement, then many of the errors that have become commonplace in our system of elections would not occur. It is unlikely, however, that the Court will take the steps necessary to extend the constitutional protections afforded to the right to vote. In recent years, the Court has sharply circumscribed Congress's ability to protect the right to vote under the Fourteenth and Fifteenth Amendments, rejecting any new conceptual framework that would more properly allocate authority over voting rights between the states and the federal government.

Nonetheless, both scholars and voting rights advocates can take advantage of the existing framework, by using the Elections Clause to supplement the Reconstruction Amendments in an effort to protect voting rights and defend the scope of federal antidiscrimination legislation. Under the Clause, states set procedural regulations that govern federal elections, but Congress can also enact its own laws and, more importantly, veto state regulations at will. This provision

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has been significantly underutilized in the two-centuries-long battle over the regulation of federal elections.

Despite this unique structure that places final policy-making authority in the hands of Congress, both the Supreme Court and legal scholars tend to discuss the Clause in federalism terms, characterizing the exercise of federal power as a rare and somewhat unwelcome intrusion on the states' relatively broad authority to legislate with respect to federal elections. Contrary to this view, this Article argues that Congress and the courts can disregard state sovereignty in enacting, enforcing, and resolving the constitutionality of legislation passed pursuant to the Elections Clause. Close examination reveals that the Clause's structure does not fit comfortably within any of the prevailing theories of federalism, which deploy notions of state sovereignty in ways that are inconsistent with the Clause's text, purpose, and history.

Descriptively, federalism doctrine fails to explain the regulatory dynamic between the states and Congress over federal elections because the Clause embodies values other than those that our federalist system safeguards. Traditional federalism doctrine emphasizes objectives such as increased citizen involvement, experimentation, and innovation in state government. In contrast, the touchstone of the Elections Clause is the continued existence and political legitimacy of federal elections: that a winner be chosen from an electoral process—implemented by the states at the sufferance of Congress—that is legitimized by clear rules and a definitive outcome. This focus makes it difficult to embrace the state-centric approach of traditional federalism, or the flexibility and nationalism that is the hallmark of the "new" federalism. This insight has significant implications as we approach the 2020 redistricting cycle, in which states will seek to defend discriminatory redistricting plans, enact more restrictive voting laws, and challenge the constitutionality of federal voting rights legislation on federalism grounds.

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INTRODUCTION

During the oral argument for *Shelby County v. Holder,* which involved a constitutional challenge to sections 4(b) and 5 of the Voting Rights Act of 1965 (VRA),[1] Justice Antonin Scalia surprised onlookers by arguing that section 5's unanimous reauthorization by the Senate in 2006 weighed against, rather than in favor of, the constitutionality of these provisions.[2] He contended that section 5 was part of a grand scheme of "racial entitlements" that are very difficult to reverse through the legislative process;[3] thus, the unanimous vote in favor of reauthorizing the Act was indicative, not of public preference, but of the desire of special interest groups to insulate the VRA from ever being legislatively overturned.[4] Other members of the Supreme Court may not have framed the problems surrounding the VRA in those terms, but they agreed with Justice Scalia's basic insight that the statute impermissibly gave minority groups an advantage in the legislative process over the majority at the expense of state sovereignty.[5]

The Court's attempt to strike a balance between these competing, and sometimes conflicting, principles has led to a jurisprudence that is inconsistent, insufficiently protective of minority rights, and over-values the states' sovereignty over elections.[6] One of the most nefarious examples of this problematic approach is in the area of

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1. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 4-5, 120 Stat. 577, 580-81 (2006) (codified as amended in scattered sections of 52 U.S.C.).

2. *See* Transcript of Oral Argument at 16-17, 47-48, Shelby County v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96).

3. *Id.* at 47.

4. *See id.* at 47-48. Justice Scalia further observed

> that this is not the kind of a question you can leave to Congress. There are certain districts in the House that are black districts by law just about now. And even the Virginia Senators, they have no interest in voting against this. The State government is not their government, and they are going to lose—they are going to lose votes if they do not reenact the Voting Rights Act.
>
> Even the name of it is wonderful: The Voting Rights Act. Who is going to vote against that in the future?

Id.

5. *See Shelby County*, 133 S. Ct. at 2618-19, 2623-24, 2631.

6. *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1196-98, 1200 (2012).

legislative redistricting. Here, the Justices have breathed new life into racial gerrymandering claims as a means of policing state redistricting plans that infringe on minority rights,[7] while simultaneously permitting partisan justifications in the name of state sovereignty that could otherwise legitimize regressive and problematic plans.[8] But there are also other cases in which the Court shows undue solicitude to the states, such as those involving voter identification laws and other restrictive voting laws that make it significantly more difficult to cast a ballot,[9] illustrating that the storied position of state sovereignty as the focal point of our federalist system holds steady even when unwarranted.[10]

Along the same lines, *Shelby County* invalidated section 4(b) of the VRA for infringing on the "equal sovereignty" of the states through a formula that used forty-year-old data to single out certain jurisdictions for voting rights violations.[11] Indicative of recent case law limiting the reach of the Fourteenth and Fifteenth Amendments because of federalism concerns, the Court focused its attention on "rediscovering" the arbitrary divide between the states and the federal government over election regulation more generally.[12] In *Arizona v. Inter Tribal Council of Arizona* (*Arizona Inter Tribal*), for example, the Court held that Congress's authority under the Elections Clause over the "Times, Places and Manner"[13] of federal elections "is paramount,"[14] but does not extend to regulating voter qualification standards, which fall firmly within the province of the

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7. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455 (2017).

8. *See* Vieth v. Jubelirer, 541 U.S. 267, 305-06 (2004) (plurality opinion). *But see* Gill v. Whitford, 137 S. Ct. 2289, 2289 (2017) (mem.) (enjoining enforcement of Wisconsin redistricting plan as impermissible political gerrymandering, pending disposition on appeal to the Supreme Court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

9. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

10. *See* Tolson, *supra* note 6, at 1196-98, 1200.

11. Shelby County v. Holder, 133 S. Ct. 2612, 2621-24, 2630-31 (2013).

12. *Compare* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 341 (2000) (finding that a redistricting plan enacted with discriminatory intent should be precleared under section 5 if the plan is nonretrogressive), *with Shelby County*, 133 S. Ct. at 2621, 2632 (criticizing Congress's decision to legislatively overturn *Reno v. Bossier Parish* by amending section 5 "to prohibit more conduct than before," including "voting changes with 'any discriminatory purpose'" (quoting 42 U.S.C. § 1973c(c) (current version at 52 U.S.C. § 10304(c) (Supp. III 2016)))).

13. 133 S. Ct. 2247, 2253 (2013) (quoting U.S. CONST. art. I, § 4, cl. 1).

14. *Id.* (quoting *Ex parte* Siebold, 100 U.S. 371, 392 (1880)).

states.[15] Similarly, in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (*Arizona IRC*), the Court held that Arizona voters, acting through a state ballot initiative, can delegate the legislature's redistricting authority to an independent commission because the Elections Clause's use of the term "legislature" embodied whatever prescriptions for lawmaking that the state established in its constitution.[16] Like *Shelby County*, the *Arizona* cases recognize, first, that the federal government's interference with laws that fall firmly within the province of state authority trigger significant constitutional issues;[17] and second, the presumptive constitutionality of state law to which the Court will generally defer, even when interpreting federal constitutional provisions.[18] All of these cases have contributed to the view that election law is federalism based, with clearly delineated spheres of authority for the state and federal governments, respectively.

This Article challenges the prevailing view that federalism best explains our system of elections, and argues that, unlike the antidiscrimination framework of the Fourteenth and Fifteenth Amendments, Congress and the courts can disregard state sovereignty in enacting, enforcing, and resolving the constitutionality of legislation passed pursuant to the Elections Clause. The Clause gives states control over the "Times, Places and Manner" of federal elections, but it also empowers Congress to "make or alter" these regulations at will.[19] Once one examines the text and structure of the Elections

15. *See id.* at 2258-59 (observing that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications").

16. 135 S. Ct. 2652, 2671, 2677 (2015). This Article does not challenge the state's ability to delegate its redistricting authority to an independent commission. Rather, the issue is the Court's failure to treat congressional approval as dispositive of the issue, and its reliance instead on the presumptive validity of state law. *See infra* Part II. This conception is at odds with the notion of congressional sovereignty.

17. *See Shelby County*, 133 S. Ct. at 2623-27 (describing the states' broad power regarding elections, the exceptional circumstances under which Congress first passed the Voting Rights Act, and the significant constitutional issues that developed over time from this federal action); *see also Arizona IRC*, 135 S. Ct. at 2666-67; *Arizona Inter Tribal*, 133 S. Ct. at 2254-57.

18. *See Arizona IRC*, 135 S. Ct. at 2673; *Arizona Inter Tribal*, 133 S. Ct. at 2257-58.

19. The Elections Clause, in its entirety, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

Clause, it is clear that this provision does not fit comfortably within any of the prevailing theories of federalism.[20] This insight is particularly powerful in the redistricting context, in which states rely on their authority under the Clause to draw congressional districts and have traditionally enjoyed wide berth in constructing these districts, largely subject only to the constraints of the once powerful, but recently more limited Fourteenth and Fifteenth Amendments.[21]

As this Article shows, Congress's authority under the Elections Clause is significantly broader than the Court has acknowledged, and can be a powerful bulwark against discriminatory state laws that are usually defended on the grounds of state sovereignty against Fourteenth and Fifteenth Amendment challenges.[22] The breadth of congressional power under the Clause lies in Congress's ability to veto state law at will, a feature that is at odds with most of the prevailing views of federalism.[23] Traditional federalism doctrine prioritizes experimentation in governance dispersed among the fifty states—a variation that emerges, in part, from limiting the reach of the federal government.[24]

In contrast, the Elections Clause has its own unique set of values that place a premium on congressional sovereignty. When it comes to federal elections, Congress rarely intervenes to increase cooperation between the states and federal government in order to—for example—encourage a regulatory partnership that allows Congress to influence policy areas beyond the scope of its enumerated powers.[25] Congress's authority over setting the "Times, Places and

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20. *See infra* Part III.

21. *Compare* City of Rome v. United States, 446 U.S. 156, 173, 175-76, 179 (1980) (describing broad and expansive congressional authority to enforce the Fourteenth and Fifteenth Amendments), *abrogated by Shelby County*, 133 S. Ct. 2621, *with* City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997) (limiting Congress's enforcement powers to remedial fixes).

22. *See infra* Part I.

23. *See infra* Part II.

24. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457-58 (1991) (reviewing the "system of dual sovereignty between the States and the Federal Government").

25. *See* Erin Ryan, *The Spending Power and Environmental Law After* Sebelius, 85 U. COLO. L. REV. 1003, 1012 (2014) (arguing that the Clean Water Act is a use of Congress's authority under the Spending Clause that "enables Congress to bargain with states for access to policymaking arenas that are beyond the reach of its other enumerated powers"); *cf.* Clean Water Act, Pub. L. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1387 (2012)).

Manner"[26] of federal elections "is paramount,"[27] and this body has, on occasion, imposed substantive requirements that states must follow when structuring federal elections.[28] Nor is the Clause frequently invoked in order to nationalize election administration or to limit state power to a particular substantive area;[29] Congress assumes that well-functioning states will fill in most of the blanks with respect to the nuts and bolts of federal elections,[30] but has been willing to impose uniformity if the need arises.[31] Indeed, the Clause's overarching purpose is to ensure the continued existence and legitimacy of federal elections,[32] so the text empowers Congress to engage in the quintessentially "anti-"federalism action of displacing state law and commandeering state officials toward achieving this end.[33] Yet the federalism label still persists as its animating theory, even though the Clause is not concerned with protecting the sovereignty of the states.[34]

This Article is divided into three parts. Part I argues that disenfranchisement has become the norm in American elections, not only because of the invalidation of portions of the VRA, but also because of the Court's reluctance to create a robust framework that places positive obligations on states to ensure broad enfranchisement. Part of the difficulty is structural—the text of the United

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26. U.S. CONST. art. I, § 4, cl. 1.

27. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2253 (2013) (quoting *Ex parte* Siebold, 100 U.S. 371, 392 (1880)).

28. *See infra* note 44.

29. *Cf.* Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-12 (2012); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 207 (1983) (noting that the Atomic Energy Act gave the Atomic Energy Commission "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials. Upon these subjects, no role was left for the States" (citations omitted)).

30. Well-functioning should not be confused with the idea that states are sovereign over federal elections. *See* Tolson, *supra* note 6, at 1244-45.

31. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 276 (2004) (plurality opinion) (describing the Apportionment Acts of 1842, 1862, and 1901, which required, at various points, that members of the House be elected from single member districts that are compact, contiguous, or have equal populations).

32. *Cf. Arizona IRC*, 135 S. Ct. 2652, 2672 (2015).

33. *See id.*

34. Recent scholarship has contributed to the view that the Elections Clause is about federalism. *See, e.g.*, Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause*, 109 NW. U. L. REV. 847, 849-51 (2015); Derek T. Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310, 310-12 (2014); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 753 (2016).

States Constitution does not contain an explicit and affirmative right to vote, and gives the states considerable authority over the electoral process.[35] The other problem lies with the constraints that the Court has imposed on the Fourteenth and Fifteenth Amendments, including, but not limited to, the onerous discriminatory purpose requirement when states enact facially neutral, but restrictive voting legislation; the Court's overly deferential posture toward the state's justification for the disputed law; and the limited remedies that the Court accords to prevailing plaintiffs in voting rights litigation.[36]

Oddly, as the Court has restricted the scope of the Fourteenth and Fifteenth Amendments, recent cases have read the Elections Clause quite expansively.[37] However, as Part II shows, the Court applies the same federalism assumptions to the Clause that animate its jurisprudence under the Reconstruction Amendments and, as a result, has not read the Clause's terms broadly enough. Part II discusses the Court's most recent Elections Clause cases, *Arizona Inter Tribal* and *Arizona IRC*, to show how the Court has misconstrued and undertheorized Congress's authority under the Elections Clause while purporting to vindicate federal power. Any theoretical framework should emphasize that, not only does Congress have broad authority under its mandates, but Congress also can act in complete disregard of state sovereignty in exercising this authority.[38] Yet, these decisions do the exact opposite. The Court's contention in *Arizona Inter Tribal* that Congress has no control over voter qualifications pursuant to the Clause, for example, is an effort to enforce a strict dichotomy of dual sovereignty.[39] Likewise, in *Arizona IRC*, the Court allowed Arizona to

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35. *See Arizona Inter Tribal*, 133 S. Ct. 2247, 2253 (2013) ("The Clause's substantive scope is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).

36. *See* Franita Tolson, *Setting a Voting Rights Agenda in an Era of "Legal" Disenfranchisement*, *in* WHAT'S THE BIG IDEA? RECOMMENDATIONS FOR IMPROVING LAW AND POLICY IN THE NEXT ADMINISTRATION 1.1, 1.1, 1.6 (2016), https://www.acslaw.org/sites/default/files/Whats%20the%20Big%20Idea.pdf [https://perma.cc/4C4V-P24E].

37. *See infra* Part II.

38. *See infra* Part III.C.2.

39. *See* Franita Tolson, The Spectrum of Congressional Authority over Elections (Dec. 4, 2017) (unpublished manuscript) (on file with author) (arguing that Congress can regulate

adopt fairly flexible lawmaking procedures in implementing the times, places, and manner of federal elections, but its failure to make Congress's endorsement of the full range of these procedures through federal statute indispensable to the holding shows that the Court is analyzing these issues within a federalism framework in which states retain sovereign authority.[40]

At least some of the Court's mischaracterization of congressional power under the Elections Clause can be laid at the feet of federalism theory. As Part III argues, much of the doctrine—without passing judgment on the merits of each theory—is an ill fit as a potential theoretical framework for the Clause, which is about decentralization, not federalism.[41] This Part shows how, descriptively, federalism doctrine fails to explain the dynamics between the states and federal government because the Clause's text, structure, and purpose embody values other than those that are traditionally safeguarded by our federalist system. These values include: (1) preserving the legitimacy of federal elections through respect for popular sovereignty; (2) ensuring finality of outcome and ease of administration with respect to federal elections; and (3) reinforcing the primacy of congressional sovereignty which—in this context—is embodied by Congress's independent authority to make legislation, alter state law, and commandeer state officials to implement federal law.[42]

This Article concludes that the Elections Clause is not only an affirmative grant of power to the federal government that allows Congress to legislate irrespective of state sovereignty, but also one that empowers courts to aggressively police state action to protect the fundamental right to vote, particularly when states use their Elections Clause authority to shut otherwise legitimate voters out of the political process. To effectively prevent states from enacting

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voter qualifications pursuant to the Elections Clause in certain limited circumstances).

40. *See Arizona IRC*, 135 S. Ct. 2652, 2671-73, 2677 (2015).

41. *See* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 20-21 (2008) ("[F]ederalism grants subunits of government a final say in certain areas of governance," whereas in a decentralized regime "the central government decides how decision-making authority will be divided between itself and the geographical subunits"); Tolson, *supra* note 6, at 1242-58 (noting that the decentralization of the Elections Clause is often confused with federalism, despite the fact that Congress has the final say in how authority is delegated under the Clause).

42. *See infra* Part III.

laws that undermine the right to vote, litigation under the Reconstruction Amendments must become part of the strategy and can no longer be the whole strategy.[43] Instead, voting rights advocates can rely on the Elections Clause by: (1) vigorously enforcing statutory provisions such as the Help America Vote Act (HAVA) and the National Voter Registration Act (NVRA), both of which Congress enacted pursuant to the Elections Clause to ensure broad registration and participation in federal elections;[44] (2) seeking new legislation based on broad authority that the federal government retains under the Elections Clause post-*Shelby County*; and (3) defending current antidiscrimination laws based on some combination of the Elections Clause and the Fourteenth and Fifteenth Amendments.[45] Because of the Election Clause's overarching emphasis on preserving the legitimacy of federal elections, this approach will help voting rights advocates build on the successes of this decade and challenge disenfranchising state laws in the post-2020 round of redistricting.

I. THE SPECTER OF STATE SOVEREIGNTY IN RECENT VOTING RIGHTS CASES

2016 was a banner year for voting rights advocates, who successfully challenged numerous restrictive laws under the Fourteenth and Fifteenth Amendments. Yet many of these court decisions, which were huge accomplishments by any metric, also revealed the weaknesses of these constitutional provisions in ways that raise red flags for the path forward. These limitations emerged because of the

43. *See* Tolson, *supra* note 36, at 1.1-1.3, 1.5-1.6.

44. Congress enacted the Help America Vote Act (HAVA) of 2002, 42 U.S.C. §§ 15301-15545 (2012) (current version at 52 U.S.C. §§ 20901-21145 (Supp. III 2016)), in response to the controversy over the 2000 election. Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act's Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 133, 134 (2006). HAVA sets minimum standards for election administration, primarily dealing with upgrades for voting technology. *See, e.g.*, 52 U.S.C. §§ 20141-20143, 20151-20153 (Supp. III 2016). The National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg (2012) (current version at 52 U.S.C. §§ 20501-20511), governs voter registration for federal elections, making it easier for individuals to register at certain state offices including DMVs (which is why the statute is referred to as the "motor-voter" law). Weinstein-Tull, *supra* note 34, at 755.

45. *See* Tolson, *supra* note 6, at 1200-01 (making this argument with respect to section 5 of the VRA).

courts' reasoning, and also because some of these decisions were significantly limited on appeal in ways that affected the ability of those participating in the 2016 elections to cast a meaningful ballot.[46] While these cases do not directly discuss the Elections Clause, they reveal that the Clause's increasing importance is best reflected, not only by recent Supreme Court cases recognizing its scope, but also in recent case law that, while invalidating restrictive state voting legislation under the Fourteenth and Fifteenth Amendments, indicates that additional tools may be necessary to supplement these efforts in the voting rights battles ahead.[47]

A. Whither Discriminatory Intent? Legal Challenges to Restrictive Voting Laws in the Lower Courts

In *Shelby County v. Holder*, decided in 2013, and *NAMUDNO v. Holder,* decided four years earlier, the Supreme Court criticized the preclearance provisions of sections 4(b) and 5 of the VRA for—among other things—forcing states to solicit permission from the federal government to enact laws that they would otherwise have the authority to implement.[48] This imposed a significant and, in the Court's view, unwarranted federalism cost.[49] Federalism concerns also played a role in recent cases, although in less obvious ways. In the lower courts, federalism has manifested in the courts' overly deferential posture toward state justifications for the disputed law; refusal to resolve an otherwise meritorious claim (otherwise known as the abuse of the constitutional avoidance canon); or alternatively, in the limited remedies accorded to plaintiffs despite winning on the merits.[50]

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46. *See, e.g.*, Veasey v. Perry 71 F. Supp. 3d 627 (S.D. Tex. 2014) (allowing Texas to "soften" its voter identification law while the district court, Fifth Circuit panel, and en banc Fifth Circuit, volleyed back and forth on the question of discriminatory intent), *aff'd in part, vacated in part sub nom.* Veasey v. Abbott,796 F.3d 487 (5th Cir. 2015), *aff'd in part, rev'd in part, vacated in part*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

47. *See* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 100, 107-13 (2013).

48. *See* Shelby County v. Holder, 133 S. Ct. 2612, 2618, 2621, 2626-27 (2013); Nw. Austin Mun. Util. Dist. No. One v. Holder (*NAMUDNO*), 557 U.S. 193, 202-03 (2009).

49. *See Shelby County*, 133 S. Ct. at 2618, 2621, 2626-27.

50. *See generally* Tolson, *supra* note 36 (discussing these cases at length).

For example, in *Frank v. Walker*, the Seventh Circuit stayed an injunction requiring Wisconsin officials to accept an affidavit instead of photo identification from voters at the polls.[51] The court allowed Wisconsin to amend its voter identification law to permit individuals to fill out paperwork at the state's department of motor vehicles and receive a free ID in the mail, without having to provide photo evidence of their identity.[52] The Seventh Circuit sustained the revised free identification process,[53] even though it did not ameliorate the burdens of the law on the disproportionate number of minorities without transportation.[54] The court also ignored that allowing individuals to obtain a free ID without proof of identification undermined the state's concerns about fraud, and completely disregarded the findings of several district court judges that the voter identification law violated some combination of the First, Fourteenth, and Fifteenth Amendments as well as the VRA.[55] In a prior opinion, the Seventh Circuit rejected these claims, adopting a reading of the relevant case law that increased the plaintiff's evidentiary burden.[56] Noticeably absent from the Seventh Circuit's

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51. Nos. 16-3003 & 16-3052, 2016 WL 4224616, at *1 (7th Cir. Aug. 10, 2016). In February 2017, the Seventh Circuit heard oral arguments challenging Wisconsin's refusal to let people vote using an affidavit if they could not get identification, but the Court has not issued its decision on the merits yet.

52. *See id.*

53. *See id.*; *see also* League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302, 305-06 (Wis. 2014) (upholding the voter identification law without an affidavit option in parallel state proceeding).

54. *See* JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN, (2006), http://dc.uwm.edu/cgi/viewcontent.cgi?article=1067&context=eti_pubs [https://perma.cc/5C2N-8T93].

55. *See* One Wis. Inst., Inc. v. Thomsen, No. 15-cv-324-jdp (W.D. Wis. Aug. 1, 2016) (order entering judgment in favor of plaintiffs); Frank v. Walker, 196 F. Supp. 3d 893, 897-98 (E.D. Wis. 2016) (order granting plaintiffs' motion for preliminary injunction) (citing Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014)). The case before the Eastern District of Wisconsin adopted the affidavit requirement. *See Walker*, 196 F. Supp. 3d at 898. The Western District declined to impose this requirement and instead required the State to refine the manner in which individuals can obtain free IDs. *See* One Wis. Inst., Inc. v. Thomsen, No. 15-cv-324-jdp, at 2-3 (W.D. Wis. Aug. 1, 2016) (order entering judgment in favor of plaintiff). The Seventh Circuit denied the State's motion to stay the Western District's order. *See* One Wis. Inst., Inc. v. Thomsen, Nos. 16-3083 & 16-3091 (7th Cir. Aug. 22, 2016) (order denying defendants' motion to stay injunction).

56. *See* Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014); *see also* Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 480 (2015) ("[T]he Seventh Circuit, in resolving *Frank v. Walker* on appeal, adopted a reading of section 2 [of the VRA] that raised the evidentiary burden to one that would require plaintiffs to show that the

analysis of the preliminary injunction was any assessment of whether the law imposed a burden that was unjustifiable in light of the state's asserted justifications for its adoption, and why, given this burden, it was inappropriate to relax the requirements of an otherwise impermissible law.[57]

The Seventh Circuit's approach has become commonplace for three reasons. First, courts start from the baseline that states retain sovereignty over voter qualifications when analyzing claims pursuant to the Fourteenth and Fifteenth Amendments, making them less likely to accuse the state of acting in a discriminatory manner. In *Veasey v. Abbott*, for example, a panel of the Fifth Circuit invalidated Texas's voter identification law pursuant to section 2 of the VRA,[58] which examines how "a certain electoral law, practice, or structure interacts with social and historical conditions *to cause* an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[59] The court relied on an effects analysis, in part, because it was uncomfortable with finding that the state (especially in its sovereign capacity) engaged in intentional discrimination.[60] But in rejecting the district court's analysis of the constitutional claim, the appeals court parsed the evidence in a very formalistic manner, relying on older instances of discrimination to validate the statutory claim that the law had a discriminatory effect,[61] while disregarding this evidence with respect

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voter-identification law amounts to what is essentially an absolute barrier to voting.").

57. Instead, the court cites to *Crawford v. Marion County Election Board* as a blanket endorsement of voter identification laws subject to challenge only if there is proof that a voter has been unduly burdened, and not by an absence of evidence as to the law's utility. *See* Frank v. Walker, Nos. 16-3003 & 16-3052, 2016 WL 4224616, at *1 (7th Cir. Aug. 10, 2016) (order staying injunction) (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 198 (2008)). In refusing to hear the case en banc, the court also credited the state's representations without any thorough analysis of the groups that would be burdened by the amended law. *See* Frank v. Walker, 835 F.3d 649, 651-52 (7th Cir. 2016) (per curiam) (denying petitions for initial hearing en banc).

58. 796 F.3d 487, 493 (5th Cir. 2015), *aff'd in part, vacated in part, rev'd in part*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

59. *Id.* at 504 (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)); *see also* 52 U.S.C. § 10301(a) (Supp. III 2016).

60. *Cf. Veasey* 796 F.3d at 501-02 (discussing the difficulty of establishing discriminatory intent on the part of an entire legislative body).

61. *See id.* at 504-05, 509-11.

to whether the state acted with discriminatory intent and violated the Constitution.[62]

This discomfort with the discriminatory intent analysis is directly tied to the second point—the assumption that states retain sovereignty over elections drastically reduces the weight that courts place on evidence of discriminatory intent. The Fifth Circuit panel was especially troubled by what it viewed as the lack of contemporary evidence of discrimination but, as the Supreme Court recognized in *McCleskey v. Kemp*, older evidence of discrimination is still probative, just less probative than more recent examples.[63]

McClesky rejected instances of discrimination that were almost one hundred years older than the contested practice (the racially discriminatory application of the death penalty) before the Court.[64] In contrast, the district court relied on official decisions and case law from the last thirty to forty years to support its discriminatory intent finding, including voting rights case law that found the state acted with racially discriminatory intent.[65] Indeed, in one such case that the Fifth Circuit tried to discount, *League of United Latin American Citizens (LULAC) v. Perry*, the Supreme Court argued that Texas's actions in crafting its legislative district lines to dilute the votes of Latinos "[bore] the mark" of the discriminatory intent that might violate the Equal Protection Clause of the Fourteenth Amendment.[66] It took the entire Fifth Circuit, sitting en banc, to

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62. *See id.* at 500.

63. *See* 481 U.S. 279, 298 n.20 (1987).

64. *See Veasey*, 796 F.3d at 500 (describing *McClesky* as "resolving that laws in force during and just after the Civil War were not probative of the legislature's intent in 1972").

65. *See* Veasey v. Perry, 71 F. Supp. 3d 627, 636 & n.23 (S.D. Tex. 2014), *aff'd in part, vacated in part sub nom.* Veasey v. Abbott, 796 F.3d 487, *aff'd in part, vacated in part, rev'd in part*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017); *see also id.* at 636 (discussing the contemporary evidence in the record, including the fact that "[i]n every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially gerrymandered districts").

66. 548 U.S. 399, 440 (2006); N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 222 (4th Cir. 2016) (citing *LULAC* favorably, noting that "[t]he *LULAC* Court addressed a claim of vote dilution, but its recognition that racially polarized voting may motivate politicians to entrench themselves through discriminatory election laws applies with equal force in the vote denial context"); *cf. Veasey*, 796 F.3d at 501 (discussing *LULAC* and stating that, "Although citing discussions of the historic discrimination against Hispanics in Texas, the Court did not base its decision on a conclusion that the legislature intentionally discriminated based on ethnicity"). The Fourth Circuit also credited recent North Carolina redistricting litigation in its discriminatory intent analysis. *See McCrory*, 831 F.3d at 225

recognize that there was sufficient evidence before the district court to support a finding of discriminatory intent.[67] Notably, the en banc court made this determination without crediting all of the evidence before the district court,[68] which, on remand, sustained the original discriminatory intent finding despite the excluded evidence.[69]

Other courts have been more willing to establish discriminatory intent based on an appropriate weighing of the evidence. The Fourth Circuit, in invalidating North Carolina's restrictive voting laws in *North Carolina State Conference of the NAACP v. McCrory*, found that the incidence of section 2 litigation, preclearance denials by the Department of Justice, and its prior case law illustrating discriminatory actions on the part of the state were all relevant to the discriminatory intent analysis.[70] The court acknowledged the limited probative value of North Carolina's pre-1965 history of racial discrimination in voting.[71] Nonetheless, the court used this history to provide context and show how unprecedented and extreme these new barriers—which included a strict voter identification requirement, the elimination of same-day voter registration, and a reduction in early voting days[72]—were with respect to ballot access.[73] A better approach to resolving intertwining statutory and constitutional claims is for courts to limit their reliance on older

("And only a few months ago ... a three-judge court addressed a redistricting plan adopted by the same General Assembly that enacted SL 2013-381.... [A] holding that a legislature impermissibly relied on race certainly provides relevant evidence as to whether race motivated other election legislation passed by the same legislature.").

67. *See* Veasey v. Abbott, 830 F.3d 216, 241 (5th Cir. 2016) (plurality opinion), *cert. denied*, 137 S. Ct. 612 (2017).

68. *Id.*

69. *See* Veasey v. Abbott, 249 F. Supp. 3d 868, 871-72 (2017). However, the district court did not rescusitate the constitutional claim despite finding discriminatory purpose sufficient to violate the Constitution. *See id.* (finding that the plaintiffs met the requirements of *Village of Arlington Heights* and *Personnel Administrator of Massachusetts v. Feeney*, two Fourteenth Amendment cases). Once again, this illustrates the limitations of the antidiscrimination framework.

70. *See McCrory*, 831 F.3d at 223-25.

71. *Id.* at 223.

72. *Id.* at 219.

73. *See id.* at 223 (criticizing the district court for disregarding North Carolina's history of discrimination and noting that, "[w]hile it is of course true that 'history did not end in 1965,' it is equally true that SL 2013-381 imposes the first meaningful restrictions on voting access since that date .... Due to this fact, and because the legislation came into being literally within days of North Carolina's release from the preclearance requirements of the Voting Rights Act, that long-ago history bears more heavily here than it might otherwise" (citation omitted)).

evidence rather than reject the evidence altogether.[74] As these cases show, however, the courts are wildly inconsistent when it comes to critiquing whether plaintiffs have presented evidence sufficient to establish the purposeful discrimination necessary to establish the constitutional claim.

Third, the remedies available to plaintiffs are significantly hampered by the antidiscrimination framework because of federalism concerns. Had the initial *Veasey* panel found that Texas engaged in intentional discrimination,[75] for example, the court could have bailed the jurisdiction back into preclearance under section 3 of the VRA.[76] Although the Fifth Circuit, sitting en banc, agreed with the original panel that some of the intent evidence was infirm,[77] it was clear at the time of the original *Veasey* decision that there was evidence of intent on the part of the Texas legislature that fell squarely within the intentional discrimination paradigm outlined in the Supreme Court decision of *Village of Arlington Heights v. Metropolitan Housing Development Corp.* This evidence included departures from normal procedures; questionable statements and omissions from legislators who supported the bill; the tenuousness of the legislature's stated purpose for passing the bill; and contemporary examples of state-sponsored discrimination.[78]

The decision of the original panel to punt on the question of discriminatory intent led to a "softening" of the Texas voter

74. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 229-32 (5th Cir. 2016) (plurality opinion) (stating that the district court placed too much weight on evidence that is not that probative of discriminatory intent, but also referring to the evidence as "infirm" and suggesting that the district court should not have relied on it at all (quoting Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982))), *cert. denied*, 137 S. Ct. 612 (2017).

75. Note that the court remanded, and did not reverse in favor of the state, because there was circumstantial evidence of discriminatory intent. *See* Veasey v. Abbott, 796 F.3d 487, 493 (5th Cir. 2015), *aff'd in part, vacated in part, rev'd in part*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

76. Section 3 of the VRA allows a judge, upon a finding of discriminatory intent, to bail a jurisdiction back into the preclearance regime. 52 U.S.C. § 10302(c) (Supp. III 2016). It was not until the subsequent en banc and district court opinions that the discriminatory purpose holding was reinstated. *See supra* notes 68-69. On June 7, 2017, the district court held a hearing on remedies, the outcome of which is still pending.

77. *See Veasey*, 830 F.3d at 230-31, 241.

78. *See* Veasey v. Perry, 71 F. Supp. 3d 627, 698-702 (S.D. Tex. 2014), *aff'd in part, vacated in part sub nom.* Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015), *aff'd in part, vacated in part, rev'd in part*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977).

identification law, which added an affidavit option to the list of acceptable identification, as opposed to invalidating the law in its entirety.[79] Invalidation of the law was more appropriate given the intent evidence before the court, especially because the Department of Justice filed a motion indicating that Texas had failed to adhere to its promise to soften the law. Though softening might be appropriate to address a claim that centers on discriminatory effects, it is arguably inappropriate when a law was passed with the intent to discriminate, as is the case with the North Carolina law (and arguably with respect to the Texas law as well). This insight is especially pertinent now, given that the Department of Justice changed its official position and filed a motion dismissing its claim that Texas acted with discriminatory intent.[80] A court's reluctance to label the state as a discriminator, as well as the setbacks that can come from a change in presidential administrations, only add to the difficulties of providing the proper remedy for Fourteenth and Fifteenth Amendment violations.

Despite their vastly different outcomes, both the Fourth and Fifth Circuits purported that they were each following the standard established by the Supreme Court in *Pullman-Standard v. Swint* in analyzing the discriminatory purpose analysis from the lower court.[81] Yet both applied a very different weighing of the facts (and in the case of the Fifth Circuit, it confused errors of law with those of fact) that ultimately led to different remedies in each case.[82] Much

79. *Veasey*, 796 F.3d at 519-20.

80. United States's Motion for Voluntary Dismissal of Discriminatory Purpose Claim Without Prejudice at 2, Veasey v. Abbott, No. 2:13-cv-193 (NGR) (S.D. Tex. Feb. 27, 2017).

81. 456 U.S. 273 (1982).

82. In *Veasey*, both the concurrence and the dissent criticized the plurality opinion for impermissibly reweighing the evidence in trying to determine whether discriminatory intent was present. *See Veasey*, 830 F.3d at 319 (Dennis, J., concurring in part, dissenting in part, and concurring in the judgment) (noting that "[t]he majority opinion erroneously assigns legal errors to the district court and, in disturbing the district court's finding of discriminatory purpose, fails to adhere to the proper standard of review and engages in an improper reweighing of the evidence"); *id.* at 320 ("The majority does not contend that the district court's finding of discriminatory purpose is implausible in light of the record as a whole. Indeed, the majority opinion itself appears to acknowledge that there is a considerable amount of evidence to support this finding. Nevertheless, the majority reverses the district court because of purported legal errors, specifically, the district court's reliance on evidence that, in the majority's view, is 'infirm.'" (citation omitted)). *Compare id.* at 322 (Clement, J., dissenting in part) (arguing that the plurality "discredits 'much of the evidence' relied on by the district court" but remands even though the "Supreme Court has instructed that when a

of the back and forth in these cases, even those in which the plaintiffs successfully showed that the state law violated a constitutional or statutory provision, stems from a fundamental misunderstanding about the scope of Congress's authority over elections and the role of the states in organizing the machinery of federal elections.

The Elections Clause escapes the complex factual questions that accompany any analysis of discriminatory intent, and voter identification laws that do not violate the Fourteenth and Fifteenth Amendments could still exceed the scope of state authority under the Elections Clause.[83] Congress's authority under the Clause is also unencumbered by any requirement that the remedy be congruent and proportional to the problem addressed, displacing contrary state laws regardless of fit or the legislature's motivations.[84] As the next Section shows, recent Supreme Court cases have been hobbled by unwarranted deference to state law, much like the lower courts, and this has had implications for racial redistricting claims under the Reconstruction Amendments.

B. Whither Shaw *Claim? The Federalism Implications of the Race or Party Question in the Supreme Court*

In recent racial redistricting cases, the Court has been especially cautious in refuting the legitimacy of partisan justifications because

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district court's findings as to discriminatory purpose are 'infirm' and 'the record permits only one resolution of the factual issue'," the case should be reversed), *with* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 220 (4th Cir. 2016) (finding that discriminatory intent is present on a totality of the facts because "[c]hallengers need not show that discriminatory purpose was the 'sole[ ]' or even a 'primary' motive for the legislation, just that it was 'a motivating factor.' Discriminatory purpose 'may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another" (alteration in original) (citation omitted) (quoting Washington v. Davis, 426 U.S. 229, 265-66 (1976))).

83. It is not entirely clear whether a voter identification law is a voter qualification standard that falls within the scope of the state's authority under Article I, Section 2, or a "manner" regulation that implicates the Elections Clause. *See* Franita Tolson, *Congressional Authority to Protect Voting Rights After* Shelby County *and* Arizona Inter Tribal, 13 ELECTION L.J. 322, 323 n.6 (2014). Nonetheless, enacting an overly broad voter identification law could exceed the scope of the state's authority under the Elections Clause. *See* Tolson, *supra* note 39.

84. *See* City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997).

of its concerns about infringing on the states' authority over elections, a failure that further highlights the constraints of the antidiscrimination framework of the Fourteenth and Fifteenth Amendments. As a long-term strategy, the "politics, not race" justification, though unsuccessful in recent cases, could see a resurgence during the 2020 round of redistricting. The likelihood of this resurgence increases substantially if the Court fails to invalidate partisan gerrymandering this term in *Gill v. Whitford*,[85] or if the Court permits states to rely on partisan justifications so long as the level of partisanship falls below some inchoate and unascertainable threshold.

The potential for partisanship to legitimize an otherwise pernicious racial gerrymander could have deleterious effects on minority voting rights and, perversely, render the recently resuscitated *Shaw* claim toothless just as it finally stands to aid minority groups in their quest for equal voting rights.[86] In *Shaw v. Reno*, the Court recognized a new cause of action under the Equal Protection Clause of the Fourteenth Amendment for legislative districts that had been racially gerrymandered.[87] *Miller v. Johnson* clarified the scope of the Court's inquiry, holding that plaintiffs must prove "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[88]

Throughout the 1990s and 2000s, *Shaw* did not lead to the wide scale invalidation of majority-minority districts as most scholars feared, because the correlation between race and partisan affiliation—particularly with respect to African Americans who overwhelmingly align with the Democratic Party's political interests—inadvertently created a safe harbor for legislative districts that would otherwise run afoul of *Shaw*'s limit on race

85. *See* Gill v. Whitford, 137 S. Ct. 2289 (2017) (mem.) (granting stay pending the Court's hearing of the case), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

86. The *Shaw* claim has long been criticized as a cause of action created to enhance the political power of white voters at the expense of minority voting power. *See* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 69-70 (2014).

87. *See* Shaw v. Reno, 509 U.S. 630, 642-44 (1993).

88. 515 U.S. 900, 916 (1995).

conscious redistricting.[89] In *Easley v. Cromartie,* the Supreme Court reversed a district court finding that race, rather than politics, was a predominant factor in the state's legislative redistricting plan because the district court ignored that voting behavior, rather than voter registration, was a better indicator of whether the legislature acted in a racially motivated manner in drawing the contested district.[90] The Court determined that predominantly African American precincts were more reliably Democratic than predominantly white precincts;[91] thus, the plaintiffs did not refute the state's argument that the legislature was driven primarily by political considerations in drawing the district.[92] This approach marked a departure from an earlier decision, *Bush v. Vera*, which rejected the idea that the legislature's desire to advance partisan goals can excuse an impermissible reliance on race.[93]

Other decisions the Supreme Court handed down that decade reinforced *Easley*'s "partisan" safe harbor. In *Vieth v. Jubelirer*, for example, a plurality of the Court held that partisan gerrymandering claims are nonjusticiable because the Framers of the Constitution anticipated that political entities would structure the districts and, presumably, that the manipulation of district lines would take place in our democracy.[94] Although five Justices disagreed with the idea that partisan gerrymandering claims should be nonjusticiable, eight Justices agreed that partisan gerrymandering is unconstitutional only if used excessively.[95] This equivocation with respect to partisanship reinforced *Easley*'s partisan safe harbor for race-based redistricting, undermining the Court's ability to address the abridgment of minority rights that happened to coincide with a shared political ideology.

The Court's approach in these cases reflected uncertainty in the case law that alternated between condoning and condemning the use of partisanship in redistricting. In *LULAC v. Perry*, the Court

89. *See* Easley v. Cromartie (*Cromartie II*), 532 U.S. 234, 251-52 (2001); *see also* Hasen, *supra* note 86, at 68-70.

90. 532 U.S. at 243-44.

91. *See id.* at 251-52.

92. *See id.* at 258.

93. 517 U.S. 952, 968 (1996) (plurality opinion).

94. *See* Vieth v. Jubelirer, 541 U.S. 267, 274-77 (2004) (plurality opinion).

95. *See* Cox v. Larios, 542 U.S. 947, 949-51 (2004) (Stevens, J., concurring).

held that, while the State's decision to redistrict mid-decade was not prima facie evidence of an unlawful partisan gerrymander, the State's desire to protect incumbents can, in some circumstances, run afoul of section 2 of the VRA.[96] A majority of the Justices condoned the naked partisan purpose underlying the mid-decade redistricting, while a different majority penalized the State for taking partisanship too far, holding that the dismantling of a majority-Latino district violated section 2 of the VRA because it deprived Latinos in the district of their political power just as they were set to exercise it.[97] Section 2 of the VRA prohibits abridgments of the right to vote only on the basis of race, but Justice Kennedy created substantial doctrinal confusion by failing to distinguish between the racial or partisan motivations underlying the State's decision to dismantle the district.[98]

While the partisan safe harbor curbed much of the *Shaw* litigation in the early 2000s, *LULAC v. Perry* illustrated that the Court was willing to rely on related doctrines to bypass *Vieth* and police behavior it viewed as too partisan.[99] It was not until the post-2010 round of redistricting that courts began to see a reemergence of the *Shaw* claim in a meaningful way. Instead of white plaintiffs complaining about being "fillers" in majority African American districts, plaintiffs now argued that states violated the mandates of

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96. *See* 548 U.S. 399, 409-10 (2006). Justice Anthony Kennedy, writing for himself, argued that a state's decision to redistrict so that its House delegation reflects the political party's share of the statewide vote is also legitimate. *See id.* at 419. Chief Justice John Roberts and Justice Samuel Alito agreed that there was no partisan gerrymander, but it is not clear if they endorsed Justice Kennedy's reasoning. *See id.* at 492-93 (Roberts, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 511-12 (Scalia, J., concurring in the judgment in part and dissenting in part). Justices David Souter and Ruth Bader Ginsburg rejected these portions of Justice Kennedy's opinion, although they agreed with Justice Kennedy "that a legislature's decision to override a valid, court-drawn plan mid-decade is [not] sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders" that run afoul of the rule of one person, one vote. *Id.* at 423.

97. *Id.* at 428-35 (majority opinion).

98. *See* Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1207 (2007) ("[One possible interpretation of the Court's holding in *LULAC v. Perry* is] that the State intentionally discriminates against voters (of color?) where the State intentionally deprives them of an electoral benefit to which they would otherwise be entitled for reasons that are not constitutionally permissible.").

99. *See, e.g.*, Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 866-67.

Shaw by packing African Americans into majority-minority districts to limit their influence and, by implication, the influence of the Democratic Party.[100] Whereas early *Shaw* cases struggled with conceptualizing the harm from racial gerrymandering,[101] these recent cases have forced the Supreme Court to more directly confront the "race or party" question.

The reemergence of the *Shaw* claim forces the Court to confront the question it skirted for far too long: Why dance around the race or partisanship question for almost two decades instead of directly addressing the issues that emerge when the two categories overlap? Not surprisingly, the answer lies in the creation of the *Shaw* claim itself, which has never resolved the problem of racial gerrymandering because the Court has been unwilling to circumscribe the states' authority over elections by first, fully vindicating antidiscrimination norms, and second, by treating partisanship as inherently suspect. After all, partisanship that harms a racial group cannot be valid simply because the legislature's reasons are more partisan than racial.[102]

On the first point, *Shaw* and its progeny failed to definitively resolve whether compliance with federal antidiscrimination laws was sufficient to justify such districting.[103] This failure has exacerbated the conflict between the mandates of the VRA, which sometimes require the creation of majority-minority districts as a remedy, and the requirements of the Equal Protection Clause, which eschews race consciousness in legislative redistricting.

In *Bethune-Hill v. Virginia*, for example, the Supreme Court rejected the lower court's argument that there must be a conflict between traditional redistricting criteria and race "that leads to a subordination of the former" in order to prevail on a *Shaw* claim.[104] But the Court sustained the lines drawn for District 75 against a racial gerrymandering challenge, a district that was 55 percent African American, despite dubious evidence that the district needed this many voters of color to elect their candidate of choice.[105] This

100. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1472-73, 1477-78 (2017).

101. *See supra* notes 85-93 and accompanying text.

102. Tolson, *supra* note 101, at 867-71.

103. *See supra* notes 85-93 and accompanying text.

104. Bethune-Hill v. Va. State Bd. Elections, 137 S. Ct. 788, 796, 797-99 (2017).

105. *See id.* at 800-02.

approach created tension with an earlier decision, *Alabama Legislative Black Caucus v. Alabama*, which rejected a reading of section 5 that would facilitate this type of packing in majority-minority districts.[106] Instead, the Court was more concerned about intruding on the state's authority over elections: "'The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands'.... Holding otherwise would afford state legislatures too little breathing room."[107]

This need to give the states "breathing room" has likewise rendered it unlikely that the Court will prevent the state from relying on partisan justifications in redistricting. In *Cooper v. Harris*, the Court once again dealt with the constitutionality of congressional Districts 1 and 12—the very same districts that were at issue in the *Shaw v. Reno* round of litigation.[108] Prior to the 2010 round of redistricting, neither district was a majority-minority district, and District 1, in particular, was substantially under-populated.[109] Post-2010, both districts became majority African American, with the State claiming that District 1 was reconfigured in order to avoid liability under section 2 of the VRA and that the District 12 lines were altered for partisan reasons.[110] The Court rejected these arguments, noting that, with respect to District 1, any potential section 2 plaintiffs could not establish the racial bloc voting necessary to sustain the statutory claim.[111] This position is understandable, given that the State's interpretation would force it to draw majority-minority districts wherever possible, even in the absence of racial bloc voting, which would put section 2 on a collision course with the Equal Protection Clause of the Fourteenth Amendment.[112]

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106. 135 S. Ct. 1257, 1272-74 (2015) (holding that section 5 of the VRA did not require states to maintain the same percentage of African Americans in majority-minority districts as had existed in the prior plan).

107. *Bethune-Hill*, 137 S. Ct. at 802 (quoting *Ala. Legislative Black Caucus*, 135 S. Ct. at 1273) ("The question is whether the State had '*good reasons*' to believe a 55% BVAP floor was necessary to avoid liability.").

108. Cooper v. Harris, 137 S. Ct. 1455, 1465-66 (2017).

109. *Id.* at 1466.

110. *See id.* at 1470-73.

111. *See id.* at 1470.

112. Unlike the effectively defunct provisions of section 5, the Court's position that

The State's arguments concerning District 12 were much more difficult for the Court to resolve, ultimately leaving in place much of *Easley v. Cromartie*'s partisan safe harbor. In *Cooper,* the State argued that its decision to reconfigure District 12 was strictly partisan[113]—a contention that the Court rejected because of the direct evidence of racial motivation, including statements by state legislators that District 12 was designed to avoid retrogression under section 5 of the VRA[114]; conflicting testimony by the State's expert witness, Dr. Hofeller, about whether he ignored race in crafting the district[115]; and an expert report by Dr. Ansolabehere that found "a black voter was three to four times more likely than a white voter to cast his ballot within District 12's borders."[116]

Nonetheless, the *Cooper* majority did not firmly and unequivocally refute that states can assert a partisan-based defense to racial gerrymandering. Because the evidence of racial motivation was substantial, the Court rejected arguments by dissenters that the plaintiffs, in order to prevail in a redistricting dispute where race and partisan affiliation correlate, must produce an alternative map that allows the state to achieve its partisan objectives without the same reliance on race.[117] In cases based on circumstantial instead of direct evidence of racial considerations, however, the Court implied that the legislature could prevail, distinguishing the present case on the grounds that "the plaintiffs' introduction of mostly direct and some circumstantial evidence ... gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question."[118] Absent such direct evidence, partisanship, no matter how toxic or how pervasive, can be a legitimate motivation for a redistricting plan, such that plaintiffs have to come forward with an alternate map in cases of circumstantial evidence. *Cooper* impor-

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compliance with section 2 triggers strict scrutiny ultimately could prove to be harmful to section 2's constitutionality, but that is an issue for another day. *See* Bartlett v. Strickland, 556 U.S. 1, 23-25 (2009).

113. *Cooper*, 137 S. Ct. at 1473 ("According to the State's version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a 'strictly' political gerrymander, without regard to race.").

114. *Id.* at 1475.

115. *Id.*

116. *Id.* at 1476-77.

117. *See id.* at 1478-81.

118. *Id.* at 1479.

tantly ignores that, just as the use of race can be a facial classification that runs afoul of the Equal Protection Clause, so too can the excessive use of partisanship "abridge or deny" the right to vote.[119]

Given this reasoning, the majority is not too far off from Justice Alito's separate concurrence and dissent, which embraced the notion that the state can be partisan in its sovereign capacity, and therefore can legitimately enact a plan that has a negative impact on people of color who vote for the opposition.[120] Instead, the disagreement between the majority and the dissenters in this case really boils down to an evidentiary issue: When must plaintiffs produce an alternate map to prevail on a racial gerrymandering claim? As Justice Alito argued in *Cooper*, the alternative map requirement has an important institutional and federalism dimension that effectively trumps the rights of minority voters: "[I]f a court mistakes a political gerrymander for a racial gerrymander, it illegitimately invades a traditional domain of state authority, usurping the role of a State's elected representatives. This does harm to both the proper role of the Judiciary and the powers reserved to the States under the Constitution."[121]

Unlike the Fourteenth and Fifteenth Amendments, there is no requirement under the Elections Clause that plaintiffs disentangle the myriad motivations for why a plan was enacted. A state, for example, can exceed the scope of its redistricting authority under the Clause by adopting rules that unduly influence the outcome of an election, regardless if enacted for racial or partisan reason.[122] In

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119. Tolson, *supra* note 56, at 476-77 (arguing that partisanship can abridge the right to voet under section 2 of the Fourteenth Amendment); *see also* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017).

120. *See Cooper*, 137 S. Ct. at 1487-88 (Alito, J., concurring in the judgment in part and dissenting in part). As Justice Alito explicitly acknowledges,

> [I]t is well known that state legislative majorities very often attempt to gain an electoral advantage through [partisan gerrymandering,]... and while some might find it distasteful, "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of the fact."

Id. at 1488 (citing Hunt v. Cromartie, 526 U.S. 541 (1999); Bush v. Vera, 517 U.S. 952 (1996)).

121. *Id.* at 1490.

122. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832-35 (1995); *see also* Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J.

addition, Congress does not have to yield to concerns over the sovereign authority of the states when regulating the times, places, and manner of federal elections. Yet recent Supreme Court case law has failed to fully theorize the Elections Clause as a provision that eschews state sovereignty, limiting the Clause's ability to supplement federal power under the Reconstruction Amendments. As the next Part shows, this failure potentially subjects the Elections Clause to the same federalism limitations as the Fourteenth and Fifteenth Amendments.

II. THE ELECTIONS CLAUSE AND THE IMPRUDENT FEDERALISM OF THE ARIZONA CASES

As I have argued in prior work, the Elections Clause stands as an additional source of authority for federal antidiscrimination laws, especially the VRA.[123] The Clause, although it explicitly applies to procedural regulations that govern federal elections, can, in some circumstances, limit the states' ability to enact legislation that abridges the right to vote.[124] Congress also has enacted legislation pursuant to the Clause that likely would be unconstitutional had that body relied on the Fourteenth and Fifteenth Amendments alone.[125] The Elections Clause historically has been important in supplementing the Reconstruction Amendments as a source of authority to combat racial discrimination in voting.[126] But using these sources concurrently has increased the risk that the Clause would be similarly limited by the federalism concerns that have hobbled enforcement of the Amendments. Both the courts and scholars often confuse the decentralized nature of the Elections Clause with federalism, even though the Clause is incompatible with the concept of "dual sovereignty" upon which the United States system of federalism is based.[127] While the authority that the states

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1021, 1028-30 (2005).

123. *See generally* Tolson, *supra* note 6, at 1197-1202.

124. *See id.* at 1212.

125. *See id.* at 1238-40.

126. *See id.* at 1197-1202.

127. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819) ("In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither

exercise pursuant to the Clause can arguably further important federalism end goals,[128] state authority under the Clause is best characterized not as sovereign, but as decentralized and autonomous. Under this characterization, states "may be immune from certain norms but are not exempt from all intervention from the federal government."[129] As Bernard Bailyn observed almost fifty

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sovereign with respect to the objects committed to the other."). Of course, this is not the only definition of federalism. Edward Purcell has persuasively argued that federalism is dynamic in "that the Constitution neither gave the federal structure any single proper shape as an operating system of government nor mandated any particular and timeless balance among its components." EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 7 (2007). Thus, new theories of federalism emerge "as the social and cultural dynamics of American politics ... change drastically." *Id.* at 179; *see also id.* at 178-81 (discussing theories of dual, cooperative, and competitive federalism, all of which "reflected the dominant needs, values, practices, and politics of the respective centuries that embraced them most fully"); FEELEY & RUBIN, *supra* note 41, at 22 (defining "true federalism" as a structure in which "geographical subunits are allowed to establish their own goals and maintain their own values"). In addition, not all of the new theories of federalism treat sovereignty as their focal point. *See, e.g.*, Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 455-56, 458-59 (2010) (viewing "federalism's central ideas" as "multilayered authority, a substantive (as opposed to territorial or personal) approach to jurisdiction, a central government with a brief and identity distinct from the combined wills of the component states," which necessitated the creation of "another institution—the judiciary—to mediate [disputes] between state and general governments"). But to the extent that the Court has, in accordance with its "federalism revival," tried to reinvigorate conceptions of "dual federalism" and "state sovereignty," then the Elections Clause is in tension with the sovereignty-based narrative underlying our system of federalism as advocated by eighteenth- and nineteenth-century politicians. *See* Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 41-42 (finding among the tenants of "dual federalism" advocated by politicians of this era was "that each of these governments had a complete, independent structure [confirmed by the Tenth Amendment] with which to exercise its powers and could not require the other to administer its laws"). The Supreme Court still protects this conception of "state sovereignty." *See, e.g.*, Printz v. United States, 521 U.S. 898, 924-25 (1997) (holding that Congress cannot commandeer state officials without undermining residual state sovereignty); New York v. United States, 505 U.S. 144, 169 (1992).

128. *See* Tolson, *supra* note 99, 862-64; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543-44 (1954) (describing the states' role "in the composition and selection of the central government" as an important device that "serve[s] the ends of federalism").

129. Tolson, *supra* note 6, at 1248. *Compare* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 3-4 (2004) (defining sovereignty "as the notion that state governments should be unaccountable for violations of federal norms" and autonomy "as the ability of states to govern"), *with* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L.

years ago, sovereignty is "the notion that there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself."[130] States are not sovereign when legislating pursuant to the Clause because they govern entirely at the pleasure of Congress, depriving states of the final policy-making authority that is the hallmark of sovereign power.[131]

In theory, dual federalism assumes that both federal and state governments retain final policy-making authority in their respective spheres, but the not-so-background assumption in the Supreme Court's case law is that the states need protection from an overly aggressive and imperialistic federal government.[132] In the Court's view, post-New Deal developments negated the states' properly ordained role in the national political process, prompting the Court to adopt a series of federalism principles to protect state sovereignty.[133]

REV. 813, 816 (1998) (defining autonomy as immunity from federal norms). One such norm that has developed is the presumptive validity of state law under Elections Clause, but this norm has erroneously contributed to a view of the Clause as embracing a federalist structure in which states exercise sovereign authority. This norm emerged due to the absence of uniform federal legislation governing federal elections for the first half century of the country's existence, and not from a reluctance to displace state law once Congress has made the decision to act (such that a clear statement rule or a presumption against preemption would be warranted). *See* Tolson, *supra* note 99, at 885-88.

130. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (50th Anniversary ed. 2017).

131. Tolson, *supra* note 6, at 1248 ("Decentralization is the best way of describing a policy area in which states are autonomous rather than sovereign .... As such, the ability of Congress to preempt state regulatory regimes reflects that the founders were not overly concerned with protecting state sovereignty in this respect because, if this had been a concern, state authority would be final."); *cf.* FEELEY & RUBIN, *supra* note 41, at 23 ("[A] common—if not essential—feature of federalism is that there are significant constraints on the national government's ability to interfere with subunit policies for managing and controlling the local governments within their borders."); Andrew C. McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215, 215 (1918) ("By federalism is meant, of course, that system of political order in which powers of government are separated and distinguished and in which these powers are distributed among governments, each government having its quota of authority and each its distinct sphere of activity.").

132. *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2024-25 (2009) (reading the Court's federalism cases as enforcing a general federalism norm that recognizes "implied limitations in federal power that are traceable to some form of historically reconstructed original understanding of the appropriate federal-state balance").

133. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950)

For example, the Court does not automatically assume that Congress intends to apply federal law to the states in areas of concurrent regulation, utilizing a clear statement rule even though Congress could subject states to federal regulation if it so chooses.[134] Similarly, the presumption against preemption does not confront the issue of whether Congress can preempt the relevant state law; instead, the presumption treats state law as valid absent evidence to the contrary.[135] In both scenarios, the Court concedes that Congress could act, but refuses to subject state actors to federal regulation or displace state law absent explicit congressional intent.[136] And other federalism principles, such as the anti-commandeering doctrine,[137] the constitutional avoidance canon,[138] and, more recently, the equal sovereignty principle,[139] insulate the states from federal authority. But there has not been much sustained effort to protect federal power and prevent overreaching by the states using similar principles.[140] This oversight is noticeable with respect to the

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(noting that the Supreme Court's jurisprudence during the New Deal is in tension with "certain postulates or axioms of constitutional interpretation closely touching the Federal System," including the postulate that "[w]ithin their respective spheres the two centers of government are 'sovereign' and hence 'equal'").

134. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458-61 (1991).

135. *See Arizona Inter Tribal*, 133 S. Ct. 2247, 2271 (2013) (Alito, J., dissenting) ("The presumption against pre-emption applies with full force when Congress legislates in a 'field which States have traditionally occupied.'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

136. *See id.* at 2272 ("[W]hen Congress believes that some overriding national interest justifies federal regulation, it has the power to 'make or alter' state laws specifying 'Times, Places and Manner' of federal elections." (quoting U.S. CONST. art. I, § 4, cl. 1)).

137. *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2181-83 (1998) (arguing that the constitutional text and history supports a ban on the commandeering of state legislatures, but suggesting that there should be a more nuanced approach to the commandeering of the state executive).

138. One of the Court's most recent efforts to preserve a federal statute using the constitutional avoidance canon led to the statute's invalidation a short four years later, suggesting that the Court will not give Congress much time to correct perceived constitutional defects in federal statutory schemes where state sovereignty is at issue. *Compare NAMUDNO*, 557 U.S. 193, 203-06 (2009), *with* Shelby County v. Holder, 133 S. Ct. 2612, 2621-27 (2013).

139. *See Shelby County*, 133 S.Ct. at 2623-24.

140. *See* Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 541-42, 624 (2012) (describing the anti-commandeering rule as "establish[ing] jurisdictional limits on the *state and federal* sovereigns by prohibiting the phenomena of commandeering" and arguing that "[t]he state takeover of federal immigration database screening protocols effectually commandeers federal resources to serve state ends.... [and] enables another form of reverse-

Elections Clause, in which Congress, by virtue of its authority to "make or alter" state regulations, determines the scope of state power but—with few exceptions—still must battle against norms that implicitly favor state regulation.[141]

Despite the distinction between the sovereign authority the Clause delegates to Congress and the autonomy the states retain over structuring the procedures of federal elections, the Court has not exempted the Clause from its tendency to enforce federalism at all costs, with little regard for the Clause's text, structure, and purpose. An initial read of recent case law might give the opposite impression, however. In *Arizona Inter Tribal*, the Court held that the NVRA, which requires that individuals affirm their citizenship status in order to register to vote in federal elections, preempted an Arizona voter registration law that required documentary proof of citizenship—instead of affirmation—to register to vote in both state and federal elections.[142] The Court rejected Arizona's argument that the presumption against preemption applied to congressional legislation, like the NVRA, passed pursuant to the Elections Clause.[143] Any congressional power exercised under the Clause, in the Court's view, is a preemption of state legislation, making the presumption unnecessary.[144]

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commandeering: the usurpation of federal enforcement discretion because state authorities can now make competing choices about where, when, and how vigorously to enforce the federal laws mirrored in their state statutes" (emphasis added)). One notable exception is where issues of field preemption arise, and the Court protects federal authority from state encroachment by prohibiting states from regulating in a particular substantive area. *See, e.g.*, PPL EnergyPlus, LLC v. Nazarian, 753 F.3d 467, 474 (4th Cir. 2014), *aff'd sub nom.* Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016). Even in cases involving issues of field preemption, there is still substantial concern about preserving the vitality of state sovereignty. *See generally* Matthew R. Christiansen, Comment, *FPA Preemption in the 21st Century*, 91 N.Y.U. L. REV. ONLINE 1, 1-3 (2016) (previewing the Supreme Court case of *PPL EnergyPlus, LLC v. Nazarian*, which involves the Federal Power Act, and arguing that the Court should narrow its field preemption doctrine to avoid "impairing the dual-federalist model that is the heart of the FPA").

141. Tolson, *supra* note 6, at 1258 (noting that the Court's "voting rights jurisprudence presupposes that the states still retain a large amount of 'sovereignty' over elections, leaving room for the Court to characterize the federal/state relationship over elections as one of shared power instead of viewing the state as subordinate to federal authority. The view of electoral authority as 'shared' has led the Court to defer more to the states over the matter of elections").

142. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2252-60 (2013).

143. *See id.* at 2256-57.

144. *Id.* at 2257 n.6.

The Elections Clause's division of authority was once again front and center two years later in *Arizona IRC*, but this time the Arizona legislature and voters were at odds over which entity was the "legislature" for the purpose of congressional redistricting.[145] The Court upheld an Arizona law adopted through direct democracy that delegated the state legislature's redistricting authority to an independent commission.[146] The Court rejected the argument that the Clause, which states that "[t]he Times, Places and Manner" of federal elections "shall be prescribed in each State by the Legislature thereof," was designed "to restrict the way States enact legislation," and instead found that its "dominant purpose ... was to empower Congress to override state election rules."[147] In an alternate holding, the Court found that the state's redistricting scheme was permitted by a federal statute, 2 U.S.C. § 2a(c),[148] which lists several requirements for congressional redistricting in the event that a state fails to adopt a redistricting plan.[149] This statute refers to a valid state redistricting plan as one that is adopted "in the manner provided by the laws thereof," which is a change from earlier language that required redistricting "by a State's 'legislature.'"[150]

On the surface, the Court's description of the Elections Clause in both *Arizona Inter Tribal* and *Arizona IRC* defies the dual sovereignty narrative because the Court emphasizes congressional power. This approach is inconsistent with the traditional federalism framework that delegates to each sovereign an exclusive sphere of authority, insulated from interference from one another. The majority opinion in *Arizona Inter Tribal*, in particular, adopted a broad view of congressional authority over federal elections, at one point describing this authority as a "paramount" and noting that it "may be exercised at any time, and to any extent which [Congress]

145. *See Arizona IRC*, 135 S. Ct. 2652, 2658-59 (2015).

146. *See id.* at 2677.

147. *Id.* at 2659, 2672.

148. *Id.* at 2659, 2666.

149. *Id.* at 2669 n.19. (noting that 2 U.S.C. § 2a(c) requires "that Representatives be elected 'by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants,' and that the districts 'be equal to the number of Representatives to which [the] State may be entitled in Congress, no district electing more than one Representative'").

150. *Id.* at 2669 (emphasis omitted).

deems expedient."[151] The Court therefore declined to apply the presumption against preemption, maintaining that federalism concerns in this context are "somewhat weaker" than in its Supremacy Clause cases because the Elections Clause gives Congress the power to displace any elements of a preexisting state regulatory regime that deal with the procedure of federal elections.[152] Similarly, in *Arizona IRC*, the Court not only held that the Elections Clause does not constrain lawmaking by the people, provided that the state constitution has endorsed direct democracy, but also gave significant weight to the fact that section 2a(c) permitted the people of Arizona, through ballot initiative, to delegate the state's redistricting authority to an independent body.[153]

Once one peels back the layers of the *Arizona* decisions, however, the differences between these cases and the Court's federalism jurisprudence are revealed as differences of form rather than substance. In these cases, the Court invoked similar concerns about state sovereignty that previously limited the reach of the Fourteenth and Fifteenth Amendments.[154] For example, the contention in *Arizona Inter Tribal* that every exercise of congressional authority under the Clause is a preemption of state law may be ideologically linked to the state action doctrine advanced in the *Civil Rights Cases*.[155] As the latter cases recognized, Congress secures the rights protected by the Fourteenth Amendment

> by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given ... to

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151. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2253-54 (2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

152. *See id.* at 2257 (noting that "the States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it 'terminates according to federal law'" (quoting Buckman Co. v. Plaintiff's Legal Comm., 531 U.S. 341, 347 (2001))). While the Supremacy Clause is considered a federalism provision—allowing Congress to preempt state law in the event of any conflicts—congressional authority under the Elections Clause is much broader, allowing Congress to independently make law. *See infra* Part III.C.1.

153. *Arizona IRC*, 135 S. Ct. at 2670 ("So long as a State has 'redistricted in the manner provided by the law thereof'—as Arizona did by utilizing the independent commission procedure called for by its Constitution—the resulting redistricting plan becomes the *presumptively* governing map." (emphasis added)).

154. *See* Shelby County v. Holder, 133 S. Ct. 2612, 2621, 2622 n.1 (2013).

155. *See* Civil Rights Cases, 109 U.S. 3, 11-12 (1883).

> legislate for the purpose of carrying such prohibition into effect; [but] *such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.*[156]

By making state law a prerequisite to federal action, the Court's decision in *Arizona Inter Tribal* could be viewed as a similar attempt to preserve the sovereignty of the states at the expense of congressional power, deemed by the Court to be "paramount."[157]

Arizona IRC also subordinated federal authority to state power in adopting an expansive reading of the term "legislature," and declining to treat federal authorization in 2 U.S.C. § 2a(c) as a necessary prerequisite before the state's redistricting authority could be delegated to an independent commission.[158] In other areas in which federal power is paramount, the Court has taken congressional silence to be a form of acquiescence in the state regulatory scheme.[159] When Congress has spoken, however, the Court determines whether federal law displaces state authority or if Congress has expressly ratified the state regulatory scheme.[160]

Properly framed, these cases are beholden to the Court's state-centered federalism jurisprudence that emphasizes the values of federalism as benefits that inure to the state; reinforces a status quo in which state law is presumptively valid; and closely scrutinizes legislative intrusions by the federal government. As the Court stated in *Gregory v. Ashcroft*,

> [Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society;

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156. *Id.* (emphasis added); *see also* Virginia v. Rives, 100 U.S. 313, 318 (1879); United States v. Cruikshank, 92 U.S. 542, 554-55 (1875).

157. One might argue that the Court did not intend to impose a state action requirement for the Elections Clause. Instead, the majority may have been more concerned with limiting congressional authority to displacing only the times, places, and manner of federal elections that states may (or may not) enact in order to cabin off voter qualification standards from federal power. I discuss the flaws of both of these interpretations in Part III.

158. *See Arizona IRC*, 135 S. Ct. at 2699 (Thomas, J., dissenting) (describing the Court's defense of direct democracy as "faux federalism").

159. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

160. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2509 (2012) (finding all but section 2(b) of the Arizona immigration law, which "requires state officers to conduct a status check during the course of an authorized, lawful detention" to be preempted because there was no "showing that it has other consequences that are adverse to federal law and its objectives").

> it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[161]

More recently, *United States v. Windsor* affirmed the state-centric vision of federalism, noting that the Defense of Marriage Act (DOMA), which defined marriage as between a man and a woman for purposes of federal law, impermissibly "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State."[162] The Court acknowledged the myriad ways in which federal law has helped define the substance of the right to marriage by according benefits to the union in its own way, which is a constitutional use of federal authority.[163] Additionally, it was not that state and federal law could not live harmoniously—DOMA defined marriage for purposes of federal, not state, law. Instead, the Court privileged the state definition of marriage, even for purposes of executing a federal law that might have benefitted from a uniform definition of marriage, because authority over marriage had long resided within the sovereign authority of the states.[164]

In contrast, the Elections Clause prioritizes federal law, despite the substantial authority that states exercise over federal elections, because "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules" to "insur[e] against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress."[165] Moreover, the Clause "act[s] as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over

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161. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

162. 133 S. Ct. 2675, 2692 (2013).

163. *See id.* at 2689-90.

164. *See id.* at 2691 ("[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." (alteration and omission in original) (citation omitted) (quoting Haddock v. Haddock, 201 U.S. 562, 575 (1906)).

165. *Arizona IRC*, 135 S. Ct. 2652, 2672 (2015).

those of the electorate."[166] This Article's focus on preserving the legitimacy of federal elections captures these variant strands that the Court and historical record have identified as the purpose behind the adoption of the Elections Clause—the Framers' concerns about partisan entrenchment potentially marginalizing the electorate; their overwhelming desire to ensure the continued health and vitality of federal elections; and their surprising willingness to give the states a central and ongoing role in the composition of the federal government—to have federal officials elected through a process that is legitimized through criteria adopted in light of all of these considerations.[167]

The Elections Clause embodies principles that ensure the legitimacy of federal elections, contrary to the state centered values that are the focus of the Court's federalism jurisprudence. The Court must interpret the allocation of power between the two levels of government in a manner that best promotes this goal. First, Congress usually defers to state law governing federal elections, but Congress has been especially deferential if the law furthers the Elections Clause values of respecting popular sovereignty while ensuring finality and ease of administration. Second, the Clause's focus on congressional, rather than state, sovereignty is embodied by Congress's authority to "alter" state law where appropriate, "make" law completely independent of the state's legal regime, and "commandeer" state officials to implement federal law.[168] This structure permits Congress to implement a complete code for federal elections, which is an invaluable source of authority, particularly if states have jeopardized the health and vitality of federal elections in some way. These values, as well as the structure of the Clause, are integral to its overarching purpose of ensuring the legitimacy of

166. *Id.*

167. Tolson, *supra* note 6, at 1226 ("The congressional veto in the Elections Clause was linked to the then-prevailing notion that the national government would be insulated from the passions of the people in a way that the states were not and probably should not be. The absence of sovereignty in the Clause, therefore, was viewed by the founding generation as a structural safeguard against partisan zeal and tyranny. The veto also reflected the delegates' fear that the states, had they been in complete control of elections, could have used this power to the detriment of their citizens, who would have little recourse." (footnote omitted)); *see also* ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850, at 113-23 (1987) (detailing the partisanship and the big state/small state disputes underlying the controversy in large versus district elections since the founding).

168. *See supra* note 19 and accompanying text.

federal elections, much of which turns on the electorate's belief that the system is working.

III. PRESERVING THE LEGITIMACY OF FEDERAL ELECTIONS THROUGH ELECTIONS CLAUSE VALUES

Similar to our system of federalism, the Elections Clause can promote democratic outcomes by deferring to the states and placing a premium on popular sovereignty. But in practice, the Clause's values cannot be divorced from federal power, exercises of which are often counter-majoritarian in prioritizing finality and ease of administration over citizen participation.[169] The Court has had difficulty in balancing these competing, and sometimes conflicting, factors, leading it to default to the baseline of state sovereignty in most cases.

For example, the *Arizona Inter Tribal* Court acknowledged, but still struggled with the notion of congressional sovereignty, taking every opportunity to reaffirm a governing role for the states. For its part, the *Arizona IRC* decision reflected that Congress's scope of authority under the Elections Clause is influenced by democratic norms inherent in constitutional provisions that have expanded individual access to our governing institutions.[170] Nonetheless, this important insight was overshadowed by a glaring error in the majority opinion that undermined one of the key attributes of congressional sovereignty inherent in the Clause. The Court, by relying on 2 U.S.C. § 2a(c) as an alternate holding, overlooked the indispensability of congressional approval to all procedural questions surrounding federal elections.[171]

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169. For example, the NVRA was designed to increase the opportunities for voter registration, but not at all costs. Under current case law, states can impose proof of citizenship requirements as a prerequisite to voting if the state provides evidence that the NVRA interferes with the administration of their voter qualification requirements. *See Arizona Inter Tribal*, 133 S. Ct. 2247, 2258 (2013).

170. *Arizona IRC*, 135 S. Ct. at 2672.

171. 2 U.S.C. § 2a(c) is evidence that Congress has ratified the use of independent redistricting commissions and as such, it is indispensable to the Court's decision that the state is permitted to use them. *Cf.* Bragdon v. Abbott, 524 U.S. 624, 644-45 (1998); Herman & MacLean v. Huddleston, 459 U.S. 375, 385-86 (1983); Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

The majority's analysis should have emphasized that sovereignty lies with Congress, such that state law is presumptively valid only if Congress permits it to be. For example, in *Arizona v. United States*, the Court upheld the majority of Arizona's immigration law because of its consistency with the federal scheme, not because states have some type of sovereign authority to regulate immigration independent of federal law.[172] Similarly, Congress defers to state lawmaking procedures, not because the states are sovereign, but because it respects popular sovereignty and promotes administrative ease. Both are important Elections Clause values that Congress itself recognized in adopting section 2a(c).[173] As this Part shows, the juxtaposition between popular sovereignty, competent election administration, and congressional sovereignty makes these values distinct from any value of federalism currently protected by the courts or favored by the legal scholarship. These values are designed to further the Clause's overarching purpose of electoral legitimacy, but the Court has ignored them, resulting in an impermissibly narrow view of federal authority.

A. Elections Clause Value: Preserving the Legitimacy of Federal Elections Through Respect for Popular Sovereignty

So where do these Elections Clause values come from? The first of these values—respect for popular sovereignty—derives from constitutional changes to our political system, starting with our founding documents but extending through several amendments that increased the political power of the people during the twentieth century, including, most notably, the Seventeenth Amendment.[174]

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172. Arizona v. United States, 132 S. Ct. 2492, 2509 (2012).

173. *See* Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 696 (2016) ("As for platitudes about popular sovereignty, the Framers instilled in the Elections Clause the notion that control of elections should be conducted by the institution most representative of the people.").

174. As the *Arizona IRC* Court noted, in resolving whether,

> [a]bsent congressional authorization, ... the Elections Clause preclude[s] the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts[.] The history and purpose of the Clause weigh heavily against such preclusion, *as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.*

135 S. Ct. at 2671 (emphasis added).

The Apportionment Act of 1911 (the 1911 Act), the predecessor to section 2a(c) at issue in *Arizona IRC,* is especially instructive here.[175] In its initial form, the Act referred to state "legislatures" as the entity responsible for redistricting, but it was enacted during the Progressive Era, which saw an increase in ballot initiatives and referenda, the use of primary elections, and ultimately, the adoption of the Seventeenth Amendment.[176] Progressives, who sought to marginalize the political elites who had created doubt and uncertainty about the outcome of many elections, argued that state legislatures should not have the power to select United States senators because the legislatures conspired with the business community regarding appointments.[177] They believed that average people should become directly involved with the political process to mitigate this corruption.[178] In response to these concerns, Congress altered the language of the 1911 Act to encompass state laws enacted through ballot initiatives to be responsive to the popular sovereignty concerns driving the Progressive movement.[179]

During this period, the overhaul of the political process highlighted divisions over the question of the entity with which sovereignty lies, but arguably, Congress's embrace of direct democracy through the 1911 Act, when interpreted in light of the Seventeenth Amendment, rejected a formalistic conception of state sovereignty in favor of a broader definition that encompassed the people of the state.[180] Even though the Amendment specifically dealt with the election of Senators, its adoption, along with the 1911 Act, suggests that the change in the nature of state sovereignty to be inclusive of

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175. *See* Apportionment Act of 1911, Pub. L. No. 62-5, 37 Stat. 13.

176. *See id.*

177. *Cf.* Ben Hovland, Comment, *Championed by Progressives and William U'Ren: Can Oregon Give the Ballot Initiative to the People Again?*, 85 OR. L. REV. 275, 279 (2006).

178. *See id.*

179. *Compare* 2 U.S.C. § 2a(c) (2012) ("[I]f there is an increase in the number of Representatives, such additional Representative or Representatives *shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State.*" (emphasis added)), *with* Apportionment Act of 1911 § 4 ("That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives *shall be elected by the State at large and the other Representatives by the districts now prescribed by law* until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act." (emphasis added)).

180. *Cf.* Persily et al., *supra* note 173, at 696.

the populace—at least in the context of federal elections—was broad and wholesale.

Congress's reliance on the Elections Clause to make allowances for popular sovereignty is in line with the Framers' desire to use the constitutional structure as a safeguard for individual liberty. As I have argued in a prior article, the Framers were willing to give Congress veto authority over state election laws, as opposed to all state laws, as a compromise position that allowed Congress to weigh in on a limited, but very important circumstance—voting and representation.[181] But, importantly, the congressional veto was also a safeguard for the people:

> The Elections Clause furthered fears that the Constitution created an all-powerful national government that would introduce tyranny, despotism, and a governing aristocracy. To address these concerns, Federalists often drew parallels between the rights that free men surrendered to their governments to protect liberty and the power that states relinquished to the central authority, also viewed as necessary to protect freedom. In other words, just as individuals had to give up some of their individual liberty to state governments in order to secure peaceful enjoyment of those liberties, so too did states have to surrender some of their power to the federal government for the same purpose—to protect the people. The congressional veto in the Elections Clause, from this perspective, was simply another layer of protection for the people in return for the states surrendering their final policymaking authority over elections to the federal government.[182]

The Clause's origins as an additional safeguard for individual liberty show that the *Arizona IRC* case was not, as the dissenters contend, about Congress's ability through section 2a(c) to unilaterally enlarge its own power by changing the meaning of the term "legislature."[183] Properly seen, the case was about the less controversial issue of whether the Court should interpret Congress's power to "make or alter" election regulations to permit Congress to shift decision-making authority under the Clause from one state entity

181. *See* Tolson, *supra* note 6, at 1223.

182. *Id.* at 1224 (footnote omitted).

183. *See Arizona IRC*, 135 S. Ct. 2652, 2677-78 (2015) (Roberts, C.J., dissenting).

to another in the name of popular sovereignty. In answering this question, it quickly becomes clear that there can be no independent analysis of the meaning of "legislature" without consideration of federal law.

To understand this point, pretend that Congress did not sanction redistricting by independent commission in section 2a(c), but instead prohibited it. The Court would then have had to directly confront the question of whether Congress, through federal statute, could prevent a state from using an independent commission for congressional redistricting. It is pretty clear that the answer would depend on the Court's interpretation of Congress's power to "make or alter" state regulations. As it stands, the statute plays very little role in the outcome because, by permitting direct democracy, it simply reinforces what the Court had already concluded with respect to the meaning of the term "legislature": that the term embodies whatever prescriptions for lawmaking are in the state constitution.[184] But the Court's approach unnecessarily aggrandizes state power at Congress's expense by leaving unresolved fundamental questions about federal power under the Elections Clause.

The majority's privileging of state law in this way is deeply ironic given that it did not prevent four dissenters from criticizing the decision as insufficiently protective of state sovereignty, at least to the extent that ideal is represented by the state legislature. As Chief Justice Roberts cautioned:

> [T]he majority's reading of Section 2a(c) as a statute approving the lines drawn by the Commission would seemingly authorize Congress to alter the Elections Clause. The first part of the

184. *See id.* at 2671 (majority opinion) (declining to resolve the constitutionality of section 2a(c) because "[a]ny uncertainty about the import of § 2a(c) ... is resolved by our holding that the Elections Clause permits regulation of congressional elections by initiative"); *id.* at 2687-88 (Roberts, J., dissenting) ("Section 2a(c) establishes a number of default rules that govern the States' manner of electing representatives '[u]ntil a State is redistricted in the manner provided by the law thereof.' Section 2a(c) is therefore 'inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict' the State. Here, the Commission *has* redistricted the State 'in the manner provided by the law thereof.' So by its terms, Section 2a(c) does not come into play in this case." (alteration in original) (quoting Branch v. Smith, 538 U.S. 254, 275 (2003) (plurality opinion)). Even if Chief Justice Roberts is correct that section 2a(c) does not apply because the Commission redistricted the State, the statute still stands as persuasive evidence that Congress permits states to delegate their authority to an independent commission pursuant to the Clause.

> Elections Clause gives state legislatures the power to prescribe regulations regarding the times, places, and manner of elections; the second part of the Clause gives Congress the power to "make or alter such Regulations." There is a difference between making or altering election regulations prescribed by the state legislature and authorizing an entity *other than the state legislature* to prescribe election regulations."[185]

Both the majority and the dissenters ignore, however, that section 2a(c) confirms that not only does Congress have the authority to determine the procedures and the institution through which states can enact the times, places, and manner of federal elections, but also the statute that the Court billed as an alternate holding definitively resolved the main issue of the case—whether states can redistrict by independent commission.

Cases decided in the wake of the 1911 Act and the Seventeenth Amendment confirm that the reallocation of redistricting authority from the state legislature to an independent commission in the name of popular sovereignty is constitutionally permissible, subject only to congressional approval. *Davis v. Hildebrant,* for example, involved a constitutional challenge to Ohio's process for enacting its congressional redistricting plan.[186] Instead of obtaining the governor's approval for the plan as required by state law, a majority of Ohioans used the referendum process enshrined in the Ohio constitution to vote down the redistricting plan.[187] The Court held that, not only did Congress endorse the referendum process in the 1911 Act as part of the legislative power of the state, the issue of whether this structure violated the Elections Clause created a

185. *Id.* at 2688-89 (Roberts, C.J., dissenting); *see also* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 81 (2016) (arguing that the *Arizona IRC* decision impermissibly allows states to "completely and permanently exclude their institutional legislatures from regulating congressional—and, by extension, presidential—elections, subject to no apparent limiting principle"). Professor Morley recognizes that states have "no inherent power to regulate federal elections" and he focuses on a number of ways in which the text and case law limits their authority. *Id.* at 103-04. But he ignores that Congress itself is also a limiting principle on state authority and can weigh in at will, even with respect to the state institutions responsible for administering the regulations that govern federal elections, because that is the nature of sovereign authority.

186. *See* 241 U.S. 565, 566-67 (1916).

187. *See id.*

nonjusticiable political question.[188] The Court's deferential posture suggests that Congress has sole authority to determine whether states have exercised their authority under the Elections Clause in a manner that is consistent with the Guarantee Clause.[189] Indeed, a different outcome in *Davis*—that the state legislature must enact regulations governing federal elections even if the state's constitutionally prescribed lawmaking function lies with some other entity—would present a nonfrivolous issue under the Tenth Amendment, an unintended paradox for a Clause that is specifically focused on congressional sovereignty.[190]

Most important, the term "legislature" defies fixed meaning in the context of the Elections Clause because the functions of the respective legislatures and their compositions vary by state.[191] In *Smiley v. Holm*, for example, the plaintiff contested the validity of Minnesota's congressional redistricting plan after the Secretary of

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188. *See id.* at 568 ("[W]e think it clear that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law.").

189. *Id.* at 569 ("To the extent that the contention urges ... to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of Article I of the Constitution, and hence void ... we again think the contention is plainly without substance [because it] must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which ... in effect annihilates representative government [in violation of the Guarantee Clause and] ... presents no justiciable controversy."). The Court appeared to retreat from this position a few years later. In *Hawke v. Smith*, the Court referred to "legislature" as a term that is fixed throughout the Constitution, defined as "the representative body which made the laws of the people." 253 U.S. 221, 227 (1920). As such, Ohio could not subject the state legislature's ratification of the Eighteenth Amendment to a referendum by the voters, which was not required by Article V of the federal Constitution. *Id.* at 225, 231. But *Hawke* can be easily distinguished on the grounds that it did not involve federal elections, and later Elections Clause cases are inconsistent with its holding. *See infra* notes 191-94 and accompanying text.

190. The Tenth Amendment issue would arise because forcing all election regulations through the state legislature would intrude on the state's sovereign authority to structure its government in the manner that it sees fit, and by implication determine which entity has lawmaking authority. *See* Smiley v. Holm, 285 U.S. 355, 367-68 (1932) ("[There is] no suggestion in [Article I, Section 4] of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted.").

191. *See id.* at 372-73.

State implemented the plan without the governor's approval.[192] The Court rejected the redistricting plan because it had not been adopted in accordance with state law, and the Clause explicitly confers on the state the authority to prescribe, *by law*, the times, places, and manner of federal elections.[193]

Because of the diversity among state governmental structures, it is unsurprising that the *Smiley* Court held that the term "prescribed ... by the Legislature thereof" requires that the apportionment plan be adopted by the lawmaking procedure set out in the state constitution,[194] which is also the document that determines the varying composition and character of all fifty state legislatures. For this reason, and contrary to the assertions of the *Arizona IRC* dissenters, "legislature" cannot be a fixed term. Query what would be the outcome under their theory if Arizona had defined its legislature in the state constitution to encompass the independent commission responsible for drawing state legislative districts? While it is unclear, one could argue that forbidding this structure ex ante undermines state sovereignty significantly more than endorsing a flexible definition of the term "legislature" subject only to implicit or explicit congressional approval.

The flexibility of the term "legislature" shows that the Elections Clause is broad enough to encompass any accommodations for popular sovereignty that a state chooses to incorporate in its lawmaking procedures. Such considerations are legitimate, provided that Congress, in its sovereign capacity to "make or alter" state law, prioritizes this value, as it had in both section 2a(c) and the 1911 Act.

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192. *See id.* at 361-62.

193. *See id.* at 367-68.

194. U.S. CONST. art. 1, § 4, cl. 1. While the end result is the correct one, the Court in *Smiley* argued that the term legislature is fixed, but its functions vary. *See Smiley*, 285 U.S. at 365-66 (noting that the legislature may act as a "ratifying body," a "consenting body," a "representative body," or an "electoral body"). This approach denies the dynamicism that is inherent in our constitutional structure that makes it difficult for "legislature" to have uniform meaning. For example, Nebraska has a unicameral legislature and all other states have bicameral legislatures. *See History of the Nebraska Unicameral*, NEB. LEG. http://nebraskalegislature.gov/about/history_unicameral.php [https://perma.cc/3SN7-ZR34]. So long as the state legislature comports with minimum constitutional requirements, a state has a lot of leeway in determining the structure of its representative body. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 577 (1964) (requiring that state representatives be elected from districts of as "equal population as is practicable").

B. Elections Clause Value: Preserving the Legitimacy of Federal Elections Through Predictable and Competent Election Administration

Elections Clause values also derive more generally from the Supreme Court's case law, which has consistently prioritized election integrity, or the idea that federal elections must be administered in a manner that does not call the outcome into question.[195] The judiciary's de facto deference to state law does not derive from any special solicitude for the states as states; rather, it is about ensuring that elections are well run in order to produce a legitimate outcome.[196] Toward this end, courts have developed a separate doctrine—the *Purcell* principle—named for a short, per curiam, 2006 Supreme Court decision that sets the standards for injunctions in election law cases that emerge close to the time of the election.[197] The *Purcell* principle privileges the status quo by blocking changes that would alter rules on the eve of the election due to administrative concerns and the increased risk of disenfranchisement should voting changes occur shortly before the election.[198]

Purcell recognized the risk of instability and uncertainty in the election law context. Along the same lines, an open struggle for power between the states and the federal government, which can help define and promote the values of federalism in other substantive contexts, can undermine the legitimacy of our system of elections. The perception that the election system was broken had damaged our political system in the wake of *Bush v. Gore,* after voters endured thirty-seven days of political high theatre in which the Florida Supreme Court and the United States Supreme Court

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195. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 189-90 (2008); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

196. Notably, the need for finality and easy administration of state election laws is the primary reason why the right to vote is not treated like other rights, at least according to the Court's case law. *See* Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 168-72 (2015).

197. Purcell v. Gonzalez, 549 U.S. 1, 4-6 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.").

198. *See id.* at 5-6; *see also* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428-29 (2016) (arguing that the *Purcell* principle should give way if there is a "risk of issuing orders [that] can disenfranchise voters or impose significant burdens on election administrators for no good reason").

battled over whether the recount comported with constitutional requirements.[199] Ultimately, George W. Bush squeaked out a victory in Florida after the United States Supreme Court ended the recount, effectively handing him the presidency.[200] Controversy over the 2000 election dogged Bush for his entire first term, which for years was haunted by accusations that he was not duly elected despite his 546-vote margin over Al Gore in Florida.[201]

Bush v. Gore notwithstanding, the Court generally has deferred to the states by privileging their interest in ensuring the integrity of their elections over a citizen's interest in exercising his or her constitutional rights. Notably, many states have enacted "election integrity" regulations under the guise of complying with federal law. For example, in *Crawford v. Marion County Election Board*, the Court upheld Indiana's voter identification law as an effort to effectuate the goals of HAVA and NVRA, both of which impose various requirements on the states that, among other things, modernize election procedures, insure the accuracy of the voter rolls, and impose a more uniform system of voter registration.[202] As the Court stated in *Crawford*, "Of course, neither HAVA nor NVRA required Indiana to enact SEA 483, but they do indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology."[203]

In some ways, *Crawford* resembles *Arizona IRC*—federal law permitted but did not require Indiana to adopt a voter identification law,[204] just as Arizona did not have to delegate its redistricting authority to an independent commission in order to comport with

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199. *See* Rick Hampson, *2000 v. 2016: Why Gore Then is Different Than Trump Now*, USA TODAY (Oct. 21, 2016, 11:04 AM), https://www.usatoday.com/story/news/politics/elections/2016/10/20/donald-trump-al-gore-2000-election-outcome/92477932/ [https://perma.cc/L2DJ-TB6B].

200. *See* Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam).

201. *See* Hampson, *supra* note 199 (discussing the criticisms of the Bush presidency in the wake of *Bush v. Gore*).

202. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008) (plurality opinion) (vindicating the state's "interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.... in preventing voter fraud .... [and] in safeguarding voter confidence"); *supra* note 44; *see also* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 607-08 (4th Cir. 2016).

203. *Crawford*, 553 U.S. at 193.

204. *See id.*

section 2a.[205] In both cases, the Court pointed to federal law as an alternative justification for the state regulation, and the justifications were explicitly tied to the key Elections Clause values of eliminating administrative concerns and ensuring the legitimacy of the outcome in federal elections.[206] But *Crawford* is especially problematic, with the court vindicating the state's interest in election integrity over the individual's right to vote without requiring any evidence that the regulation actually furthered Indiana's regulatory goals.[207] While one might take issue with the Court's approach for this and other reasons,[208] it is nonetheless clear from *Crawford* that the states' interest in election integrity is a cornerstone of our political system, and it has been validated, in the Court's view, by federal legislation enacted pursuant to the Elections Clause.

Doe v. Reed further confirmed that the states' interest in election integrity is substantial, holding that states can disclose the names of those who sign a petition to challenge a state law by referendum.[209] Although there were First Amendment concerns in compelling the disclosure of the signatories through a public records request, the Court stated that the electoral context must be taken into account in determining whether such disclosure raises constitutional concerns.[210] The Court determined that, on balance, Washington's interest in preserving the integrity of its electoral process trumped its citizens' First Amendment rights:

> [T]he State's interest in preserving the integrity of the electoral process suffices to defeat the argument that [disclosure] is unconstitutional with respect to referendum petitions in general .... [That] interest is particularly strong with respect to efforts to

205. *See supra* notes 145-49 and accompanying text.

206. *See supra* notes 145-49 and accompanying text.

207. *See Crawford*, 553 U.S. at 192-93.

208. And I have. *See* Tolson, *supra* note 196, at 161-65.

209. *See* 561 U.S. 186, 191 (2010).

210. *Id.* at 194-95 ("The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered 'by the whole electorate.'" (quoting Meyer v. Grant, 486 U.S. 414, 421 (1988))).

> root out fraud .... But the State's interest ... is not limited to combating fraud[; it] extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. [The State's] interest also extends more generally to promoting transparency and accountability in the electoral process.[211]

Though *Doe* did not involve federal law, the Court cited to *Purcell* and *Crawford* to illustrate the overriding importance of protecting the legitimacy of our political system, even when there are countervailing First Amendment interests (or in the cases of *Crawford* and *Purcell*, Fourteenth Amendment interests) on the other side.[212]

The regulatory actions that states can take in the name of election integrity are extremely broad, so the Court's view that Congress has endorsed this interest in federal legislation is extremely important. In addition to *Crawford*'s description of "election integrity" to include the state's adoption of a voter identification law as a means of modernizing its administrative procedures,[213] the Court has also upheld various state statutes in the name of election integrity. For example, the Court has allowed states to place boundary restrictions on the distribution of campaign finance materials;[214] impose waiting periods on voters who wanted to change their party registration;[215] bar judicial candidates from personally soliciting campaign funds;[216] and exclude write-in candidates from the ballot.[217] It is clear that the rubric of "election integrity" is not only about an honest process, but also about easing the administrative burdens on state officials. Once one understands that certainty of outcome and ease of administration hold a vaunted position in the electoral context,[218] it is easier to dismiss some of the

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211. *Id.* at 197-98 (citations omitted).

212. *Id.* at 197.

213. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191, 200 (2008) (plurality opinion).

214. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion).

215. Am. Party of Tex. v. White, 415 U.S. 767, 793-94 (1974); *see also* Tashjian v. Republican Party of Conn., 479 U.S. 208, 210-11 (1986).

216. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015).

217. Burdick v. Takushi, 504 U.S. 428, 430 (1992).

218. Note that emphasizing the values of integrity and efficiency is qualitatively different from deferring to state sovereignty, even though states often rely on the latter in justifying

more prominent theories of federalism that promote organizational structures between the states and the federal government that could potentially undermine the electoral legitimacy that these values are designed to safeguard.[219]

In my prior work, I rejected the argument that polyphonic federalism, which "asks how the overlapping power of the state and federal governments can best address a particular issue,"[220] works as a governing framework for the Elections Clause because the fluidity of the doctrine is not amenable to a system that requires clear winners and losers.[221] I have also probed the utility of cooperative federalism as an underlying theory for the Elections Clause,[222]

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their interest in electoral integrity and efficiency. The states and the federal government may have differing opinions about how the goals of integrity and efficiency are best furthered. *See, e.g.*, *Arizona Inter Tribal*, 133 S. Ct. 2247, 2251, 2260 (2013) (finding that Arizona's documentary proof of citizenship requirement is preempted by the NVRA, which only requires voters to affirm their citizenship status).

219. *See, e.g.*, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 119 (2010) (arguing that Congress can "tax, spend, and regulate" under Article I, Section 8 "when two or more states face collective action problems" that derive from "interstate externalities and national markets.... that affect the general welfare"). This theory's focus on using federalism to provide a solution for collective action problems as a justification for federal action could apply to the Elections Clause. Congress often imposes uniformity on the states to address a problem that requires a one-size-fits-all solution, *see, e.g.*, Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311 (Supp. III 2016), but this theory does not capture the unique dynamic of the Clause in which Congress can act for any reason at all—no collective action problem required.

220. Tolson, *supra* note 6, at 1214 (quoting Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005)).

221. *See, e.g.*, *id.* at 1214-15 (rejecting the theory of polyphonic federalism because "encouraging the dialogue that polyphonic federalism envisions between state and federal governments results in an absence of finality and an increase in forum shopping that could undermine the legitimacy of our electoral system") (citing Schapiro, *supra* note 220, at 291). Polyphonic federalism would arguably support a view of Congress's Elections Clause authority that places voter qualification standards firmly within the scope of federal authority. *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 95 (2009) ("In the polyphonic conception, federalism is characterized by the existence of multiple, independent sources of political authority. The scope of this political authority is not defined by subject matter. No kind of conduct is categorically beyond the boundaries of state or federal jurisdiction."). This Article resists a reading of federal power that would essentially negate the constitutional structure, arguing instead that Congress can reach voter qualifications pursuant to Elections Clause only in certain circumstances. *See* Tolson, *supra* note 39.

222. Tolson, *supra* note 6, at 1216 (noting that the Clause "provides that states will draw the lines in the first instance but gives Congress the ability to change or alter such plans, suggesting a coordination that is akin to many modern federal regulatory programs").

a contention that, at least initially, seemed more plausible than polyphonic or process-based theories of federalism.[223] But I ultimately concluded that the presence of the congressional veto in the text of the Elections Clause and the substantive mandates imposed on the states are in direct conflict with the very idea of "cooperative" federalism.[224]

Recent work by Professor Abbe Gluck has added significantly more nuance to the concept of "cooperative federalism," nuance that—at least initially—may offer stronger support than prior iterations for cooperative federalism as a theoretical description of our system of elections.[225] Professor Gluck envisions a system in which states preserve some aspects of their sovereign authority through inter-governmental cooperation, in which states strengthen their position relative to the federal government through altering, shaping, and implementing federal law.[226] States exercise this power

223. While the states' role in setting the times, places, and manner of federal elections is an important "political safeguard of federalism" that gives states significant autonomy in this sphere, *see* Tolson, *supra* note 99, at 861-62, Congress's ability to negate state law at will in furtherance of values that have little to do with protecting the policymaking authority of the states limits this theory's explanatory power as a framework for the Clause, *see* Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1554 (2012) (noting that process federalists "argue that federalism depends on preserving the de facto autonomy of the states, not the de jure autonomy afforded by sovereignty"). Some process theorists have also relied on courts to police federal power as a supplement to the political safeguards. *See, e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358-59 (2001). However, I reject the argument that the federalism-based doctrines that the Court has developed to protect state power, such as the equal sovereignty or clear statement rules, apply to legislation enacted pursuant to the Elections Clause. *See supra* notes 19-21 and accompanying text.

224. *See* Tolson, *supra* note 6, at 1216 ("[M]ost cooperative federalism programs entail voluntary state involvement[, but] [t]he VRA and other federal legislation that alters or changes state electoral practices are anything but voluntary and tend to trigger substantial outrage on the part of the states."); *see also* Corwin, *supra* note 133, at 21 (discussing cooperative federalism in the context of social security and noting, "[t]he other great objection to Cooperative Federalism is more difficult to meet, if indeed it can be met. This is, that 'Cooperative Federalism' spells further aggrandizement of national power. Unquestionably it does, for when two cooperate it is the stronger member of the combination who calls the tunes.").

225. *See* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998-99 (2014).

226. *See id.* at 1997 ("With almost every national statutory step, Congress gives states new governing opportunities or incorporates aspects of state law—displacing state authority with one hand and giving it back with the other. Federalists should pay attention: ... this role for the states within the federal legislation is a primary vehicle through which states have influence on major questions of policy, and through which state *sovereign* powers retain their relevance, albeit in ways different from those contemplated by the traditional account.").

at the pleasure of Congress, but still play a substantial role in coordinating the structure and scope of federal regulatory programs.[227]

The political system is similar in this respect because Congress routinely relies on state-level implementation and state law in regulating federal elections.[228] Prior to *Shelby County*, section 5 of the VRA allowed states to negotiate with the federal government over changes that the state wanted to make to its election laws.[229] Both the HAVA and the NVRA are prime examples of federal statutes that rely on state implementation and cooperation.[230] Congress could arguably administer the programs itself, but instead has used its "make or alter" authority to delegate this responsibility, evoking Professor Gluck's powerful imagery of inter-governmental cooperation that is at the heart of cooperative federalism.

Nonetheless, conceptual problems arise when describing the interaction between the states and the federal government over elections as "cooperative federalism." Federal election statutes, even those that rely on state law for substantive content, are very restrictive of state power in a way that is unimaginable for a statute emerging from the federalism inspired process that Professor Gluck outlines.[231] The VRA's preclearance regime, for example, is not a system in which any state concerned about its sovereign authority would want to participate.[232]

Similarly, the NVRA looks far different than the structure created by the Affordable Care Act (ACA), which Professor Gluck points to as a paradigmatic example of federalism in the age of statutes.[233] The NVRA's requirements are driven, not by deference to state law, but by a need for certainty and legitimacy of the outcome with respect to voter registration, factors that do not apply to the same

227. *See id.* at 1998-99.

228. *See supra* Part II.

229. *See* Michael J. Pitts, *Rescuing Retrogression*, 43 FLA. ST. U. L. REV. 741, 743-44 (2016).

230. *See* Weinstein-Tull, *supra* note 34, at 749-52.

231. *See* Gluck, *supra* note 225, at 1997, 1999.

232. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); *see also* Shelby County v. Holder, 133 S. Ct. 2612, 2618, 2624 (2013) (criticizing the VRA for requiring states to seek approval to enact laws that are otherwise constitutional).

233. In the context of the ACA, states have final policymaking authority over some aspect of the healthcare statute, but Congress delegates this authority to them. *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 539-41 (2011).

extent in the context of the ACA and other federal statutory regimes that have structures premised on flexibility.[234] The NVRA establishes criteria with which states must adhere in conducting voter registration for federal elections and prohibits certain regulations that would needlessly disenfranchise individuals. The statute clarifies when states can conduct voter registration;[235] how voters can be removed from the voter rolls;[236] and the process by which states must allow voters to register.[237] These regulations impose costs and minimize the flexibility that states would otherwise have in structuring this aspect of their electoral system.[238] Arguably, recent attempts by states to alter the federal voter registration form highlight the problem with flexibility in this context; it can lead to voter confusion and disenfranchisement that ultimately undermines the statute's purposes.[239] Comparatively, the ACA, which permits states to decide whether to set up health care exchanges, has managed to survive despite the fact that its reach has been undermined by the flexibility of its mandates—flexibility that could be fatal to the legitimacy and administration of federal elections.[240]

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234. *See, e.g.*, Jackson, *supra* note 137, at 2181 ("[S]tability in sustaining a sufficiently principled law of federalism-based limits on national power can be better achieved with more flexible (rather than categorical) standards, given the dynamic and pragmatic character of successful federalism.").

235. Section 6 requires each state to designate as voter registration agencies all offices in the state that provide public assistance and administer state-funded programs primarily engaged in providing services to persons with disabilities. 52 U.S.C. § 20506 (Supp. III 2016).

236. Each state must also provide that a registrant may not be removed from the official list of eligible voters except by registrant request, by reason of criminal conviction or mental incapacity, or by a general program that removes voters ineligible due to death or a change in residence. *Id.* § 20507(a)(3)-(4) . States must complete any program to systematically remove ineligible voters from the official lists of eligible voters no later than ninety days prior to the date of a federal election. *Id.* § 20507(c)(2)(A).

237. Under section 5, a voter registration application form must be part of each state's motor vehicle registration. *Id.* § 20504(a)(1). Section 6 requires each State to accept and use the voter registration application form prescribed by the Federal Election Commission to register voters by mail. *Id.* § 20505(a).

238. *See, e.g.*, Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1416 (9th Cir. 1995) (holding that the federal government does not have to cover the costs of state implementation of the NVRA).

239. *See* Robin Shulman, *Avoiding Contempt of Court, Kansas Secretary of State Kris Kobach Says He'll Let People Vote*, ACLU (Sept. 29, 2016, 5:15 PM), https://www.aclu.org/blog/voting-rights/promoting-access-ballot/avoiding-contempt-court-kansas-secretary-state-kris?redirect=blog/speak-freely/avoiding-contempt-court-kansas-secretary-state-kris-kobach-says-hell-let-people [https://perma.cc/B54K-WB5M].

240. *See* Gluck, *supra* note 233, at 539-41.

If Professor Gluck's theory fails to capture the finality and administrative ease at the heart of the Elections Clause, then Professor Heather Gerken's theory of federalism as nationalism presents this problem to an even greater degree. Professor Gerken argues that the true value of federalism is in achieving a well-functioning national democracy and, as such, her theory is significantly less concerned with state sovereignty than other approaches.[241] With this theory's focus on federal preemption of state law, the states can become irrelevant if their governing prerogatives do not further democratic end goals.[242]

Contrary to nationalism, the Elections Clause assumes that well-functioning states will exercise significant authority in order to preserve their role in the formation of the federal government,[243] and are not there simply to "tee up the conflicts and debates that forge national norms."[244] Toward this end, Congress has routinely

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241. Gerken, *supra* note 223, at 1556-57 (arguing that a well-functioning national democracy can be achieved by placing policy-making authority with the federal government, but it does not preclude the devolution of decisions down to the state level if doing so would achieve this goal).

242. *Cf.* Gluck, *supra* note 225, at 2000 ("[T]o be clear, National Federalism is not a federalism shorn of state sovereignty. It is true that National Federalism emerges through congressional displacement of state law with a new, overarching federal statutory scheme. But this federalism depends on, and strengthens, the states' continuing sovereign status in important ways that have yet to be recognized.").

243. *See* Tolson, *supra* note 6, at 1207, 1258 (arguing that this is one of the purposes behind the Clause's adoption).

244. *See* Heather K. Gerken, *Sovereignty Is the Wrong Path for Federalism: A Response to Ilya Somin*, BALKINAZATION (Jan. 3, 2017), https://balkin.blogspot.com/2017/01/sovereignty-is-wrong-path-for.html [https://perma.cc/UVE7-DPZ7] (emphasis omitted) (arguing that states do not need to be sovereign to play this important role). This debate further corroborates the problems with the federalism framework, and in particular, its laser focus on state sovereignty but oversight of congressional sovereignty. Sovereignty remains an important concept as applied to the Elections Clause because it can resolve disputes between the states and the federal government over the regulation of federal elections. But both the nationalists and the more traditional federalists continue to deploy notions of state sovereignty—or in this case the absence of sovereignty—in ways that are consistent with federalism doctrine but inconsistent with the Elections Clause. *Compare* Rick Hills, *A Response to Heather Gerken: Why the Politics of Tolerent Pluralism Need the Legal Institutions of Federalism*, PRAWFSBLAWG (Jan. 3, 2017, 4:15 PM), http://prawfsblawg.blogs.com/prawfsblawg/2017/01/a-response-to-heather-gerken-why-the-politics-of-tolerant-pluralism-need-the-legal-institutions-of-f.html [https://perma.cc/ M8HP-D8QS], *with* Heather K. Gerken, *Do the Rules of the Game Matter When You Are Playing in a Hurricane?*, BALKINIZATION (Jan. 8, 2017, 2:23 PM), https://balkin.blogspot.com/ 2017/01/do-rules-of-game-matter-when-you-are.html [https://perma.cc/23Q5-CB4L].

declined to intercede in the management of federal elections, even when states have passed laws that are decidedly antidemocratic.[245] And the few times when Congress has intervened in the electoral process were not only to protect our national democracy, but also to further important process goals designed to keep the states inextricably intertwined in the business of federal elections.

Congress's enactment of HAVA as a response to several issues that occurred during the 2000 Presidential election is instructive of this point.[246] The statistical tie in Florida, where approximately one hundred million ballots were cast, created significant doubt about the voting process in several counties in Florida, leading to litigation and public protest.[247] Congress had major concerns about the use of varying technologies throughout the state, the questionable experience of poll-workers, and the fact that local governments bore the costs of elections and voter registration—all of which played a role in the controversy surrounding the 2000 election.[248] Given this, Congress could have easily justified imposing a uniform rule that addressed these issues, but HAVA does not nationalize presidential elections. Instead, it addresses these administrative problems by moving the election process "from an environment of local control with loose state and federal oversight to an environment of strong state control and loose federal oversight."[249] Congress assumed that most states were well-functioning such that they could continue to manage presidential elections; for those with problems, the answer was not federal uniformity, but more oversight of local election boards by state officials.

Through HAVA, Congress adhered to its traditional position of leaving much of the preexisting state regime in place to promote finality and ease of administration, even when it was incentivized, as with the 2000 election controversy, to remove all aspects of federal election regulation from the states entirely. Congress's decision not to nationalize federal elections in the wake of the 2000

245. *See supra* notes 211-17 and accompanying text.

246. *See* Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 426-28 (2004).

247. *See* Bush v. Gore, 531 U.S. 98, 103 (2000) (per curiam) (holding that the recount of presidential ballots without uniform standards violated equal protection).

248. *See* Shambon, *supra* note 246, at 424-25.

249. *Id.* at 431.

election illustrates that these values matter at least as much as—and probably more than—creating a well-functioning national democracy in which uniform federal authority might better address dysfunction in a swing state, but could potentially cause chaos in the forty or so other states that properly conduct their elections. The baseline assumption in the Clause is that states should be sufficiently autonomous to properly structure federal elections, but in those instances in which federal oversight could result in more democratic outcomes, Congress has proven to be remarkably stubborn in enacting uniform and far reaching legislation.[250] This complex dynamic cannot be captured by a theory that marginalizes the role of the states in national politics, particularly when their continued political health must be a vital part of any theory that seeks to explain the unique structure of the Elections Clause. For purposes of legitimacy and ease of administration, states remain relevant and important for the regulation of federal elections—just not sovereign over them.

C. Elections Clause Value: Preserving the Legitimacy of Federal Elections Through Congressional Sovereignty

Recently, scholars have built on Professor Gerken's nationalism approach by explicitly applying this sovereignty-free theory of federalism—congressional, state, or otherwise—to explain intergovernmental relationships in the context of federal elections. For example, Professor Justin Weinstein-Tull describes the Elections Clause as embodying "election clause federalism" because federal election statutes enacted pursuant to the Clause impose liability on states for any violations, even though most states have delegated responsibility for election administration to local governments.[251] As a result, states often attempt to evade liability under these statutes by pointing to local governments as the wrongdoers, placing the federal government in the uncomfortable position of trying to force the states to enforce federal election law against their subdivi-

250. *See, e.g.*, Vieth v. Jublierer, 541 U.S. 267, 276-77 (2004) (plurality opinion) (noting the numerous times that Congress has proposed, but not passed, legislation to govern redistricting).

251. *See* Weinstein-Tull, *supra* note 34, at 764.

sions.[252] Professor Weinstein-Tull describes these relationships as "hyperfederalized[,] not only because states push election decisions down to the local level, but because the quality of decentralization, including legal relationships between counties and states, varies by state."[253]

While Professor Weinstein-Tull's insight about the complexities of these relationships is important, he uses the federalism label in a manner that ignores the historical and legal baggage associated with the term, while downplaying the importance of congressional sovereignty in resolving the hard questions that arise over election regulation.[254] Indeed, Congress's ability to act in complete disregard of state sovereignty not only undermines the federalism narrative, but it also explains why statutes like the HAVA and NVRA can, as Professor Weinstein-Tull argues, "require states to organize their subdivisions to either effectively oversee certain kinds of election administration or administer elections themselves[,] ... even though organizing and delegating power to political subdivisions has long been understood as the very essence of state sovereignty."[255]

Shoving the Clause's organizational structure into an ill-fitting federalism framework that does little to explain the sui generis nature of congressional power does not provide clarity or resolve issues arising across a broad range of cases in determining which entity should dictate policy in this area. The Clause's focus on congressional sovereignty helps resolve these legal and political disputes.[256] However, the level of deference accorded to state law in

252. *See id.* at 767-75; *see also* Gerken, *supra* note 223, at 1556-60.

253. Weinstein-Tull, *supra* note 34, at 753.

254. *See id.* at 753 n.33 ("Courts and scholars have discussed federalism and voting rights before—particularly in the context of the 'federalism costs' of the Voting Rights Act. Here, I mean something different: not the costs to state sovereignty of the federal election statutes, but rather the set of federal-state-local relationships implicated by the statutes and the balance of power—both formal and functional—inherent in those relationships." (citation omitted)). It is not entirely clear if Professor Weinstein-Tull models his Elections Clause theory after a cooperative federalism model, or if he thinks that this is federalism just because it involves governance by more than one sovereign. *See id.* (suggesting that it is the latter). *But see id.* at 753 n.32 ("The term 'election law federalism' follows a number of other studies about federalism as it relates to specific policy areas."). If Professor Weinstein-Tull embraces nationalism as his governing theory, nationalists view federalism as one of many tools that can further the theory's focus on creating a national democracy, but do not see it as a theory of federalism in and of itself. *See* Gerken, *supra* note 223.

255. *See* Weinstein-Tull, *supra* note 34, at 751-52.

256. *See* Issacharoff, *supra* note 47, at 108 (arguing that "the level of constitutional scrutiny

this context often turns on the Court's view that states retain sovereignty under the Elections Clause in amounts similar to the Reconstruction Amendments.[257]

Consistent with this view, the *Arizona* cases reaffirm that federal authority is paramount in the context of federal elections. But these cases impermissibly view the federal government's primary role to be a vehicle to protect state sovereignty over elections instead of furthering the Clause's primary goal of ensuring the legitimacy of federal elections. As Justice Alito argued in his dissent in *Arizona Inter Tribal*:

> [T]he Elections Clause's default rule [that states retain their authority unless Congress indicates otherwise] helps to protect the States' authority to regulate state and local elections. As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections.[258]

Because congressional interference can undermine a state's authority over its own elections, Justice Alito (and Justice Thomas who dissented as well)[259] argued that the Court must defer to state authority to regulate federal elections.[260] But the Clause does not

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should drop when Congress exercises powers directly granted by the Constitution rather than powers inherited pursuant to the enforcement of the Equal Protection Clause").

257. *See supra* Part II; *see also* Morley, *supra* note 185, at 99 (arguing that the Elections Clause is a "grant[] of constitutional authority to state legislatures .... [and] this specific delegation of authority imposes a special duty on other governmental entities to ensure that they apply election laws as written by the legislature, rather than with the flexibility and discretion they otherwise might be permitted to apply").

258. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2272 (2013) (Alito, J., dissenting).

259. *See, e.g.*, *id.* at 2262 (Thomas, J., dissenting).

260. *See also* Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1416 (9th Cir. 1995) (rejecting the argument that the use of state offices and state officials to implement the NVRA violated the Tenth Amendment). Notably, *Wilson* does not prioritize state sovereignty over federal power, rightly confining its analysis to whether the NVRA could impair the state's authority over its own elections in violation of the Tenth Amendment. *See id.* at 1413. The court concluded that this is the only federalism that matters—not the relationship between the states and the federal government over federal elections, but the relationship between the states and the federal government over state and local elections. *See id.* at 1415. Although declining to read the NVRA in a manner that would impair California's power to conduct its

require Congress to circumscribe its own power to protect state authority in this way.

Nonetheless, the Court's framing in *Arizona Inter Tribal* of congressional power under the Clause as "none other than the power to pre-empt" could be interpreted in two possible ways that are consistent with the dissenters' protectionist stance toward state sovereignty.[261] Because Congress shares concurrent authority over the times, places, and manner of federal elections with the states, one reading of *Arizona Inter Tribal* is that federal power, when exercised, by definition displaces some aspect of state authority, even if the state has not acted.[262] The Court approaches its Dormant Commerce Clause cases in this manner, and could be applying similar reasoning to the Elections Clause.[263] Alternatively, the Court's language framing federal power in terms of preemption alone could mean that Congress has to displace some element of state law to act pursuant to the Clause and cannot legislate independently.[264] This is the equivalent of a state action require

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state elections, the Ninth Circuit rightly recognized that, with respect to federal elections, states cannot use the power reserved to them under the Tenth Amendment to subvert Congress's authority under the Elections Clause. *See id.* at 1415-16.

261. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2257 (2013).

262. One could argue that, similar to cases involving field preemption, Congress has the authority to preempt laws hat states have enacted as well as those laws that could be, but were not enacted. This framework would leave Congress with the authority to independently make law. But to frame the Clause's structure in terms of field preemption principles ignores the substantial authority that the Clause delegates to states over the times, places, and manner of federal elections and the Clause's broader purpose that the states would continue to exercise this power, if not abused. Given *Arizona Inter Tribal*'s concession that federal power under the Clause could interfere with state control over voter qualifications, arguably one is justified in taking seriously the possibility that the Court intended to impose a state action requirement on exercises of federal power under the Elections Clause.

263. *Cf.* Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 571 (1997) (holding that "the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power. 'In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.'" (quoting S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945))). *But see Arizona Inter Tribal*, 133 S. Ct. at 2257 n.6 (distinguishing the exercise of federal power under the Elections Clause from the Commerce Clause because "laws enacted under the Commerce Clause (arguably the other enumerated power whose exercise is most likely to trench on state regulatory authority) will not always implicate concurrent state power—a prohibition on the interstate transport of a commodity, for example").

264. *Arizona Inter Tribal*, 133 S. Ct. at 2257 & n.6 ("When Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces

ment, similar to that which exists under the Reconstruction Amendments.[265] This requirement would preserve "state control of state and local elections"[266] but hamper Congress's ability to regulate federal elections.

Both of these interpretations are problematic for a number of reasons. If the Court, under the Dormant Commerce Clause approach, seeks to limit Congress to the subject matter of the Clause—times, places, and manner—by tying it to state power over the same topic, this approach ignores the elusive boundary between manner regulations and voter qualification standards. As Justice Thomas argued in dissent, it is impossible to disentangle Arizona's proof of citizenship requirement (arguably a voter qualification standard) from the regime of voter registration (long held to be a manner regulation), posing problems for the power that the states retain, under Article I, Section 2, to set voter qualifications for federal elections.[267] The answer, however, is less about finding ways to vindicate or protect state authority, and more about conceding the sovereignty that Congress has under the Clause, which may, in some limited instances, permissibly interfere with state control over voter qualifications.[268]

The state action interpretation of the Elections Clause raises even more red flags than the dormant commerce clause approach. By interpreting every exercise of congressional authority as a preemption of state law, the Court read the terms "make" and "alter" in the Clause as synonyms, which is contrary to its prior case law. In *McConnell v. FEC*, for example, the Court upheld Title I of the Bipartisan Campaign Regulation Act against a claim that Congress exceeded its authority under the Elections Clause in barring the use of soft money to fund federal elections.[269] While the Court acknowledged that Title I would "prohibit[ ] some fundraising tactics that would otherwise be permitted under the laws of various States," the Court framed these effects as "indirect" because Title I "does not

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some element of a pre-existing legal regime erected by the States" because "the text of the Clause confers the power to do exactly (and only) that").

265. *Cf.* James v. Bowman, 190 U.S. 127 (1903); Civil Rights Cases, 109 U.S. 3, 11-12 (1883).

266. *Arizona Inter Tribal*, 133 S. Ct. at 2272.

267. *Id.*, 133 S. Ct. at 2265-68 (Thomas, J., dissenting).

268. *See* Tolson, *supra* note 39.

269. 540 U.S. 93, 184 (2003).

expressly pre-empt state legislation, ... leav[ing] the States free to enforce their own restrictions on the financing of state electoral campaigns."[270]

In contrast, *Arizona Inter Tribal* could be interpreted as making state legislation a prerequisite for federal action because of the Court's unerring loyalty to the dual federalism regime. Federalism, and its focus on the governing prerogatives of the states, is at odds with the two key features of congressional sovereignty in the Elections Clause: (1) Congress's power to legislate in complete disregard of state law; and (2) Congress's authority to commandeer state officials to enforce federal election law.[271] As we see in the *Arizona* cases, concerns about state power make it easy to confuse the state's autonomy in this area with authentic sovereign authority, but these factors confirm that the Clause's focus is federal power.

1. Federalism "Lite": State Sovereignty and Congress's Independent Authority to Legislate

The Supreme Court's statements about the supremacy of federal law under the Elections Clause, while true, lull the reader into thinking that state sovereignty has taken a backseat to congressional power. But the Court's implicit deference to state law in the *Arizona Inter Tribal* opinion suggests that this narrative is misleading. By declining to apply the presumption against preemption, the Court made an institutional choice that it, and not Congress, is best equipped to determine the extent to which state law is preempted. Recent preemption controversies have been primarily matters of institutional choice, or put differently, questions over which institution should determine if a federal statute preempts state law.[272] The presumption against preemption places this responsibility squarely on the shoulders of Congress, by requiring Congress to be express in its preemption of state law, lest the Court decide otherwise by assuming the presumptive validity of state law.[273]

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270. *Id.* at 186.

271. *See* Tolson, *supra* note 6, at 1216.

272. *Cf.* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 508 (1992).

273. *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 728 (2008).

Declining to apply the presumption aggrandizes the Court at the expense of Congress, and unfortunately, the Court has perceived its role in this area to be protector of the states.[274]

The refusal to apply the presumption is defensible only if the Court truly believes, as it claims in *Arizona Inter Tribal*, that federalism interests are weaker in the context of federal elections.[275] Congress is arguably sovereign in that sphere, and the Court's doctrine must always reflect this primacy. On initial review, the *Arizona Inter Tribal* Court's refusal to apply the presumption against preemption to the NVRA accords with this basic observation. There should be no presumption against preemption in this context, just as there are no other prerequisites—such as a clear statement rule—which would require Congress to "make its intention [to alter the usual constitutional balance between the states and the federal government] 'unmistakably clear in the language of the statute.'"[276] For example, the Sixth Circuit declined to apply the clear statement rule to exercises of federal power under the Elections Clause because

> the Clause expressly presses states into the service of the federal government by specifying that state legislatures "shall" prescribe the details necessary to hold congressional elections. This stands in stark contrast to virtually all other provisions of the Constitution, which merely tell the states "not what they must do but what they can or cannot do."[277]

But the Court's position in *Arizona Inter Tribal* that every federal action under the Clause displaces some preexisting element of a state regime applies in a manner that limits federal power in a

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274. One could easily make an argument for the application of the presumption in those cases in which Congress makes legislation, but solely for normative reasons that respect what has historically been Congress's posture toward legislation under the Clause. The states are the first movers with respect to setting the times, places, and manner of federal elections.

275. *See, e.g.*, *In re* Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98, 110, 112 (2d Cir. 2016) (declining to apply the presumption against preemption because bankruptcy, governed by Article I, Section 8, Clause 4 of the Constitution, is not "an area recognized as traditionally one of state law alone").

276. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

277. Harkless v. Brunner, 545 F.3d 445, 454 (6th Cir. 2008) (quoting ACORN v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995)).

counterintuitive way. First, the few decisions dealing with preemption under the Elections Clause prior to *Arizona Inter Tribal* analyzed the relevant state laws under conflict preemption principles rather than express preemption, which appropriately reflects that state and federal law can live harmoniously under the Clause.[278] Federal appeals courts have applied two major tests to questions of Elections Clause preemption in recent years, and these tests conflict with the Court's all-or-nothing approach. Despite *Arizona Inter Tribal*'s focus on express preemption, none of these tests assess whether federal law should replace a preexisting state law. The tests used by the Fifth, Ninth, and Tenth Circuits all provide that a state election law will be struck down if, and only if, it directly conflicts with federal law.[279] Indeed, the Fifth Circuit perceived Congress's failure to legislate on a subject as acquiescence in the state scheme, as opposed to a sign that the exercise of federal

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278. The Court's express preemption approach is a curious move, particularly when Justice Scalia dissented in a case in which the Court tried to treat state and federal power as having the exact same substantive scope in an analogous context. In *King v. Burwell*, he drew on the Elections Clause in arguing that state and federal authority should not be viewed as equivalents, even if a statute allows Congress to step in when the state has failed to act:

> The Court emphasizes that if a State does not set up an Exchange, the Secretary must establish "such Exchange." It claims that the word "such" implies that federal and state Exchanges are "the same." To see the error in this reasoning, one need only consider a parallel provision from our Constitution: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter *such Regulations*." Just as the Affordable Care Act directs States to establish Exchanges while allowing the Secretary to establish "such Exchange" as a fallback, the Elections Clause directs state legislatures to prescribe election regulations while allowing Congress to make "such Regulations" as a fallback. Would anybody refer to an election regulation made by Congress as a "regulation prescribed by the state legislature"? Would anybody say that a federal election law and a state election law are in all respects equivalent? Of course not. The word "such" does not help the Court one whit.

135 S. Ct. 2480, 2499-500 (2015) (Scalia, J., dissenting) (citations omitted).

279. *See* Voting Integrity Project, Inc. v. Bomer, 199 F.3d 773, 775 (5th Cir. 2000) ("[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject."); *see also* Gonzalez v. Arizona, 677 F.3d 383, 394 (9th Cir. 2012), *aff'd sub nom. Arizona Inter Tribal*, 133 S. Ct. 2247 (2013) (holding that if the two statutes would complement each other as part of the same scheme, there is no conflict, and therefore no preemption); Kobach v. U.S. Election Assistance Comm'n, 6 F. Supp. 3d 1252, 1265-66 (D. Kan. 2014), *rev'd and remanded*, 772 F.3d 1183 (10th Cir. 2014).

power is limited by or somehow tied to the actions of the states.[280] Similarly, the Ninth Circuit's preemption analysis recognized that every action of Congress is not intended to displace state law, and the court explicitly took the position that "state and federal laws [are to be examined] as if they comprise a single system of election procedures."[281]

Second, Congress can legislate independently of the states because, as sovereign, its power over the times, places, and manner of federal elections is broader than the power retained by the states.[282] For example, in *Foster v. Love*, the Court held that 2 U.S.C § 7, which sets the November date for the biennial election for federal offices, preempted a Louisiana law allowing candidates for federal office to be "elected" on primary day in October if they obtained a majority of the votes.[283] Notably, the Court did not hold that the states must have the opportunity to set the date for federal elections *first* before Congress could act. In addition, congressional power under the Clause arguably extends to setting voter qualifica-

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280. For example, in *Voting Integrity Project, Inc. v. Bomer*, the court examined the text of a Texas statute that allowed voting to begin seventeen days before election day, and found that the statute did not conflict with federal voting statutes requiring that the "election" of members of Congress and presidential electors occur on the Tuesday after the first Monday in November. *See* 199 F.3d at 774. The plaintiffs argued that federal law contemplated that all voting would occur on the same day because the statutes set a specific date for the "election" of federal representatives. *See id.* at 776 (interpreting "election" to mean "the combined actions of voters and officials meant to make a final selection of an office holder" (quoting Foster v. Love, 522 U.S. 67, 71 (1997))). The court held that, "[b]ecause the election of federal representatives in Texas is not decided or 'consummated' before federal election day," the Texas laws were not inconsistent with federal law. *Id.* Notably, the court determined that Congress's failure to curb absentee balloting, which is now available in all fifty states but has been in use for over a century, is persuasive evidence that "election" does not require that all voters cast ballots on the same day. *Id.* at 777. In fact, the court noted that there are certain federal laws in which Congress has actually *required* that individuals be able to vote absentee, most notably the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and portions of the VRA. *Id.*

281. *Gonzalez*, 677 F.3d at 394.

282. The Court has rejected a construction of congressional power in other contexts in which the scope of Congress's authority would be unduly tied to the actions of the states or the courts. *See* Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966) (rejecting New York's challenge to the literacy test provisions of the VRA because Congress does not need a judicial determination that state literacy requirements actually violate the Constitution before Congress can act).

283. *See* 522 U.S. 67, 68-69 (1997); *see also* Millsaps v. Thompson, 259 F.3d 535, 547, 549 (6th Cir. 2001) (upholding the Tennessee early voting statute because the law was "not intended to make a final selection of a federal officeholder" on the day before Election Day).

tions if Louisiana had failed to do so for its general election, indicating that federal power under the Clause is different in kind and scope than state authority.[284] The Court recognized that the Elections Clause "gives Congress 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'"[285]

Functionally, tying federal action to state law calls into question the myriad examples in which it is not clear whether Congress is independently making new law or altering some element of the preexisting state regime.[286] For example, the NVRA allows a state to remove a person from the official list of registered voters, but only if the voter: (1) confirms in writing that he has moved outside the jurisdiction in which he is registered, or (2) fails to return a postage prepaid, pre-addressed address confirmation card and does not vote in two consecutive federal election cycles.[287] Under Colorado law, an individual could be removed from the voter rolls if the confirmation card is returned as undeliverable within twenty days of mailing the notice, but the state does not check to see if the person has also failed to vote in two consecutive federal election cycles.[288]

This provision of the NVRA could be an example of Congress altering state law by preempting Colorado's rule that an undeliverable confirmation card is sufficient to remove the voter from the rolls, or Congress could be making new law by adding an additional requirement that a person must fail to vote in two consecutive elections before they can be removed from the rolls. It is not immediately apparent which interpretation is the correct one, but if Congress's ability to "make" law is tied to replacing some element

284. Tolson, *supra* note 39.

285. *Foster*, 522 U.S. at 71 n.2 (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)); *see also id.* (stating that this authority encompasses both congressional elections and "any 'primary election which involves a necessary step in the choice of candidates for election as representatives in Congress'" (quoting United States v. Classic, 313 U.S. 299, 320 (1941)).

286. *See Arizona Inter Tribal*, 133 S. Ct. 2247, 2272 (2013) (Alito, J., dissenting) ("A federal law regulating the operation of grain warehouses, for example, necessarily alters the 'pre-existing legal regime erected by the States'—even if only by regulating an activity the States had chosen not to constrain." (citation omitted)).

287. National Voter Registration Act, 52 U.S.C. § 20507(d) (Supp. III 2016).

288. *See* Common Cause of Colo. v. Buescher, 750 F. Supp. 2d 1259, 1264-65 (D. Colo. 2010).

of the preexisting state regime, then the constitutionality of this provision of the NVRA turns on whichever interpretation the court adopts. The district court in *Common Cause of Colorado v. Buescher* construed the Colorado law to apply only to new voters, thereby avoiding any conflict with the NVRA.[289] By reading the NVRA's dual requirements to apply to existing voters and leaving Colorado's scheme in place as it applies to new voters, the district court's approach illustrates Congress's authority to independently make law, separate from the state regulatory regime, under the Elections Clause.

The Supreme Court confronted a similar issue in the fall of 2017 when it heard arguments in *A. Philip Randolph Institute v. Husted,* which challenges Ohio's supplemental process that removes voters who have not engaged in any "voter activity" for two years, such as filing an address change on a voter registration card or with a state agency; or voting, either provisionally, through an absentee ballot, or in person on election day.[290] The first method that Ohio uses to purge its rolls is to remove voters who do not respond to a confirmation card or update their registration, *and* who do not vote in two consecutive federal elections.[291] But the supplemental process imposes an additional burden on voters by allowing them to be purged after six years of inactivity, even if the person is otherwise eligible to vote.[292] The Sixth Circuit treated the issue as one of statutory interpretation; however, like the Colorado law, the legitimacy of Ohio's supplementary scheme depends in part on whether Congress was making law in enacting the NVRA, which suggests that states can purge their rolls only in accordance with the NVRA process;[293] or altering state law, which suggests that states can supplement the NVRA process with their own procedures.[294]

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289. *See id.* at 1277-78.

290. 838 F.3d 699, 703 (6th Cir. 2016), *cert. granted,* 137 S. Ct. 2188 (2017).

291. *See id.* at 702-03.

292. *See id.* at 703.

293. *See* 52 U.S.C. § 20507(a)(3) (Supp. III 2016); *see also Arizona Inter Tribal,* 133 S. Ct. 2247, 2260 (2013) (holding that Arizona's additional proof of citizenship requirements for voter registration are preempted by the NVRA).

294. *Cf. Arizona Inter Tribal,* 133 S. Ct. at 2273 (Alito, J., dissenting) (arguing that states can supplement the federal form).

Treating the validity of Ohio's supplementary process solely as an issue of statutory interpretation does not fully resolve why the law is problematic. For example, a supplemental process is arguably contrary to the purpose of the NVRA, which is to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office."[295] But the NVRA also has another purpose that could be consistent with the Ohio scheme: "to ensure that accurate and current voter registration rolls are maintained."[296] The NVRA's statutory scheme suggests that Congress was making new law and prioritizing the former purpose over the latter.[297] Explicitly recognizing Congress's ability to independently make law, as the Court failed to do in *Arizona Inter Tribal*, avoids muddying the water with respect to whether states can supplement federal voting requirements, even if doing so would make it harder for individuals to vote. In theory, this increased difficulty should raise concerns under the Fourteenth Amendment, but despite recent successes, such claims are usually difficult to prosecute.[298] Thus, clarity under the Elections Clause doctrine is especially important.

HAVA's provisional balloting requirements raise a separate question about whether the federal government can impose new, substantive requirements on the states that are not traceable to state law, or that might skirt the boundaries of what is considered a time, place, and manner regulation. Section 303(b) of HAVA requires a voter who registered by mail to present photo identification or documentary proof of identification when voting in person for the first time.[299] Without such identification, states must treat a prospective voter's ballot as provisional until he or she produces the

295. 52 U.S.C. § 20501(b)(1).

296. *Id.* § 20501(b)(4); *see A. Philip Randolph Inst.*, 838 F.3d at 705-06 (recognizing the tension between the dual purposes of the NVRA but noting that the statute imposes "multiple constraints" on the state's ability to maintain accurate voter rolls).

297. *See* Franita Tolson, Husted, Arizona Inter Tribal, *and Lessons from the Constitutional Structure*, ACS BLOG (Aug. 17, 2017), https://www.acslaw.org/acsblog/husted-arizona-inter-tribal-and-lessons-from-the-constitutional-structure-0 [https://perma.cc/52V9-TAR4] (noting that the NVRA "imposes significant constraints on the states' ability to remove voters").

298. And will likely become more difficult given the spate of recent judicial appointees to the federal courts—appointees who are less likely to be amenable to voting rights claims than appointees of the prior Administration.

299. Help America Vote Act, 52 U.S.C. § 21083(b)(1)-(2).

proper documentation.[300] Prior to HAVA, many states required voters to produce identification at other points during the voting process; allowed individuals to vote using less onerous forms of identification; or utilized procedures, including for provisional ballots, that were altogether different. To the extent that voter identification requirements straddle the line between manner regulation and voter qualification standards, HAVA might raise some constitutional concerns.[301]

Courts have already mediated disputes over the scope of HAVA and the extent to which it displaces state law. In *Sandusky County Democratic Party v. Blackwell,* the district court concluded that voters have a right to cast a provisional ballot under HAVA and a private right of action to enforce the provisional voting requirement, but the state was not required to count provisional ballots cast in the wrong precinct.[302] The court reasoned that "[t]here is no reason to think that HAVA, which explicitly defers determination of whether ballots are to be counted to the States, should be interpreted as imposing upon the States a federal requirement that out-of-precinct ballots be counted."[303]

In contrast, *White v. Blackwell* read HAVA to require states to allow voters who requested (but did not cast) an absentee ballot to vote provisionally.[304] At the time of the election, Ohio did not have a law that was preempted by this requirement.[305] *White v. Blackwell* is a prime example of Congress creating "new law" pursuant to its authority under the Elections Clause while *Sandusky* takes a more conservative view of Congress's intent to "make" new law given the statute's structure. But both cases implicitly recognize that Congress has independent authority to legislate and use HAVA—rather than state law—as the baseline for resolving the thorny issues in these cases.[306]

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300. *Id.* § 21083(b)(2)(B).

301. Tolson, *supra* note 83.

302. 387 F.3d 565, 568 (6th Cir. 2004) (per curiam).

303. *Id.* at 578.

304. *See* White v. Blackwell, 418 F. Supp. 2d 988, 991 (N.D. Ohio 2006).

305. *See id.* at 990-91 (discussing how Ohio Rev. Code § 3509(B)(1) moots the litigation because it requires the state to allow electors to cast a provisional ballot when the elector has requested (but not received) an absentee ballot).

306. *See, e.g., Arizona Inter Tribal,* 133 S. Ct. 2247, 2270-75 (2013) (Alito, J., dissenting).

2. The Incidents of Congressional Sovereignty: Commandeering State Offices, State Law, and State Officials

In addition to its authority to "make or alter" state regulations, the sharpest and most prominent iteration of congressional sovereignty under the Elections Clause is its power to commandeer state offices, state law, and state officials—authority that stands in stark contrast to traditional views about the nature of sovereignty under federalism doctrine.[307] Under a cooperative federalism framework, Congress might be able to depart from the anticommandeering principle, but the Elections Clause allows Congress to go much further than even the most permissive theory of federalism. And despite the reinvigoration of the Court's federalism jurisprudence and the advent of new, judicially created safeguards to preserve state power, Congress's authority to commandeer state officials pursuant to the Elections Clause remains unchanged. As Samuel Issacharoff has observed,

> [Congress's] power to enforce its "general supervisory power"... has remained intact [under the Elections Clause], even with the Court's developing Eleventh Amendment jurisprudence, which carves out a protected zone for core state functions.... Similarly, direct federal regulation [of elections] is unaffected by the concern for impermissible federal commandeering of state functions presented by congressional attempts to compel state undertakings for federal programs directly.[308]

The text of the Clause similarly suggests that Congress, in the course of exercising its authority, can commandeer the offices, law, and officials of the state in accordance with its "general supervisory power."[309] The Clause's provision that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, *shall*

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307. *See* Morley, *supra* note 185, at 101 (noting that the Supreme Court has not resolved this issue, but determining that "anti-commandeering challenges ... are unlikely to succeed"); Weinstein-Tull, *supra* note 34, at 752. Other scholars have also argued that Congress can commandeer state officials when acting pursuant to the Elections Clause. *See, e.g.*, Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 237-38.

308. Issacharoff, *supra* note 47, at 109.

309. *See id.* (quoting *Ex parte* Siebold, 100 U.S. 371, 387 (1879)).

be prescribed in each State by the Legislature thereof" is very different from Congress's authority, which "*may at any time* by Law make or alter such Regulations."[310] The use of the mandatory language "shall be prescribed" to describe state authority and "may ... make or alter" to describe congressional authority, illustrates that Congress can act if it chooses, but states must act, even if at the behest of Congress.

Arguably, neither the language of the Elections Clause nor its structure justify reading "shall" as anything other than a direct command to the states to enact the laws governing federal elections, or to permit Congress to commandeer the state regulatory regime if the states have failed to carry out their duty. The Elections Clause uses both "shall" and "may" in its language, so to interpret "shall" to mean "may" in order to limit Congress's ability to commandeer the states would result in the perverse outcome that neither government is obligated to issue the laws that govern federal elections. The lack of a clear directive to either sovereign also stands at odds with the purpose of the Clause, in which ensuring that states make provisions for federal elections is integral to preserving their overall legitimacy.

This view is consistent with how the Supreme Court has generally interpreted "shall," a term signaling that Congress can conceivably—and in other contexts, impermissibly—draft state officials into implementing a federal regulatory regime.[311] Indeed, those times where the Court has interpreted "shall" to mean "may" have been to avoid the constitutional issues created by Congress's commandeering of state officials in the context of the Commerce Clause which, unlike the Elections Clause, does not give Congress the same commandeering power.

In *New York v. United States*, for example, the Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required that states form regional compacts with other states in order to dispose of waste generated within their borders; those states that refused to comply were forced to take title

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310. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

311. *See, e.g.*, Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432 n.9 (1995) ("Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.' For example, certain of the Federal Rules use the word 'shall' to authorize, but not to require, judicial action." (citations omitted)).

to waste generated by any source and pay damages incurred by the failure to take prompt possession.[312] The Court held that Congress could not commandeer states into enacting a federal regulatory program by forcing them to take title to their waste.[313] However, the Court applied the constitutional avoidance canon to section 2032c(a)(1)(A) of the Act, declining to read its language that "[e]ach State *shall* be responsible for providing ... for the disposal of ... low-level radioactive waste generated within the State" as a direct command from Congress, "despite the statute's use of the word 'shall,'" because "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems."[314] Thus, the Court read "shall" to mean "may" and treated section 2021c(a)(1)(A) as establishing a series of incentives in order to encourage states to dispose of their waste.

Recent cases have confirmed that the Court interprets "shall" to mean "may" in order to avoid striking down the statute only because the Commerce Clause does not allow Congress to commandeer state officials as a strict interpretation of "shall" would require. In *National Federation of Independent Businesses v. Sebelius*, the dissenters argued that the individual mandate was a penalty for this very reason because it "commands that every 'applicable individual *shall* ... ensure that the individual ... is covered under minimum essential coverage.'"[315] Instead, the Court treated the mandate, which encouraged people to get health insurance by imposing a tax for noncompliance, as a financial incentive similar to those at issue in *New York v. United States*.[316]

Avoiding potentially unconstitutional interpretations is not the only reason the Court has interpreted "shall" to be permissive. The Court also has done so in order to bring coherence to an otherwise

312. 505 U.S. 144, 151-54 (1992).

313. *Id.* at 149.

314. *Id.* at 151, 170 (second omission in original) (emphasis added) (quoting 42 U.S.C. § 2021c(a)(1)(A) (1988)); *see also* Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 663 (2012) (Scalia, J., dissenting) (declining to read *New York v. United States* to "justify reading 'shall' to mean 'may'" because the "'shall' in that case was contained in an introductory provision—a recital that provided for no legal consequences").

315. *Nat'l Fed. of Indep. Bus.*, 567 U.S. at 649 (quoting 26 U.S.C. § 5000A(a) (Supp. IV 2006)).

316. *See id.* at 568-70 (majority opinion).

ambiguous statutory scheme. In *Gutierrez de Martinez v. Lamagno*, for example, the Court declined to read "shall" as mandatory in interpreting the Westfall Act,[317] which empowers the Attorney General to certify that a federal employee was acting within the scope of his employment if that employee is sued for a wrongful or negligent act.[318] The Act provides that, "Upon certification by the Attorney General ..., any civil action or proceeding ... *shall* be deemed an action against the United States ..., and the United States *shall* be substituted as the party defendant."[319] Reading "shall" to be mandatory instead of permissive would make the Attorney General's certification conclusive, and in the process, run afoul of the "traditional understandings and basic principles[ ] that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up to render."[320] In contrast, the Elections Clause's Congress-centric focus, which allows states to be pushed into the service of the federal government, is not inherently ambiguous such that reading the term "shall" as mandatory instead of permissive creates separation of powers (or any other structural) issues.

The Court in *Arizona Inter Tribal*, by reasoning that the Elections Clause is an area of concurrent state and federal power in which each government exercises power of the same kind and type, hobbles Congress's commandeering authority. Congress's ability to commandeer the states is unlike any power that the states possess and often occurs in the absence of state action.[321] Over the past two centuries, Congress has stepped in to facilitate election administration when the states have been unable or unwilling to do so, commandeering state officials, state facilities, and state law to ensure the continued health of federal elections. During the Reconstruction Era, for example, Congress sought to force state election officials to comply with state law by making noncompliance with state law a federal crime.[322] The Enforcement Act of 1870 incorporated by reference

317. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 436-37 (1995) (Ginsburg, J.).

318. 28 U.S.C. § 2679(d)(1) (2012).

319. *Gutierrez de Martinez*, 515 U.S. at 421-22 (quoting 28 U.S.C. § 2679 (d)(1) (1994)).

320. *Id.* at 434.

321. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2257 (2013).

322. *See* Enforcement Act of 1870, § 22, ch. 114, 16 Stat. 140, 145. For example, section 22 of the Enforcement Act of 1870 provided:

> That any officer of any election at which any representative or delegate in the

substantive state law that governed the mechanics of federal elections,[323] exposing state officials to dual liability that blurred the lines of accountability at the core of the Court's anti-commandeering jurisprudence.[324] In the companion cases of *Ex parte Siebold* and *Ex parte Clarke*, the Supreme Court rejected the argument that this use of state law and state officials was impermissible, noting in *Siebold* that

> it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties.[325]

The Court further argued that, while "Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State," Congress can punish them for violating federal law.[326]

More recently, Congress has commandeered both state officials and state offices by imposing affirmative obligations on the states to implement the NVRA. Under section 10 of the NVRA, each state must designate a state officer as the chief state election official responsible for coordinating the requirements of the Act.[327] The NVRA also requires each state to designate all offices in the state

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> Congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States or by or under any State, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election ... shall be deemed guilty of a crime and shall be liable to prosecution and punishment therefor.

Id.

323. *Id.* § 2.

324. *See Ex parte* Clarke, 100 U.S. 399, 408 (1879) (Field, J., dissenting).

325. *Ex parte* Siebold, 100 U.S. 371, 387 (1879).

326. *Id.*; *see also id.* at 388. ("It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed.").

327. 52 U.S.C. § 20509 (Supp. III 2016).

that provide either public assistance or state-funded programs primarily engaged in providing services to persons with disabilities as voter registration agencies.[328] In *Voting Rights Coalition v. Wilson,* California argued that these provisions violated the Tenth Amendment by commandeering state agencies to administer a federal election scheme.[329] The Ninth Circuit rejected this argument, holding that "Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators. The exercise of that power by Congress is by its terms intended to be borne by the states without compensation."[330] Courts in both Pennsylvania and South Carolina declined to impose an anticommandeering rule for similar reasons, recognizing that Congress can directly regulate the state's manner and means of voter registration.[331]

CONCLUSION

Despite the increasing sophistication in how we think about federalism both descriptively and normatively, this Article shows how federalism doctrine is a poor framework for understanding the nature of the Elections Clause and the values the Clause embodies.

To the extent that federalism traditionally is, and has been, about granting a subunit of government final policymaking authority in an area of governance, the Clause denies states the true hallmark of sovereignty by giving Congress veto authority over the times, places, and manner of federal elections. Other theories of federalism, most of which are less focused on sovereignty and instead promote the instrumental uses of federalism, fail to capture the unique dynamics that motivate federal action in this area, action

328. *Id.* § 20506(2)(A)-(B); *see* Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen, 152 F.3d 283, 285 (4th Cir. 1998) (holding that NVRA applies to public colleges); Nat'l Coal. for Students with Disabilities v. Taft, No. 2:00-CV-1300, 2002 WL 31409443, at *2 (S.D. Ohio Aug. 2, 2002) (same); *see also* United States v. New York, 700 F. Supp. 2d 186, 203-04 (N.D.N.Y. 2010) (holding that NVRA applies to public colleges and community colleges).

329. 60 F.3d 1411, 1415 (9th Cir. 1995).

330. *Id.*

331. *See* Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Ridge, Nos. CIV. A. 94-7671, CIV. A. 95-382, 1995 WL 136913, at *6-7 (E.D. Pa. Mar. 30, 1995); Condon v. Reno, 913 F. Supp. 946, 963 (D.S.C. 1995).

that is primarily focused on preserving the legitimacy of federal elections.

The failure to recognize congressional sovereignty in this context has led courts to interpret Congress's power under the Elections Clause more narrowly than is appropriate in order to avoid intruding on the states' authority over elections. Because Congress is sovereign with respect to federal elections, however, the Court's long-standing deference to the states is not only unnecessary, but courts, scholars, and advocates should consider the sheer breadth of the Clause and its irreverence of state power when thinking about the protections that the Constitution extends to the right to vote. These considerations are important on the eve of the 2020 redistricting cycle, as courts struggle to define the scope of the antidiscrimination framework under the Fourteenth and Fifteenth Amendments, leaving room for the Elections Clause to play an important supporting role in voting rights enforcement.

Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act

Franita Tolson[*]

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INTRODUCTION

The legal landscape has changed significantly since Congress passed the Voting Rights Act of 1965 ("VRA" or "the Act"). Even though Congress amended the Act in 2006, these amendments have done little to address the new obstacles faced by minority communities who seek to expand their electoral opportunities.[1] Some of these obstacles are political, as partisan forces have often manipulated the Act for electoral gain,[2] but the greatest obstructions have been judicial. The Supreme Court has strongly implied that Congress might violate principles of federalism by requiring states to preclear their redistricting plans with the Department of Justice;[3] has held that states are not required to maximize electoral opportunities for minority voters;[4] and has deferred to the states in the face of conflicting federal and state statutory mandates over redistricting.[5]

1. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, §§ 4–5, 120 Stat. 577, 580–81 (2006) (codified as amended at 42 U.S.C. § 1973c).

2. *See, e.g.*, Steve Bousquet, *Gov. Rick Scott Stalls New Voter-Approved Redistricting Standards*, ST. PETERSBURG TIMES, Jan. 26, 2011, http://www.tampabay.com/news/politics/gubernatorial/gov-rick-scott-stalls-new-voter-approved-redistricting-standards/1147578 (stating that Governor Scott withdrew Florida's request for section 5 preclearance of voter-approved ballot initiatives that would require nonpartisan standards to be instituted for legislative redistricting).

3. Nw. Austin Mun. Dist. No. One v. Holder (*NAMUDNO v. Holder*), 129 S. Ct. 2504, 2511 (2009).

4. Bartlett v. Strickland, 556 U.S. 1, 24–25 (2009).

5. Riley v. Kennedy, 553 U.S. 406, 428 (2009).

These decisions and others have rendered the once successful VRA[6] legally impotent to address the new challenges faced by minority voters and have called its constitutionality into question.[7]

The inconsistency between the Act as written and the Act as implemented surfaces because the Supreme Court presumes that the states' authority over elections is sovereign. The Elections Clause gives states the ability to choose the "time, place, and manner" of elections but reserves to Congress the power to veto state electoral schemes. As evident from the text, the states have autonomy, defined here as the ability to make policy in the absence of congressional action, over their electoral mechanisms.[8] In contrast, the states lack true sovereignty—or final policymaking authority—over elections because Congress can veto state action. The Elections Clause has, in effect, its own Supremacy Clause that emphasizes the primacy of federal law.[9]

As the constitutional text and history show, the Elections Clause has less to do with federalism, as that term is typically understood,[10] and more to do with providing an organizational structure that gives the states broad power to construct their electoral systems while retaining final policymaking authority for Congress. The Elections Clause, when combined with Congress's ability to

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6. STEVEN ANDREW LIGHT, THE LAW IS GOOD: THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS, at ix (2010) ("In 1964, there were only about 300 black elected officials in the U.S. Today there are over 9,000 . . . . The number of Asian Americans has tripled in recent years, and in large part due to the VRA, more than 6,000 Latinos now serve in elected or appointive office.").

7. *See* Michael Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 905 (2008) (describing current VRA enforcement as an "Era of Maintenance" because of judicial refusal to maximize minority opportunities and instead focus on maintaining minority political strength at its current levels).

8. The Elections Clause provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1.

9. *See Ex Parte* Siebold, 100 U.S. 371, 386 (1880) ("[I]n the case of laws for regulating the elections of representatives to Congress, the State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.").

10. MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 20 (2008) ("[F]ederalism grants subunits of government a final say in certain areas of governance . . . ."). Of course, this is not the only definition of federalism. *See* S. RUFUS DAVIS, THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING (1978) (providing an analysis of the meanings of federalism over time).

enforce the mandates of the Fourteenth and Fifteenth Amendments,[11] provides ample constitutional justification for the VRA. The Act represents an appropriate use of congressional power to alter or modify state electoral schemes that govern federal elections and implicate the constitutional right to vote.[12] Moreover, since the Fourteenth and Fifteenth Amendments changed the balance of federalism in our system, at best the states retain a limited sovereignty over state practices that do not run afoul of these provisions.[13]

Contrary to these principles, the Court continues to defer to state sovereignty in this area because states have plenary authority over elections pursuant to the Elections Clause, even though Congress can intervene if it so chooses. Since Congress's "make or alter" authority has been used sparingly, first because of federalism concerns and later because the Fourteenth and Fifteenth Amendments did most of the work of regulating state electoral practices, the Court has ignored that the Clause, by its very terms, deprives states of final policymaking authority over elections. Thus, the Court's decisions that narrow the scope of the VRA on the grounds of "state sovereignty" mischaracterize the historical and textual relationship between the states and the federal government over the matter of elections. As a result of this misunderstanding, the Court has been overly critical of federal legislation that alters or modifies state electoral laws.

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11. The Fourteenth Amendment guarantees each citizen "equal protection of the laws" and the Fifteen Amendment gives Congress the power to enforce, "by appropriate legislation," the right of citizens to vote without regard to race, color, or previous condition of servitude. U.S. CONST. amends. XIV & XV.

12. The theory of interpretation articulated here is loosely based on "intratextualism," a method of constitutional interpretation in which the Constitution is read holistically by comparing and contrasting identical words or phrases in different parts of the document. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999). The Elections Clause and the Fifteenth Amendment both pertain to voting and elections, but my analysis includes the Fourteenth Amendment, which has also been interpreted as a constraint on state authority over elections. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966) (finding that the right to vote is a fundamental interest under the Equal Protection Clause); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87–101 (1980) (rejecting a narrow, clause-bound interpretation of various provisions of the Constitution).

13. *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 226 (2000) (noting that the states' power over elections "has been eradicated by five constitutional amendments (Section 2 of the Fourteenth Amendment, as well as the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments), federal voting rights legislation, and the Supreme Court's Equal Protection cases. It is, in fact, impossible to think of anything a state could do to protect itself with this power today that would not be either unlawful or ineffective.") (internal citations omitted).

The legal scholarship has largely ignored the Court's conflation of sovereignty with autonomy because the theory of dual federalism—the idea that each level of government has a mutually exclusive regulatory sphere[14]—does not require the Court to define what it means for an entity to be sovereign.[15] Rather, the Court has focused on the scope of the entity's policymaking area, which has allowed the Court to define sovereignty by negative implication.[16] As a result, the boundaries of the "residual sovereignty" that the Constitution reserves to the states are unclear,[17] and the Court has been able to bypass these definitional constraints by viewing state sovereignty as concurrent with that of the federal government, even if there is no principled justification for that conclusion.[18]

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14. Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1468 (2001) ("Article VI explicitly recognizes that state judges will engage in some type of judicial review, for they are commanded to set aside state law that comes into conflict with federal law. In the course of this task, state judges first must ask whether a federal statute, with which state law conflicts, itself is consistent with the Constitution. If a state law conflicts with a federal law but the federal law itself is unconstitutional, then the state court may be under no Article VI obligation to invalidate the state law.").

15. *See, e.g.*, Roderick Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 938 (1998) ("The Court has relied either on palpably untrue statements that the federal and state governments operate in separate, independent, and mutually exclusive spheres or on conclusory assertions that commandeering legislation deprives states of sovereignty.").

16. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 200–01 (1824) ("[T]hat a State might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence, from this concession, that a State may regulate commerce with foreign nations and among the States, cannot be admitted."); Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (quoting *Gibbons*, 22 U.S. at 195) ("The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purposes of executing some of the general powers of government.' "); *see also* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 139 ("Since the start, or shortly after the start, the scope of Congress's commerce power has been defined by negative implication from what Chief Justice Marshall said it was not.") (citing *Gibbons*, 22 U.S. at 195).

17. *See, e.g.*, Printz v. United States, 521 U.S. 898, 928 (1997) (holding that Congress cannot commandeer state officials without undermining residual state sovereignty). *Printz*, like the early federalism cases, defines residual sovereignty by negative implication. *Id.* at 918–19 (stating that residual sovereignty is "reflected throughout the Constitution's text" including in the Judicial Power Clause, the Privileges and Immunities Clause, and the Guarantee Clause; it is "also implicit, of course, in the Constitution's conferral of Congress upon not all governmental powers, but only discrete, enumerated ones").

18. *Id.* at 918 ("It is incontestable that the Constitution established a system of 'dual sovereignty.' "); New York v. United States, 505 U.S. 144, 166 (1992) ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); Gregory v. Ashcroft, 501 U.S. 452, 459–60 (1991) ("One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this 'double security' is to be

Regardless of which definition of sovereignty one endorses, however, all theories require that the political entity in question have final policymaking authority in a defined area in order to command the respect of both its citizens and the central authority.[19] For this reason, dual federalism does not tell us much about the Elections Clause because both levels of government are involved in regulating elections. Even cooperative federalism, in which policymaking authority is shared, does not provide an adequate theoretical foundation for the Elections Clause. The text explicitly rejects the notion of shared power by depriving the states of final authority and allowing for the possibility of federal preemption.

In any case, the scholarly and judicial preoccupation with state, as opposed to congressional, sovereignty has had significant implications for the VRA. Because of this presumption that the states are sovereign over elections, the Supreme Court has employed a "federalism norm" that has undermined the effectiveness of the Act, and in particular, section 5.[20] The federalism norm is a nontextual, free-floating conception of the federal/state balance of power that the Court uses to "restore" the original balance of power between the states and the federal government. Besides the fact that the norm is pro state sovereignty and disregards the significant federal authority in this area, the Court ignores that the original balance is an elusive and arbitrary concept. Indeed, it is impossible for the Court to allocate regulatory authority over elections in a way that does not make the Court itself appear political.

By focusing on "sovereignty" as the defining principle of the Elections Clause and using evidence from the constitutional text and

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effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible."); Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.").

19. *See, e.g.*, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 342; *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (1967) (noting that sovereignty is based on the notion that "there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself"); THE FEDERALIST NO. 39, at 245 (1961) (James Madison) (Clinton Rossiter ed. 1961) ("The idea of a national Government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things, so far as they are objects of lawful Government."); Frank I. Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1167 (1976).

20. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2006) (requiring certain covered states and political subdivisions to get preclearance from the federal government if they "shall seek to enact or seek to administer any voting qualification or prerequisite to voting" in order to ensure that none "has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color").

history, this Article fills a gap in the literature. While there has been some debate over how federalism affects election law,[21] there has not been a sustained treatment of the implications of the Elections Clause's allocation of power between the states and the federal government for the Court's VRA jurisprudence. This may be because many scholars reject sovereignty as a basis for understanding our system of federalism.[22] But sovereignty, I argue, plays an important role in understanding the scope of congressional power to regulate state electoral mechanisms. Although Congress usually intervenes in state electoral practices pursuant to its enforcement power under the Fourteenth and Fifteenth Amendments, the Elections Clause serves as the baseline for the relationship between Congress and the states with respect to elections. And since the Elections Clause gives Congress final policymaking authority over federal elections and the Fourteenth and Fifteenth Amendments extend this authority to state elections, any judicially enforced federalism norm in favor of state power is illegitimate. These factors require the Court to employ rational basis review of the legislative record of the VRA for any challenges going forward.

Part I.A of this Article reviews the scholarly literature, which is bereft of any discussion of how the Elections Clause, and its allocation of power, should affect judicial interpretations of the VRA. Part I.B focuses on several federalism theories that can explain the allocation of power in the Elections Clause, concluding that all are inadequate because they do not properly consider the role of sovereignty in their analyses. Part II surveys the constitutional history, text, and the Court's case law on the Elections Clause as well as the Fourteenth and Fifteenth Amendments. This Part argues that the states knew that they were surrendering their sovereign authority over elections by ratifying the Constitution. Based on this premise, Part III presents a new theoretical framework for the Elections Clause. Part III.A argues that the Elections Clause gives the states autonomy, or broad authority, over the matter of elections as part of a

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21. *See, e.g.*, Kareem U. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 230–40 (2010) (inventing a new framework for section 5 preclearance that addresses federalism concerns); Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 719 (2009) (discussing judicial interpretation of VRA and the rejection of federalism arguments); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 60 (2010); Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 908–09.

22. *See infra* Part I.B.2. (discussing process theorists who reject an account of federalism that centers around sovereignty); *see also* Gerken, *supra* note 21, at 6 ("Academics argue that sovereignty is in short supply in 'Our Federalism.' They insist that the formal protections sovereignty affords are unnecessary for achieving federalism's ends.").

decentralized organizational structure that requires the Court to defer to Congress when it exercises its authority over elections. Decentralization, not federalism, best describes our electoral system, where states are autonomous rather than sovereign and where they may be immune from certain federal norms but are not exempt from all federal government intervention.[23]

As such, the federalism norm, discussed in Part III.B, is illegitimate because it elevates state over federal authority. The norm is a way to reallocate power between the federal government and the states outside of the legislative process, but it inappropriately prioritizes state sovereignty over Congress's authority to act in this area. This Article, which is both descriptive and normative, aims to fill a gap in the literature by showing how the states' authority under the Elections Clause, although extensive, is not sovereign. As such, abandoning the federalism norm in this context will result in a more faithful interpretation of the VRA and of our system of federalism as a whole. The Court's conflation of "sovereignty" and "autonomy" in its voting-rights jurisprudence and its perception that the Clause is about federalism as opposed to simply decentralization has resulted in an ill-conceived and misplaced deference to state authorities over the matter of elections.

I. DEFINING THE STATES' POWER OVER ELECTIONS: ELECTION LAW MEETS FEDERALISM THEORY

A. The Voting Rights Act as a Justified Intrusion on State Sovereignty: The Scholarly Literature

Congress renewed the VRA in 2006 for another twenty-five years, but the Act continues to generate significant controversy among scholars and the courts. Its two most successful provisions—section 2 and section 5—have received particular attention because these provisions have eradicated much of the racial discrimination in voting, but at a significant cost to the states. Section 2 forbids any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color" and operates nationwide.[24] The Court has interpreted section 2 to reach claims of vote dilution, where a sizable group of minority voters is denied the opportunity to elect the candidate of its choice

23. *See generally* FEELEY & RUBIN, *supra* note 10, at 20–21.

24. 42 U.S.C. § 1973(a) (2011).

because its vote is submerged in a district where residents vote along racial lines.[25]

In contrast, section 5 is a remedial measure that covers only those areas that engaged in the most blatant discrimination in voting at the time of the Act's passage, all of which are in the Deep South. Section 5 suspends all changes in state election procedure until a three-judge federal district court in Washington, D.C., or the U.S. Attorney General approves the changes. The preclearance provision was designed to ensure nonretrogression in minority voter registration or, in other words, to prevent minorities from being worse off under the new voting provision than they were under the previous plan.[26]

For many years, minority groups effectively used section 2 to increase their political representation in local, state, and national bodies. As a result, much of the legal scholarship has focused on the scope of the states' obligations to further increase minority representation, especially in light of past successes.[27] In 1993, the Supreme Court sharply limited the states' obligations under the VRA by holding, in *Shaw v. Reno*, that the Equal Protection Clause is not amenable to race-based redistricting.[28] Given that the very means that states have used to further the Act's mandates have come under assault, it is no surprise that other provisions of the VRA are ripe for constitutional challenge.

In particular, section 5 of the Act, which is the focus of this Article,[29] has borne the brunt of criticism in recent attempts to curb federal power. Many scholars argue that section 5 is still needed in order to combat discrimination in voting, despite the fact that its preclearance provisions allegedly interfere with state autonomy over elections.[30] However, the Court's decision in *City of Boerne v. Flores*,

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25. Thornburg v. Gingles, 478 U.S. 30, 45 (1986).

26. 42 U.S.C. § 1973c (a), (b).

27. *See* sources cited *infra* note 30.

28. 509 U.S. 630, 645 (1993); *see also* Miller v. Johnson, 515 U.S. 900, 913–14 (1995) (applying strict scrutiny to a redistricting plan in which race was a predominant factor in the creation of districts).

29. Going forward, references to "the Voting Rights Act" and "the VRA" refer specifically to section 5 unless otherwise noted.

30. *See, e.g.*, Kristen Clark, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 386 (2008) (arguing that section 5 "helps eliminate barriers to political participation and provides greater levels of access to minority voters"); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 714–15 (2006) (discussing different theories in support of section 5, including the fact that the threat of a lawsuit under the VRA is an important "bargaining chip"); Nathaniel Persily, *The Promises and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 199–202 (2007) (discussing section 5's deterrent effect and violations in covered jurisdictions); Michael J. Pitts, *Section 5 of the Voting*

which required that legislation enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment be a congruent and proportional remedy to the alleged constitutional violation,[31] has raised serious questions about the future of section 5 of the VRA.[32] *Boerne* and other cases that circumscribe Congress's power under the Fourteenth and Fifteenth Amendments, the Commerce Clause, and the constitutional structure have generated a great deal of scholarship that focuses on whether Congress's 2007 renewal of the VRA for another twenty five years is constitutional under *Boerne*'s congruence and proportionality standard.[33]

Rights Act: A Once and Future Remedy?, 81 DENV. U. L. REV. 225, 231 (2003) ("The drastic nature of the Section 5 remedy comes from its abrogation of the autonomy of some state and local governments in all matters related to voting.").

31. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

32. *See, e.g.*, Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1397 (2010) ("However, the Court's decision in *City of Boerne v. Flores* established that Congress's power to enforce the guarantees of the Fourteenth Amendment only extends to laws that were 'congruent and proportional[]' to the constitutional violations that the laws attempt to prevent or remedy. Under this new standard, the question arises whether Congress must justify the coverage formula by distinguishing between covered and noncovered states in their relative rates of violation of minority voting rights."); *see also* United States v. Morrison, 529 U.S. 598, 613 (2000) ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); Alden v. Maine, 527 U.S. 706 (1999) (holding that federalism requires Congress to respect state sovereignty) (internal citations omitted); United States v. Lopez, 514 U.S. 549, 561 (1995) (holding that the Gun-Free School Zones Act "is a criminal statute that had nothing to do with 'commerce' or any sort of economic enterprise" and cannot be sustained under the Commerce Clause"). *Compare* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Amend and Extend the Voting Rights Act*, 44 HOUS. L. REV. 1, 13–14 (2007) (presenting cases in which the Court "upheld congressional abrogation of state's sovereign immunity"), *and* Fuentes–Rohwer, *supra* note 21, at 719 (discussing the Court's and Congress's acknowledgment of the federalism concerns of the Act), *with* Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 177–78 (2005) (discussing cases that "increase the chances that the Court would hold that Congress has the power to reenact Section Five's preclearance provisions").

33. Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 103–04 (2006) (analyzing the DOJ's approach to section 5 after *Bossier I* and *Bossier II*); *see also* Nw. Austin Mun. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 272–78 (D.D.C. 2008), *rev'd and remanded sub nom.* Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009) (upholding section 5 under the congruence and proportionality standard); Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 47–48 (2006) (discussing the constitutionality of section 2 of the VRA after *City of Boerne*); Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 187–88 (2005) (discussing section 2's constitutionality and conflicts with federalism and the congruent and proportional standard); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691–93 (2006) (analyzing conflicting cases that have addressed section 2 and suggesting a burden-shifting test to govern section 2 vote denial claims). *But see* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV.

In sum, the scholarship is replete with discussion of how the VRA interferes with state sovereignty, and the primary focus has been on whether this intrusion is justified.[34] The Court, at least initially, believed that Congress had the authority to circumscribe the states' authority over elections, but not because Congress is sovereign. In *South Carolina v. Katzenbach*, for example, the Court rejected the argument that the VRA distorted our constitutional structure of government and offended our system of federalism.[35] The *Katzenbach* Court found that although the states "have broad powers to determine the conditions under which the right of suffrage may be exercised," the Fifteenth Amendment supersedes contrary exertions of state power.[36] The idea that Congress can intervene in elections only when states are behaving badly has persisted in the case law. The Court's most recent decision on the constitutionality of section 5, *NAMUDNO v. Holder*, is on point. Although sustaining the constitutionality of the Act, the *NAMUDNO* Court noted that the VRA raises significant federalism concerns because it "authorizes federal intrusion into sensitive areas of state and local policymaking" and, as such, "imposes substantial federalism costs" by making distinctions between similarly situated sovereigns.[37] Thus, because section 5 already has been successful in

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1127, 1132 (2001) ("In my view, Section 5 provides Congress with the same capacious discretion to select among various means to achieving legitimate ends as does Article I as construed in *McCulloch v. Maryland*.").

34. *See, e.g.*, Ansolabehere et al., *supra* note 32, at 1388 ("We believe that the VRA, and especially the coverage formula for section 5, needs to be updated or revised specifically to provide greater protection for minority voting rights. However, we also believe the VRA continues to represent a constitutional exercise of congressional power under the Fourteenth and Fifteenth Amendments."); *see also* Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 954–55, 1001 (2011) (debunking the argument that section 5 imposes significant federalism costs because "preclearance has functioned for the most part as a learning/monitoring regime that, in over 99% of all cases, has simply required the production of information. In those rare cases in which an objection has been lodged, the DOJ's concerns usually could be satisfied by limited changes to the jurisdiction's chosen election design.").

35. South Carolina v. Katzenbach, 383 U.S. 301, 313–14 (1966) ("Case-by-case litigation against voting discrimination under the Civil Rights Acts of 1957, 1960, and 1964, has not appreciably increased Negro registration. Voting suits have been onerous to prepare, protracted, and where successful have often been followed by a shift in discriminatory devices, defiance or evasion of court orders."); *see also* City of Rome v. United States, 446 U.S. 156, 176 (1980), *superseded by statute, as recognized in* Nw. Austin Mun. Dist. No. One v. Holder (*NAMUDNO v. Holder*), 129 S. Ct. 2504 (2009) ("[L]egislation enacted under authority of § 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with the letter and spirit of the constitution,' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.").

36. *Katzenbach*, 383 U.S. at 324.

37. *NAMUDNO*, 129 S. Ct. at 2511 (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).

reducing discrimination, thereby making covered states no more culpable for existing discrimination than their northern counterparts, congressional intervention is not justified.[38]

Along these lines, much of the commentary surrounding *NAMUDNO* has debated why the Supreme Court continues to sustain the statute despite doubts about its constitutionality.[39] Recently, Professor Fuentes-Rohwer has referred to the *NAMUDNO* Court's willingness to uphold the statute while employing a narrow and questionable reading of the language as a "paradox."[40] Indeed, the legitimacy of the *NAMUDNO* decision often centers on whether the Court was correct in questioning section 5's constitutionality, particularly since we live in a "post-racial" society.[41] The continued existence of racially polarized voting in both covered and noncovered jurisdictions, however, has convinced some scholars that the Court's concerns about state sovereignty should hold little weight against sustaining the constitutionality of a statute that is clearly still needed.[42]

What the Court and the legal scholarship ignore, however, is that concerns about "sovereignty" and "federalism," at least as they pertain to whether the VRA interferes with the states' authority over elections, are misplaced for reasons other than the continued need for section 5.

The Elections Clause, which gives the states the ability to "choose the time, place, and manner of elections," grants authority

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38. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1712 (2004).

39. Fuentes-Rohwer, *supra* note 21. *Compare City of Rome*, 446 U.S. at 181 (upholding the constitutionality of the VRA), *with* City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, § 3, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. 1973 (2006)) ("[T]he language of § 2 no more than elaborates upon that of the Fifteenth Amendment, 9 and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."). *City of Rome* and *City of Mobile* were decided the same day.

40. Fuentes-Rohwer, *supra* note 21, at 702.

41. *See, e.g.*, Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL'Y REV. 59, 59 (2009) ("Some have suggested that his victory marks the beginning of a 'post-racial' era in which race bears less significance or consequences."); Abigail Thernstrom & Stephen Thernstrom, Op-Ed, *Racial Gerrymandering is Unnecessary*, WALL ST. J., Nov. 11, 2008, at A15 (observing that "American voters have turned a racial corner"); *see also* Ansolabehere et al., *supra* note 32, at 1399 (noting that "a lack of polarized voting does not speak to whether racial minorities face increased obstacles or unconstitutional conditions at the polls").

42. Issacharoff, *supra* note 38, at 1172; Karlan, *supra* note 32, at 31; *see also* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 4 (2008) (arguing that "it is a mistake to judge the efficacy and neutrality of section 5 against an idealized system" given the level of partisanship in the judiciary).

that the states exercise freely, so long as Congress decides not to exercise its power to "alter" state electoral mechanisms. In essence, Congress has a veto power over state practices that govern federal elections, a veto that deprives states of the hallmark of sovereignty: final policymaking authority. As the next Section shows, this absence of sovereignty makes it difficult for many of the different theories of federalism to provide an adequate analytical framework for our electoral system.

B. The Voting Rights Act as an Unjustified Intrusion on State Sovereignty: The Inadequacies of Federalism Theory

As the prior Section shows, the legal scholarship, in arguing for the constitutionality of the VRA, has ignored that the states are not sovereign over elections and has assumed that the Act is a justified intrusion on state sovereignty rather than questioning if it is an intrusion at all. In reality, our system of federalism distinguishes between state autonomy and state sovereignty: whether the states are sovereign is determined by the constitutional text, history, and the specific policy area. With regard to the area of elections, the Elections Clause gives states autonomy over their electoral apparatuses. This authority is plenary if Congress has not acted, but it is not sovereign because Congress retains its authority to modify or alter state practices. Because of this structure, the Elections Clause is not really a federalism provision at all. It does not give the states "exclusive jurisdiction over some set of issues."[43] The Clause is a decentralized organizational structure that gives Congress final policymaking authority over federal elections. And, as Part II.B will show, the Fourteenth and Fifteenth Amendments expand this authority to state elections as well.

This clarification regarding the scope of congressional authority should inform the level of deference that the Court uses to analyze congressional acts that alter or change state electoral practices. If we start from the baseline that the Clause is about congressional sovereignty, then it quickly becomes apparent that the VRA is not an intrusion on state sovereignty at all. The problem is that there has not been a theory of federalism advanced by the Court or the scholarly literature that can explain the Elections Clause, which promotes federalism but is not really "federalist" in nature because there is only one sovereign. Given that most federalism doctrine either has moved away from sovereignty as the core of

43. FEELEY & RUBIN, *supra* note 10, at 16.

federalism theory or embraces a dualism that does not reflect the world we live in, this Article articulates a working theory of sovereignty to help fill this gap with respect to our system of elections. First, it is important to understand why the other theories are lacking.

1. Dual Federalism as a Theoretical Framework for the Elections Clause

Understanding the concept of sovereignty is critical to articulating a meaningful definition of federalism, particularly with respect to elections. Sovereignty and autonomy have been embraced as the focal points of federalism for some scholars, even though the Court has been laissez-faire in its usage of the terms. Professors Feeney and Rubin, for example, define federalism as a polity that grants "partial autonomy" to geographically defined subunits.[44] For these scholars, partial autonomy is the equivalent of sovereign authority; they focus on how geography creates a mutually exclusive zone of policymaking that promotes federalism in a way that a functional grant of powers over a range of governance areas does not.[45] Having an assigned zone does not insulate decisionmaking and power in the same way as defined borders. Moreover, the focus on separate zones of policymaking reflects that dual federalism, or the idea that the state and federal governments each have independent spheres of policymaking authority, remains an organizing principle for many theorists even if it is no longer an accurate description of our system.[46]

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44. *Id.* at 13.

45. *Id.* ("[A]t least one key to our conception of federalism lies in the question of geography itself and the significance of geographical divisions of authority, in contrast to other sorts of divisions."); *see also* Rapaczynski, *supra* note 19, at 349 ("[T]o say that a state is sovereign is an abbreviated way of saying that its sovereignty is limited to some domain. . . . defined geographically by the territory of the country. . . .").

46. *See* Hills, *supra* note 15, at 815 (discussing the argument that dual federalism is dead and has been replaced with theories of cooperative federalism); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005) ("[T]he conceptual framework of dual federalism remains pervasive in theory and doctrine."); *see also* FERC v. Mississippi, 456 U.S. 742, 761 (1982) (rejecting the argument that "the States and the Federal Government in all circumstances must be viewed as co-equal sovereigns" because it is "not representative of the law today"); Fry v. United States, 421 U.S. 542, 546 (1975) (forcing state decisionmakers to comply with the requirements of federal law); FEELEY & RUBIN, *supra* note 10, at 20–25, 29 (criticizing the Court for confusing values of federalism with values that emerge from any decentralized system); Schapiro, *supra*, at 274 ("Dualist theories of federalism identify important values, but they do not address the resolution of the conflicts that commonly arise. The theories focus on the reasons for separating state and federal authority, not on how to reconcile them."). *Compare* John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27–28 (1998) (advocating for dual federalism), *with* Lessig, *supra* note 16, at 214 (discussing the limits of federalism).

Rather, our system is much more fluid because historical, political, and economic realities have made it largely impossible to keep the two spheres—state and federal—separate.

As Lawrence Lessig has persuasively argued, all of the early rules that maintained the line between state and federal power depended on the Court's ability to draw lines: to distinguish direct from indirect regulation of commerce, manufacturing from commerce, and intended from unintended effects.[47] In dormant commerce clause cases, these distinctions, as well as the ability to measure economic effects, determined whether a state statute would stand. Similarly, in the area of federal preemption, the relevant determination turned on whether federal regulation occupied a particular field and left little or no room for state regulation.[48] But the line drawing and formalism that allowed the Court to maintain these distinctions ultimately made the Court appear political—first, by the New Deal,[49] then following the Court's intergovernmental tax immunity decision in *New York v. United States*,[50] and finally by the Court's response to federal regulation of the states in *National League of Cities v. Usury*.[51] Because of the risk that any rule drawing a line between state and federal power may become politicized, Professor Lessig focuses on how prophylactic rules can indirectly advance federalism. His solution to the broader problem of the politicization of federalism rules reflects the hazards of attempting to draw the boundary between state and federal power to the Court's institutional legitimacy.

Despite the problems that arise in trying to keep state and federal power separate, the Court continues to adhere to dual-federalism theories because they represent a schematically easier way of drawing a boundary between state and federal power. Not only is it simpler for the Court to draw categorical lines, but these distinctions

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47. *See* Lessig, *supra* note 16, at 139–40 (describing the fact-specific inquiry that the Court had to use to determine what objects the commerce clause power reached).

48. *Id.* at 166–67.

49. *Id.* at 177 ("Why the old categories were rendered political is . . . because part of what these old limits rested upon had itself been drawn into doubt—had been rendered contestable. Not only the ideas of a passive government in the face of crisis, and the ideas of laissez-faire, but also some of the very premises of federalism itself . . . . To draw these artificial lines to limit governmental power became artificial; the effort, political.").

50. *Id.* at 181–82 (discussing how the rule of *McCulloch v. Maryland* extended to state immunity from federal taxation, but how the doctrine later fell apart because the inability of the Court to discern when immunity was appropriate made it look political when it made such attempts).

51. *Id.* at 184 ("[T]here could be no firm line that would divide proper from improper federal regulation; the line instead was constantly shifting. And if the line was constantly shifting, then the Court couldn't help but appear political in its shifting resolution of these federalism cases.").

also allow the states to retain some meaningful control over certain policy areas.[52] But problems remain. Dual federalism tells us very little about the residual sovereignty that the Court often touts as key to maintaining the values that the framers had hoped federalism would promote, nor does this theory shed much light on the autonomy that the states have in some policymaking areas.[53] Indeed, identifying sovereign authority, rather than relying on rigid boundaries, helps us determine where the locus of power truly lies.

The Court, aware of its spotty history in enforcing federalism, continues to rely on dual federalism in policing Congress's commerce power, albeit in a diluted form. In *United States v. Morrison*, the Court invalidated the civil remedy provision of the Violence Against Women Act on the grounds that Congress was impermissibly regulating noneconomic behavior and therefore exceeded the scope of its commerce authority and its authority to enforce the Fourteenth Amendment.[54] *Morrison,* like *United States v. Lopez,* reflected the Court's belief that it could enforce a rigid separation between state and federal power by focusing on the economic/noneconomic distinction, similar to its early dual-federalism cases.[55] But this proposition quickly fell apart in *Gonzales v. Raich,* where the Court held that Congress may regulate local, noneconomic behavior if such regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[56] The shifting boundaries of federalism made it difficult for the Court to rely on hard lines, despite its dogged insistence that such lines can and should be drawn. Thus, it was inevitable that the states' "residual sovereignty" would be defined by focusing on the outer limits of congressional power.

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52. Schapiro, *supra* note 46, at 271.

53. *See* THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (noting that the union is federal in character because "the jurisdiction [of the proposed Government] extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects" but observing that there will be controversies related to "the boundary between the two jurisdictions").

54. United States v. Morrison 529 U.S. 598, 617–19, 627 (2000).

55. *Id.* at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *see* Lessig, *supra* note 16, at 129 ("*Lopez* is an act of interpretive fidelity. It is an effort to reconstruct something from the framing balance to be preserved in the current interpretive context.").

56. Gonzales v. Raich, 545 U.S. 1, 36 (2005) (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

The Court's ephemeral notion of "residual sovereignty" and persistence in keeping the boundaries separate have led it to ignore the definitional problem that arises whenever it tries to use the term "sovereignty" to describe state action in an area, like elections, where there are not the separate policy spheres typical of dual federalism.[57] States choose the time, place, and manner of both federal and state elections, but, in this context, the term "residual sovereignty" has no special independent significance outside of signifying that the states retain some power to act. "Residual sovereignty" does not, in and of itself, serve as an independent source of authority for state action in the Elections Clause because of the congressional veto.[58]

Consequently, dual sovereignty, which serves as the basis for much of the Court's federalism jurisprudence, does not work as a theoretical framework for the Elections Clause because it does not allocate power in a way that is mutually exclusive.[59] It does not give the states their own independent zone to act, insulated from federal regulation.

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57. *See generally* Lessig, *supra* note 16; *see also* THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (arguing that the union is federal in character because the "jurisdiction [of the proposed Government] extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects").

58. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 804 (1995) ("[T]he [constitutional] provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States."); *see also* Cook v. Gralike, 531 U.S. 510, 520–21 (2001) (rejecting the argument that the states had the right to give instruction to their representatives that the Tenth Amendment reserved, despite historical evidence indicating that this practice was common). Indeed, the *Cook* Court reasoned that the Tenth Amendment could not reserve any state authority to regulate federal elections since the federal offices "arise from the Constitution itself." *Id.* at 522–23 ("Because any state authority to regulate election to [the federal] offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved by, the States.' ") (citation omitted). James Madison had a difficult time discerning the contours of the states' residual sovereignty, but ultimately concluded that because the state governments are "constituent and essential parts of the federal government," federal power will, by definition, be constrained. THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961) ("Thus each of the principal branches owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them."); *see also id.* at 292–93 (noting that the powers reserved to the states are "numerous and indefinite" but "extend to all the objects, which, in the ordinary course of affairs concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State").

59. *See, e.g.*, *Morrison*, 529 U.S. at 648 (explaining that one purpose of the Convention was to secure sovereignty for the states); *Lopez*, 514 U.S. at 576 (describing federalism as the diffusion of sovereign power); Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936) (explaining that while states are only quasi-sovereign, in all power reserved to them they are supreme); Ableman v. Booth, 62 U.S. 506, 516 (1858) ("And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.").

Despite this unique power allocation, the Court still interprets election law regulations from a dualist perspective. The idea that the VRA intrudes on state sovereignty, as several Justices have argued over the years, presupposes that the exercise of congressional authority is so rare as to constitute an exception to the general rule that this is a policy area that belongs to the states.[60] In other words, Congress can intrude on state sovereignty over elections, but only if justified. This proposition is not totally farfetched—the Elections Clause speaks only to governing the "Elections for Senators and Representatives," so state sovereignty could conceivably be at issue since states are required under the Act to preclear *any* change to their election laws.

But this is not completely correct given that the Court does not distinguish between state and federal elections in making arguments about protecting state sovereignty.[61] And, as I argue in Part II.B, the Fourteenth and Fifteenth Amendments limit the amount of residual sovereignty reserved to the states over practices that govern state elections. Interestingly, in criticizing the Act on federalism grounds, the *NAMUDNO* Court focused on how it differentiates between states; the Court also said nothing about whether Congress's authority is broader with respect to regulating federal elections than it is for state elections.[62]

In *NAMUDNO*, the Court relied on "the structure of the Voting Rights Act" and "the underlying constitutional concerns [that] compel a broader reading of the statute" in allowing a small utility district that did not conduct registration for voting to bail out under section

60. I also use dual federalism as a general label that captures the Court's dormant commerce clause jurisprudence because that doctrine says that the states cannot legislate in Congress's domain, even if Congress has not acted, so the presumption that each level of government has its own exclusive sphere is still in force. *See, e.g.*, Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 426–27 (1921) (invalidating a state licensing requirement that disproportionately burdened cars manufactured outside the state); Walling v. Michigan, 116 U.S. 446, 461 (1886) (holding that state tax on liquor salespeople that discriminated against the introduction of products from another state was unconstitutional); Webber v. Virginia, 103 U.S. 344, 350–51 (1880) (invalidating a state licensing statute for agents of articles manufactured in other states).

61. *See, e.g.*, United States v. Brewer, 139 U.S. 278, 287 (1891) (dismissing indictment of defendants for violating federal law for failing to open ballot boxes since state elections law did not clearly require that ballot boxes be opened at the polling place).

62. Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504, 2512 (2009) ("The Act also differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.' Distinctions can be justified in some cases. 'The doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared.' But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.") (citations omitted).

4(a) of the statute.[63] Typically, only states and their political subdivisions can bail out, or be released from coverage under the Act, if they illustrate that they conduct registration for voting and have not discriminated in the past ten years.[64] The Court expanded the scope of the bailout provisions in order to allow NAMUDNO, which did not conduct voter registration, to bail out so as to avoid ruling on the constitutional questions surrounding the preclearance provisions of section 5. Yet, had the Court acknowledged that Congress has expansive power over elections, it would have recognized that the constitutional problems did not emerge from an application of section 5 to the utility district, but rather from the limited scope of section 4(a) in allowing the district to bail out.[65] Once the question is framed properly, it is clear that the small utility district in *NAMUDNO* should have been able to bail out from section 5 coverage because it had not committed any voting rights violations; the ability to bail out should turn on this factor rather than on whether the jurisdiction conducts registration for voting.[66]

Focusing on the question of whether the section 5 preclearance regime unjustifiably intrudes on the states' zone of authority over elections, as the Court did, ignores that there are very few state electoral procedures that do not have implications for federal elections and federal representation.[67] As such, dualism has no place in the

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63. *Id.* at 2513.

64. *Id.* at 2509 (noting that to bail out, a political subdivision "must show that for the previous 10 years it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations"). The Act defines "political subdivision" as "any county or parish . . . [or] any other subdivision of a State which conducts registration for voting." *Id.* at 2514.

65. Abigail Thernstrom, NAMUDNO: *Right Question, Wrong Case*, SCOTUSBLOG (Feb. 8, 2010, 10:53 AM), http://www.scotusblog.com/2010/02/namudno-right-question-wrong-case/.

66. *See NAMUDNO*, 129 S. Ct. at 2514–16 (holding that all political subdivisions, even those that are not counties or parishes and do not conduct voter registration, are eligible to file for a bailout).

67. *Id.* at 2512–13 (implying that section 5 is neither congruent or proportional nor rationally related and therefore exceeds Congress's power under the Fifteenth Amendment, but not definitively resolving this question). *But see* Roe v. Alabama, 68 F.3d 404, 408–09 (11th Cir. 1995) (explaining that directing a federal district court to dismiss state election cases would leave plaintiffs without an adequate forum for vindication of federal constitutional claims); *see also* Riley v. Kennedy, 553 U.S. 406, 425 (2008) (finding that state court orders that changed the method of election for county commissioners did not have to be precleared "because the prerogative of the Alabama Supreme Court to say what Alabama law is merits respect in federal forums, a law challenged at first opportunity and invalidated by Alabama's highest court is properly regarded as null and void *ab initio*, incapable of effecting any change in Alabama law or establishing a voting practice for § 5 purposes"); Foster v. Love, 522 U.S. 67, 71 (1997) ("When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder."); *Ex Parte* Yarbrough (*The Ku Klux Klan Cases*), 110 U.S. 651, 662 (1884) (arguing that Congress

analysis. Based on the Court's approach and reliance on this theory, however, all it takes is the wrong plaintiff, like an obscure utility district, to show the limitations of a widely successful piece of civil-rights legislation.[68]

As *NAMUDNO* illustrates, starting from the premise that states are "sovereign" over elections can potentially result in the invalidation of legislation that is actually well within congressional authority to implement. The Elections Clause is not about rigid boundaries or multiple sovereigns; it is about the broad authority that the states have to control elections, referenced here as "autonomy," and the sovereignty that ultimately lies with Congress, which allows Congress to intervene through its veto power. It is impossible for dual federalism to capture this dynamic because the Elections Clause leaves little room for the exercise in line drawing that this theory requires.

2. Polyphonic, Cooperative, and Process Federalism as Theoretical Frameworks for the Elections Clause

In order to escape the rigidity of dual federalism, some scholars have sought to develop federalism theories that do not focus on strict boundaries between state and federal authority but still provide a solution to the tension that arises when the two sovereigns try to coexist. These more fluid theories could describe the context of elections, where states still play a significant, sometimes even dominant, role. In particular, Robert Schapiro has argued for what he calls "polyphonic federalism," or a concurrent federalism that does not define the state and federal governments as separate governing enclaves; rather, his theory "asks how the overlapping power of the state and federal governments can best address a particular issue."[69] Under this functionalist approach, there is a background presumption that state and federal power can coexist.[70]

The problem with Schapiro's approach, which he acknowledges, is that encouraging the dialogue that polyphonic federalism envisions between state and federal governments results in an absence of

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can regulate state electoral practices that govern federal elections even if state elections are held on the same day and in the same place, and it is not relevant that "the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the states, refrained from the exercise of these powers"); Fuentes-Rohwer, *supra* note 21, at 719.

68. Thernstrom, *supra* note 65; *see also* Ansolabehere et al., *supra* note 32, at 1400 (finding that, if race-based voting patterns were the only factor to decide if a jurisdiction is covered or uncovered, the list of covered states would be different than it currently is).

69. Schapiro, *supra* note 46, at 285.

70. *Id.* at 295.

finality and an increase in forum shopping that could undermine the legitimacy of our electoral system.[71] The need for finality, an important aspect of sovereign authority and a legitimating factor for our system of elections,[72] justifies judicial deference toward congressional action that alters or modifies state electoral provisions. Polyphonic federalism, much like dual federalism, sheds little light on how the judiciary should approach a text that imagines a role for two sovereigns but creates a context in which there can only be one.

While polyphonic federalism does not focus on sovereignty and instead uses shared authority as its underlying theory, many commentators have rejected a sovereignty-based account of federalism in its entirety.[73] This rejection is most prominent in theories of cooperative federalism which, according to one scholar, "invite[] state agencies to implement federal law," primarily through federal regulatory programs.[74] The benefits of such cooperation are that it results in a diversity of regulatory policy within a framework of uniform federal standards. It has the coordination between sovereigns that tends to be absent in dual-federalism regimes.[75] The coordination and freedom that state agencies have to tweak federal programs do

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71. This is already a significant concern. *Id.* at 291; *see also Kennedy*, 553 U.S. at 406–07 (lawsuit filed in state and federal courts); Bush v. Gore, 531 U.S. 98, 103 (2000) (treating application for stay of state Supreme Court's mandate as petition for writ of certiorari and granting it); *Roe*, 68 F.3d at 405–06 (federal lawsuit where question was certified to state court).

72. *See* sources cited *supra* note 21.

73. These commentators observe that concurrent federalism, where the states and the federal government share authority, is more reflective of our system. *See* John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 87 (Daphne A. Kenyon & John Kincaid eds., 1991); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1692 (2001) [hereinafter Weiser, *Federal Common Law*]; Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (arguing that, despite talk about dual federalism, in reality Congress enacts cooperative regulatory programs); Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS 15, 18 (2001) (describing cooperative federalism as the opposite of dual federalism). Others focus on institutional arrangements outside of state and federal regimes that can give minorities power without sovereignty. *See* Gerken, *supra* note 21 (recasting federalism as minority rule without sovereignty, which focuses attention on ignored institutions).

74. Weiser, *Federal Common Law*, *supra* note 73, at 1694.

75. *Id.* at 1697 ("A critical feature of cooperative federalism statutes is the balance they strike between complete federal preemption (a preemptive federalism) and uncoordinated federal and state action in distinct regulatory spheres (a dual federalism). Under preemptive federalism regimes like the Employee Retirement Income Security Act (ERISA), for instance, the federal courts interpret federal enactments or defer to federal agency action as preempting all state action in a field. Dual federalism regimes, by contrast, separate federal and state authority into two uncoordinated domains, giving rise to heated legal battles and considerable confusion for the regulated parties.").

not require sovereignty to be a focal point. While final policymaking authority may lie with Congress under cooperative federalism, this authority is somewhat illusory. States, in implementing federal programs, require flexibility and freedom, tend to be more knowledgeable about the underlying policy, and modify federal rules to comport with local circumstances—a system that strongly implies that neither body is truly sovereign.[76]

There are several persuasive arguments that support cooperative federalism as an underlying theoretical framework for our system of elections. The first is the text—it provides that states will draw the lines in the first instance but gives Congress the ability to change or alter such plans, suggesting a coordination that is akin to many modern federal regulatory programs. The second is our political system. Thanks to the two-party model, state and federal officials coordinate in order to draw district lines and pass electoral rules that give each party the best chance of maximizing its electoral success. The two-party system unites state and federal officials, who coordinate their efforts in order to advance partisan goals.[77]

The problem with cooperative federalism as a framework, however, emerges from the same textual provision that initially led us to believe it might work: the congressional veto. The congressional veto allows Congress to engage in what is effectively a full preemption of state law over federal elections. Cooperative federalism is designed to prevent the full preemption of state law by giving the federal agency and the state the responsibility of implementing federal law.[78] The second problem is that most cooperative federalism programs entail voluntary state involvement. The VRA and other federal legislation that alters or changes state electoral practices are anything but voluntary and tend to trigger substantial outrage on the part of the states.[79] Finally, the allocation of power in our electoral system

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76. *Id.* at 1700 ("As a result of this need for cooperation, both the states and the federal government are well aware that they are tied together in their ability to administer cooperative federalism programs. The resulting interdependence gives each important influence over the other."); *see also id.* at n.13 ("Cooperative federalism statutes regularly include 'savings clauses,' which explicitly allow states to impose more stringent requirements than federal law demands.").

77. *See* Kramer, *supra* note 13 at 276 ("[D]ecentralized national political parties . . . linked the fortunes of federal officeholders to state politicians and parties and in this way assured respect for state sovereignty."); Tolson, *supra* note 21, at 862 (arguing that redistricting can protect state authority from expanding federal power).

78. Weiser, *Federal Common Law*, *supra* note 73, at 1697–98.

79. For example, when Congress first passed the VRA, South Carolina immediately challenged its constitutionality. *See* South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (upholding challenged portions of the VRA). States and their political subdivisions have continued to challenge the constitutionality of the Act over the years. *See, e.g.*, Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (2009) (applying constitutional avoidance canon to

cannot be understood without referencing sovereignty, although there can be some disagreement as to where the locus of sovereignty should lie.[80] As a result, trying to apply a cooperative framework, which is not focused on the core of power but its allocation from somewhere other than the core, to the Elections Clause brings us back to our initial questions about which level of government has the authority to do what.

Sovereignty similarly has not been central to advocates of process federalism, who believe that the values of federalism are best served by focusing on procedural constraints on federal power that can be enforced in the courts.[81] With regard to the substance of federalism doctrine, these theorists observe that the state and federal governments will generate policy in order to compete for the political allegiance of citizens.[82] As a result, some (but not all) of these scholars believe that the political process, rather than the courts, is best able to police federalism.[83] Others embrace a limited form of judicial review.[84]

The problem with process theory, and in particular the political safeguards approach, is that, standing alone, it tells us very little about what our federalism should look like.[85] The political safeguards

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refrain from deciding if preclearance requirements are unconstitutional); City of Rome v. United States, 446 U.S. 156, 183 (1980) (upholding *Katzenbach*).

80. *See, e.g.*, Gerken, *supra* note 21, at 8 (proposing to recast federalism as including minority rule through small administrative units lacking sovereignty).

81. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1364 (2001) ("Process federalism's central insight is that the federal/state balance is affected not simply by what federal law is made, but by how that law is made. Most classic separation of powers issues—delegation, for example, or the legitimacy of federal common lawmaking—thus have an important federalism dimension. The converse also seems true: We can go a long way towards assuring state autonomy by policing the federal lawmaking process, even if we are unwilling or unable to enforce substantive limits on federal power.").

82. *See* Gerken, *supra* note 21, at 6 (listing one of the well-known benefits of federalism as competition); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 59–61 (2004) (arguing that states provide political competition for popular loyalty).

83. *See* THE FEDERALIST NOS. 10, 51 (James Madison) (discussing political and institutional checks on national power). *But see* THE FEDERALIST NO. 80 (James Madison) (discussing scope of judicial authority and courts as a way to effectuate constitutional provisions); Young, *supra* note 81, at 1354 (arguing that judicial review in federalism cases should be an important secondary mechanism for maintaining political safeguards).

84. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a sacred province of state autonomy."); Young, supra note 81, at 1372–73 (arguing that federalism doctrines "should maximize the ability of the system to police itself").

85. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–52, 558–

are less about presenting a theory of federalism and more about choosing a forum to resolve these issues.[86] Whether or not one believes that courts are best suited to address these questions,[87] it is undisputed that the courts are haunted by line drawing and definitional problems that have plagued every theory of federalism that they have formulated up to this point. None of the theories or approaches discussed above definitively resolves how the Court should approach the Elections Clause which, I argue, has a decentralized organizational structure that appears to mimic federalism but in reality concentrates final policymaking authority in only one sovereign—Congress.[88] As the next Part shows, the constitutional history and text, as well as the Supreme Court's jurisprudence, support this view of the Elections Clause.

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59 (1954) (arguing that "the existence of the states as governmental entities and as sources of the standing law is in itself the prime determinant of our working federalism"); *see also* Kramer, *supra* note 13, at 220 (discussing Wechsler's arguments in depth); Young, *supra* note 81, at 1373 (embracing process theory but noting that it deserves "two cheers" instead of three because "even a process oriented Court ought to impose some substantive limits on federal regulatory authority").

86. Schapiro, *supra* note 46, at 279–80 ("[T]he most significant problem with the political safeguards approach is that it is fundamentally a theory of judicial review, not a theory of federalism. The political safeguards argument explains why courts should not draw lines between the state and federal government . . . . However, the theory does not tell Congress how it should make the allocational decisions."); *cf.* Prakash & Yoo, *supra* note 14, at 1461–62 (laying out criticisms of political safeguards theory); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1318–21 (1997) (discussing scope and criticisms of political safeguards theory). *See generally* United States v. Lopez, 514 U.S. 549, 577 (1995) ("To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process.") (citing THE FEDERALIST NO. 46, at 295 (James Madison) (Clinton Rossiter ed., 1961)).

87. *Compare* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1500 (1994) ("[H]ere we come, finally, to the crux of the argument against judicially-enforced federalism—that courts are poorly situated to make (or second guess) the difficult judgments about where power should be settled or when it can be shifted advantageously. Judges lack the resources and institutional capacity to gather and evaluate the data needed for such decisions. They also lack the democratic pedigree to legitimize what they do if it turns out to be controversial. But most of all, courts lack the flexibility to change or modify their course easily, an essential quality in today's rapidly evolving world. Stare decisis is still a major force guiding judicial decision making—a quality we should be loath to surrender, but one that most definitely impedes the ability of courts to abandon previous holdings."), *with* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1748–49 (2005) ("The open-textured nature of the Constitution's structural commitments calls for judicial implementation through doctrine: There is simply no way to administer our federal system without developing rules to flesh out the allocation and balance of authority.").

88. FEELEY AND RUBIN, *supra* note 10, at ch. 1 (distinguishing federalism from decentralization).

II. UNDERSTANDING THE ELECTIONS CLAUSE: THE HISTORY, TEXT, AND CASE LAW

The framers chose a federalist system to protect the people from tyranny by allocating power between the states and the federal government[89] to counteract ambition with ambition, so to speak.[90] But very little of the Court's recent federalism jurisprudence concerns the people as sovereigns;[91] rather, much of its focus has been on how to protect the sovereignty of the states as states from federal overreaching.[92] Protecting the people as sovereigns and protecting the states as states are values of federalism that have converged, with federal overreaching seen as antithetical to the interests of the state and, by implication, the interests of the people.[93] This makes defining sovereignty and developing a normative theory of federalism very difficult when the interests of the people and the state diverge or when the interests of the people are more aligned with federal interests. Federalism is destined to be instrumental and incremental without a basic framework that outlines the attributes of sovereignty.

The Elections Clause, with its initial allocation of power to the states, and its subsequent delegation to Congress of the power to alter state electoral arrangements, escapes the textual and historical

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89. *See* BAILYN, *supra* note 19, at 201 (noting that the theory of parliamentary sovereignty triumphed in England at the end of the Glorious Revolution because it is justified by a theory of the ultimate supremacy of the people, a supremacy that is "normally dormant and exercised only at moments of rebellion against tyrannical government," a theory "that was carried on into the eighteenth century and into the debates that preceded the American Revolution").

90. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("Ambition must be made to counteract ambition.").

91. For a recent exception, see Bond v. United States, 131 S. Ct. 2355, 2364, 2367 (2011) (finding that individuals can bring Tenth Amendment claims and that federalism provides liberties to citizens through the diffusion of sovereign power). Yet, even the *Bond* Court viewed this individual cause of action as a part of protecting the sovereignty of the states. *See id.* at 2364 ("[T]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.").

92. *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding that "Congress cannot conscript the *State's* officers directly" (emphasis added)); New York v. United States, 505 U.S. 144, 188 (1992) (holding that "[t]he Federal Government may not compel the *States* to enact or administer a federal regulatory program" (emphasis added)); Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (holding that the "people of Missouri" have the "prerogative as citizens of a *sovereign State*" to "establish[] a qualification for those who would be their judges" and "[n]either the ADEA nor the Equal Protection Clause prohibits the choice they have made" (emphasis added)).

93. *Gregory*, 501 U.S. at 458 (discussing federalism values from the vantage point of the state being able to ensure that its citizens have certain things).

constraints that plague judicial attempts to find substantive restrictions on congressional authority. There is an organizing principle for the Elections Clause just by virtue of the way it allocates power between "sovereigns"—here, the federal government and the states—which highlights why the distinction between "sovereignty" and "autonomy" is important. Yet the Court's difficulty separating sovereignty from autonomy in its federalism jurisprudence raises interesting questions about a provision of the Constitution that specifically denies that states are sovereign.

As Part II.A shows, the founding generation, and in particular the Anti-Federalists, recognized that the Elections Clause deprived the states of their sovereign authority over elections. This history explains why the Clause generated so much opposition during the debates over the ratification of the Constitution. Part II.B illustrates that the Court has recognized the absence of state sovereignty in its interpretation of the Elections Clause, although it has not extended this understanding of limited state power to the context of voting rights. Part II.C argues that Congress's power to enforce the Fourteenth and Fifteenth Amendments, when combined with its power under the Elections Clause, illustrates that our electoral system is about congressional, not state, sovereignty.

A. The Elections Clause as a Source of State Autonomy and Congressional Sovereignty

1. The Elections Clause as a Constraint on State Authority: The Historical Record

The states' lack of sovereignty over elections is consistent with our system of federalism and our constitutional history. The constitutional framework embraced multiple layers of authority to prevent both levels of government from being sovereign in the same regulatory sphere at the same time. This system of divided governance was inherited from Great Britain and was common in the colonies until the 1760s.[94] The pre-Revolutionary period was first defined by divided sovereignty between the Crown and Parliament, and then the theory of parliamentary sovereignty became dominant, defined as

94. *See* ALLISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 5 (2010) (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)) ("The Framers split the atom of sovereignty . . . . [T]heir idea that our citizens would have two political capacities, one state and one federal, each protected by incursion from the other . . . .").

unlimited and undivided sovereignty within a single polity.[95] Throughout this period, the colonies continued to exercise autonomy over areas of local jurisdiction.[96] The notion of parliamentary sovereignty and the corresponding lack of divided authority served as the basis for many of the disputes between Great Britain and the colonists.[97]

The post-Revolutionary period reflected these concerns about having one supreme authority, which is why the federal government was extremely weak under the Articles of Confederation. The delegates to the Constitutional Convention recognized that more power had to be ceded to the federal government without completely eliminating the sovereign nature of the states. The founders designed the Constitution so that the states would retain control over local matters and, to avoid the despotism of parliamentary sovereignty, the federal government would exercise power only over limited areas that tended to exceed or fall outside of the scope of local competencies.[98] Sovereignty, at least from the 1760s on, was not "final, unqualified, and indivisible" in only one body; instead, the power was divided between two sovereigns, each responsible for specific policy areas, with ultimate sovereignty lying with the people.[99]

The struggle over the delegation of sovereign authority continued well after the new government was established. In particular, the debate during the Constitutional Convention about the proposed congressional veto over all state laws illustrates how the congressional veto in the Elections Clause was intended to be a delegation of sovereignty from the states to the federal government. The Articles of Confederation were ineffective, in part, because of

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95. *Id.* at 13–15 (noting that throughout the seventeenth and eighteenth centuries, "[t]he idea that separate and equal authorities could exist within the same juridical boundaries offended contemporary understandings of the very nature of government power" and noting that some commentators stated that Parliament "hath sovereign and uncontrollable authority . . .").

96. *See* BAILYN, *supra* note 19, at 200, 202–03 (noting that except for certain powers England exercised over "only the outer fringes of colonial life" that "[a]ll other powers were enjoyed . . . by local, colonial organs of government"). In the seventeenth century, there was a dispute over where the locus of sovereignty lay—with the Crown or Parliament. By the Glorious Revolution, the theory of parliamentary sovereignty, justified by the notion that the people are supreme, was the dominant theory in England until the eve of the American Revolution. *Id.* at 200–01.

97. LACROIX, *supra* note 94, at 17 (noting that the nature of sovereignty was contested and that there were "two versions of the British Constitution"—the one "in which Parliament was omnipotent" and "the colonial interpretation, premised on the belief that there were limits to Parliament's authority to legislate for the colonies") (internal citations omitted).

98. *Id.* at 35, 132–33.

99. *See* BAILYN, supra note 189, at 200–28 (discussing the progression from the idea of an absolute, unified sovereignty to the Revolutionary idea of sovereignty in the people).

Congress's inability to control the content or direction of state laws that conflicted with its own dictates. To address this problem, Charles Pinckney proposed during the Constitutional Convention "that the National Legislature should have authority to negative all laws which they should judge to be improper."[100] Both Pinckney and James Madison believed that the provision was necessary because "the States must be kept in due subordination to the nation,"[101] and each understood that a powerful central government was key for the nation to succeed. Along these lines, one delegate, in rejecting the idea that the congressional negative should be limited, observed the following:

> Federal liberty is to States, what civil liberty, is to private individuals. And States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, [than] the savage is to purchase civil liberty by the surrender of his personal sovereignty, which he enjoys in a State of nature. A definition of the cases in which the Negative should be exercised, is impracticable. A discretion must be left on one side or the other? [W]ill it not be most safely lodged on the side of the National government?[102]

The national government, therefore, should have this power because we are "one nation of brethren" and "must bury all local interests and distinctions."[103] Thus, the congressional negative represented a passing of sovereignty from the states to the national government because the states would have no longer had any assurances of finality in the passing of their own laws.

James Madison had proposed the congressional negative to Thomas Jefferson, Edmund Randolph, and George Washington in the months prior to the Convention, arguing that the "federal negative" would establish the supremacy of the national government.[104] Madison envisioned it as a tool to keep the states from defeating acts of Congress, violating national treaties, and being aggressive toward each other. The proposal was ultimately defeated, however, because of fear that the negative gave Congress unchecked authority,

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100. James Madison, *Debate on the Veto of State Laws*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 58 (Ralph Ketcham ed., 2003) (June 8, 1787).

101. *Id.* at 58–59. This provision was a part of Article VI of the Virginia Plan, which gave the national legislature the ability "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of the Union." James Madison, *The Virginia Plan*, *in* 10 THE PAPERS OF JAMES MADISON 16 (Robert A. Rutland et al. eds., 1977) (May 29, 1787) (noting that James Madison supported "Charles Pinckney's motion for an unlimited veto over state laws").

102. Madison, *supra* note 100, at 60.

103. *Id.*

104. LACROIX, *supra* note 94, at 138–39.

particularly over the internal workings of the states.[105] Nevertheless, the debate over the congressional negative speaks to the larger debate concerning the locus of authority and power contained in the Elections Clause.

Madison believed that the congressional negative would show that power emanated from the center; he was willing, in fact, to model the negative after the one used by the very empire from which colonists had sought freedom: Great Britain. The federal negative mirrored "the same type of ex ante review of state legislative acts that the British Crown, through the mechanism of the Privy Council, had formerly wielded over the acts of the colonial assemblies."[106] According to Allison LaCroix, "Madison envisioned the federal negative functioning in the same manner as the Privy Council's practice of reviewing statutes ex ante, in a general posture, *before they could be applied in individual cases or challenged by specific parties.*"[107]

Thus, Madison's view of the scope and nature of the congressional negative was that it would have sharply limited state sovereignty and state autonomy by giving Congress the ability to invalidate state laws before they went into effect.[108] The proposal of a congressional negative was ultimately defeated, however, because, for many delegates, it resembled too closely the practices of Great Britain during the pre-Revolutionary period.[109] Other delegates expressed fears that a congressional negative over state laws placed too much power in Congress, but they expressed a willingness to support a negative in a more narrow form. Thus, the congressional veto in the Elections Clause represents a compromise of sorts: it gives Congress the ability to veto state laws in limited, but important, circumstances—representation and voting. The importance of elections was a recurrent theme during the Convention, so Congress's ability to veto state electoral regulations was widely seen as necessary to prevent the states from destroying the national government without

105. Madison, *supra* note 100, at 58–60 (stating that Mr. Williamson was concerned that a congressional negative would undermine states ability to control internal police and that Mr. Sherman believed the nature of the congressional veto should be defined).

106. LACROIX, *supra* note 94, at 139; *id.* at 141 ("By positing that lands beyond the realm were held by the monarch alone by virtue of conquest, the doctrine of the king's dominions vested the king's council with authority to oversee colonial legislation and to review the decisions of colonial courts.").

107. *Id.* at 145 (emphasis added).

108. *Id.* at 146 (noting that the negative gave "the general government the power to police both a state's relationship with its inhabitants and its relationship with its fellow states").

109. *See id.* at 147–54 (stating that some thought the negative looked "like little more than a rehash of imperial procedure").

intruding on state sovereignty in the same way that a general negative over state laws would have.

Even the limited veto over elections, however, was problematic for some in the founding generation. The Elections Clause furthered fears that the Constitution created an all-powerful national government that would introduce tyranny, despotism, and a governing aristocracy. To address these concerns, Federalists often drew parallels between the rights that free men surrendered to their governments to protect liberty and the power that states relinquished to the central authority, also viewed as necessary to protect freedom.[110] In other words, just as individuals had to give up some of their individual liberty to state governments in order to secure peaceful enjoyment of those liberties, so too did states have to surrender some of their power to the federal government for the same purpose—to protect the people. The congressional veto in the Elections Clause, from this perspective, was simply another layer of protection for the people in return for the states surrendering their final policymaking authority over elections to the federal government.[111]

Even though the Convention ultimately rejected a general congressional negative over state laws and despite the delegates' assurances about the limited nature of the congressional veto in the Elections Clause, the states recognized the danger that the congressional veto over elections presented. The loss of sovereignty, even in this limited context, led Massachusetts and New Hampshire, for example, to propose an amendment to the Elections Clause that

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110. THE FEDERALIST NO. 51 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself."); *see also* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 11 (1981) ("[J]ust as individuals have to give up some of their natural rights to civil government to secure peaceful enjoyment of civil rights, so states must give up some of theirs to federal government in order to secure peaceful enjoyment of federal liberties." (citing multiple sources)). The analogy between individual liberty/states and state liberty/federal government was a common one. *See, e.g.*, Madison, *supra* note 100, at 60 (comments of James Wilson) ("Federal liberty is to States, what civil liberty, is to private individuals. And States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, than the savage is to purchase civil liberty by the surrender of his personal sovereignty . . . .").

111. *See generally* Foster v. Love, 522 U.S. 67, 73 (1997) (noting that one of the reasons that Congress, pursuant to its power under the Elections Clause, passed a statute fixing the election of congressional members to the same day is to remedy "the distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and with the burden on citizens forced to turn out on two different election days to make final selections of federal officers in Presidential election years . . . .") (citing CONG. GLOBE, 42d CONG., 2d SESS. 141 (1871) (remarks of Rep. Butler)).

would allow Congress to exercise its veto power only if states failed to call for congressional elections or passed electoral laws that otherwise subverted rights protected by the Constitution.[112] James Winthrop, writing in the *Massachusetts Gazette*, proposed fourteen conditions for accepting the new Constitution, including, "Congress shall have no power to alter the time, place or manner of elections, nor any authority over elections, otherwise than by fining such state as shall neglect to send its representatives or senators, a sum not exceeding the expense of supporting its representatives or senators one year."[113] Other individuals writing at the time also expressed alarm at the veto, with one questioning "how can [C]ongress guarantee to each state a republican form of Government" when the "time place & Manner of chusing the Members of the Lower house is intirely [at their mercy]."[114]

The notion that the veto would be used rarely and only for practical reasons[115] did little to comfort opponents who feared that the Elections Clause undermined the proposed constitution's creation of a federation and evinced an intent by the national government to absorb the states. As one commentator opined:

> By sect. 4th of the 1st article, "the times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; *but the Congress may at any time, by law, make or alter such regulations, except as to the*

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112. *See generally* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–1788, at 448 (2010) ("All of the states that recommended amendments asked for a modification of that provision so Congress could regulate congressional elections only when states themselves did not or could not call elections. Massachusetts and New Hampshire also proposed to add a statement that would allow Congress to use its power over elections against state electoral rules that were 'subversive of the rights of the People to a free & equal representation in Congress agreeably to the Constitution.' ").

113. *See* James Winthrop, *"Agrippa" XVIII*, MASS. GAZETTE (Bos.), Feb. 5, 1788, *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALISTS AND ANTIFEDERALISTS SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO 155, 158 (1993) [hereinafter THE DEBATE ON THE CONSTITUTION, PART TWO].

114. Letter from Joseph Spencer to James Madison, Enclosing John Leland's Objections (Feb. 28, 1788), *in* THE DEBATE ON THE CONSTITUTION, PART TWO, *supra* note 113, at 267, 268 (noting the objections of John Leland, a leading Virginia Baptist).

115. *See* Letter from Samuel Holdon Parsons to William Cushing, Our Security Must Rest in Our Frequently Recurring Back to the People (Jan. 11, 1788), *in* THE DEBATE ON THE CONSTITUTION: FEDERALISTS AND ANTIFEDERALISTS SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART ONE 748, 751 (1993) [hereinafter THE DEBATE ON THE CONSTITUTION, PART ONE] ("[I]t appears to me proper that Congress should determine the *Time*, our Different Legislatures have on this Subject gone into different Practices, it is necessary all Elections should be in Season to attend the federal Legislature and expedient, at least, they should be in One Day throughout the Union this can only be done by the national Authority—it may be so that the present Places of holding Elections will be impossible for the Electors to be convened at . . . it may happen that some one of the States in the Union may neglect or refuse to make any Law by which the Electors may be conven'd.").

> *place of chusing senators*?" The plain construction of which is, that when the state legislatures drop out of sight, from the necessary operation of this government, then Congress are to provide for the election and appointment of representatives and senators.[116]

Thus, even those who would not go as far as accusing Congress of attempting to abolish the states expressed discomfort with the congressional veto because it still represented an opportunity for Congress to assert undue influence over elections. This prospect, when taken to its most extreme conclusion, gave Congress the means to destroy the states' ability to be independent, autonomous units. One individual writing during the ratification debates argued that "Congress [is] to have the power of fixing the *time, place,* and *manner* of holding elections, so as to keep [the states] forever subjected to [its] influence."[117] The common response by Federalists was that Congress would prevent the undue influence of partisan zeal that came from unchecked state control of elections.[118] The congressional veto in the Elections Clause was linked to the then-prevailing notion that the national government would be insulated from the passions of the people in a way that the states were not and probably should not be.[119] The absence of sovereignty in the Clause, therefore, was viewed by the founding generation as a structural safeguard against partisan zeal and tyranny. The veto also reflected the delegates' fear that the states, had they been in complete control of elections, could have used this power to the detriment of their citizens, who would have little recourse.[120]

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116. Samuel Bryan, *Centinel* I, INDEP. GAZETTEER (Phila.), Oct. 5, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 52, 58–59.

117. William Findley?, *Reply to Wilson's Speech: "An Officer of the Late Continental Army,"* INDEP. GAZETTEER (Phila.), Nov. 6, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 100.

118. Rebuttal to *"An Officer of the Late Continental Army": "Plain Truth"*, INDEP. GAZETTEER (Phila.), Nov. 10, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 111 ("Congress indeed are to have control to prevent undue influence in elections, which we all know but too often happens through party zeal.").

119. *See, e.g.*, Oliver Ellsworth, *Reply to Elbridge Gerry: "A Landholder" IV*, CONN. COURANT (Hartford), Nov. 26, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 234, 236 ("[P]erhaps it may be said, Congress have a power to control this formality as to the time and places of electing, and we allow they have: But this objection which at first looks frightful was designed as a guard to the privileges of the electors. Even state assemblies may have their fits of madness and passion, this tho' not probable is still possible.").

120. *See, e.g.*, JAMES MADISON, *Thursday Aug. 9 in Convention, in* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 414, 425 (Ohio Univ. Press 1984) (comments of Madison) (noting that the Elections Clause "was meant to give the National Legislature a power not only to alter the provisions of the States, but to make regulations in case the States should fail or refuse altogether").

Many of the delegates also believed that the Clause was necessary because of basic differences of opinion between the state governments and the delegates over what form national elections should take. For example, members of the House of Representatives are elected to two-year terms and senators are elected to six-year terms with no term limits for either, a structure that was different from many of the state systems at the time.[121] While these differences and others were points of concern during the state ratification debates, the disagreements over the Elections Clause occurred in a framework where most of the delegates, despite advocating for the congressional veto power, believed that states should still have broad authority over elections.[122] Yet these delegates could not deny their concern that states were more susceptible to abusing their authority than Congress would be in using its veto power. Giving states autonomy but not sovereignty addressed this concern.

Notions of dual and concurrent sovereignty do little to capture the historical and theoretical underpinnings of the veto—that there cannot be two sovereigns that make final decisions with regard to elections. And, more importantly, there cannot be two sovereigns without ignoring the concerns that the framers had about the potential for abuse if states had sole authority over their electoral apparatuses. Indeed, the debates during the Constitutional Convention recognized the loss of state sovereignty inherent in giving Congress the ability to negate state laws in their entirety. Thus, the actual structure of the Clause, much like the rejected congressional negative, creates a decentralized structure over elections where state authority is broad but Congress has a veto that, even if used sparingly, still reflects a one-sovereign regime rather than a dualist or concurrent one.

Ironically, the Elections Clause has not been a useful repository of congressional authority because of many of the same federalism concerns that led to the demise of the proposed

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121. MAIER, *supra* note 112, at 31 ("The Constitution put no limit on the number of terms representatives and senators could serve, unlike both the Articles of Confederation and many state constitutions, which imposed terms limits to avoid . . . an 'inconvenient aristocracy' of entrenched officials with no immediate knowledge of the people's needs and feelings.").

122. *Id.* at 452 (noting that Aedanus Burke proposed to limit Congress's authority over elections to " 'only when any state shall refuse or neglect, or be unable, by invasion or rebellion' to make such regulation itself' as a part of the Bill of Rights); *id.* at 151 (discussing objections by individual towns in Massachusetts and Connecticut to Congress's power to overrule the states over the matter of elections); *id.* at 339 (discussing similar objections in the New York ratification debates); *see also* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 597 (Max Farrand ed., 1911) (giving states the ability to "prescribe the time & manner of holding elections" under the Pinckney's Plan submitted to John Quincy Adams).

congressional negative over all state laws.[123] Congress's sparing use of its veto power over the years has allowed the states' authority under the Elections Clause to become dominant and have more influence in our system of federalism.[124] Nevertheless, the existence of a congressional veto gives Congress substantial leeway when in fact it does opt to regulate state electoral authority, through either the Clause or other related constitutional provisions. And, as history reminds us, the veto represents a delegation of sovereignty on the part of the states, a fact that should play a large role in how the Supreme Court interprets congressional action going forward.

2. The Elections Clause as a Repository of Congressional Power: The Case Law

Unlike most federalism issues, there is constitutional text that explicitly deprives the states of complete sovereignty over the matter of elections; the Elections Clause gives states autonomy—or a right to make policy and exercise regulatory authority for the benefit of its citizens absent congressional intervention.[125] The Court has not

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123. As one writer noted:

> A general uniformity of acting in confederations (whenever it can be done with convenience) must tend to federalize (allow me the word) the sentiments of the people. The time, then, might as well have been fixed in the Constitution—not subject to alteration afterwards. Because a day may be chosen by Congress which the Constitution or laws of a State may have appropriated to local purposes, not to be subverted or suspended. Leaving the places subject to the alteration of Congress, may also lead to improper consequences, and (*humanum est errare*) tempt to sinister views.

Strictures on the Proposed Constitution, FREEMAN'S J., Sept. 26, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 18, 19. This history is discussed at length in Tolson, *supra* note 21, at 877–88.

124. Tolson, *supra* note 21, at 884–87 (discussing Congress's use of its authority under the Elections Clause, which is controversial because of federalism concerns). Since 1842, Congress has used its authority under the Elections Clause to require states to create single member districts that are compact and contiguous. However, the Fourteenth and Fifteenth Amendments, although more narrow in some respects because of cases interpreting the Amendments to require proof of discriminatory intent, *see, e.g.*, Washington v. Davis, 426 U.S. 229 (1976), have done much of the work that the Clause would have otherwise accomplished. *Id.*; *see also infra* Part II.B. The problem is that premising congressional action solely on the Fourteenth and Fifteenth Amendments, instead of in conjunction with the Elections Clause, calls into question the constitutionality of federal legislation like the VRA, the scope of which extends beyond federal elections and encompasses state practices as well.

125. Young, *supra* note 82, at 14 (" 'Autonomy,' on the other hand, emphasizes the positive use of governmental authority, rather than the unaccountability of the government itself. The OED defines 'autonomy' as '[t]he right of self-government, of making [a state's] own laws and administering its own affairs.' ") (alteration in original); *see* FEELEY & RUBIN, *supra* note 10, at 29 ("In a decentralized regime, the central authority can always override the decisions of the subdivisions if they fail to achieve the purpose that the centralized authority intended when it authorized the subdivisions to decide.").

explicitly adopted this position, but its case law recognizes that the states delegated a portion of their sovereignty over elections to the federal government with the ratification of the Constitution.

In *Foster v. Love*, the Supreme Court invalidated a Louisiana open-primary statutory scheme that violated the Elections Clause by changing the day on which candidates for federal office were elected. The Supreme Court described the Elections Clause as "a default provision; it invests the States with responsibility for the mechanics of congressional elections, . . . but only so far as Congress declines to pre-empt state legislative choices . . . ."[126] The Court interpreted the Clause as giving Congress " 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.' "[127]

Similarly, in *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court held that Arkansas, even though it had reserve power over the selection of its congressional representatives, violated the Qualifications Clause when it prevented otherwise eligible individuals who had been elected three or more times to the House or two or more times to the Senate from appearing on the ballot.[128] The Qualifications Clause does not impose term limits on congressional representatives.[129] The Court found that the state's attempt to impose term limits as an added requirement to the Qualifications Clause was contrary to the constitutional text, structure, and history.[130]

The Court reasoned that, since Congress has no authority to change the qualifications of its members,[131] states are similarly limited as the qualifications for members of Congress in the Constitution are "fixed and exclusive."[132] In an earlier case, *Powell v. McCormick*, the Court applied this same reasoning to circumscribe

126. Foster v. Love, 522 U.S. 67, 69 (1997) (internal citations omitted) (citing multiple sources).

127. *Id.* at 71 n.2 (citing Smiley v. Holm, 285 U.S. 355, 366 (1932)).

128. 514 U.S. 779, 800 (1995).

129. *See* U.S. CONST. Art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

130. *Thornton*, 514 U.S. 779, 790 (1995) (discussing "a proposal made by the Committee of Detail that would have given Congress the power to add property qualifications" which was rejected because James Madison argued that "such a power would vest 'an improper & dangerous power in the Legislature,' by which the Legislature 'can by degrees subvert the Constitution.' ") (certain internal quotations marks omitted) (quoting Powell v. McCormack, 395 U.S. 486, 533–34 (1969)).

131. *Id.* at 791–92 (citing *Powell*, 395 U.S. at 539).

132. *Id.* at 790.

Congress's ability to exclude a duly elected individual from being able to take his seat.[133] In contrast, *Thornton* dealt specifically with the issue of whether the state had the ability to change the qualifications of its congressional delegation, even if Congress lacked this ability.[134] The Court answered this question in the negative, reasoning that if states could alter the qualifications of congressional representatives it would violate basic principles of representative government. The Court reached this conclusion in part by observing that "sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government."[135]

Although *Thornton* did not involve the Elections Clause, the Court recognized that the states delegated at least some of their authority over elections to the federal government when they ratified the Constitution. The Court observed that the power to add qualifications was not within the original powers of the states, and, even if it were, this power was stripped from the states with the ratification of the Constitution. As the Court noted, "[T]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[136]

Thus, as *Thornton* recognizes, in order to have sovereignty over the incidents of a federal system, such as altering the qualifications of the congressional delegation, the power must be left to the states by the Constitution.[137] The Elections Clause, even though it gives the states broad power over the time, place, and manner of elections, represents a delegation of power from the states to the federal government because it leaves final authority to Congress. As the *Thornton* Court noted,

> [I]n Art. I, § 4, cl. 1, though giving the States the freedom to regulate the "Times, Places and Manner of holding Elections," the Framers created a safeguard against state abuse by giving Congress the power to "by Law make or alter such Regulations." The Convention debates make clear that the Framers' overriding concern was the potential for States' abuse of the power to set the "Times, Places and Manner" of elections. Madison noted that "it was impossible to foresee all the abuses that might be made of the discretionary power." . . . As Hamilton later noted: "Nothing can be more evident

133. *Id.* at 790–93 (citing *Powell*, 395 U.S. at 539).

134. *Id.* at 800.

135. *Cf. id.* at 794 (discussing its holding in *Powell* with regards to representative government).

136. *Id.* at 801 (emphasis in original omitted) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985)).

137. *Id.* at 805.

> than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy."[138]

This notion that the Constitution deprived states of their sovereign authority over elections is consistent with the constitutional history and text, and the Court's precedent.[139] To find otherwise would give the states the ability to subvert Congress's veto power in the Elections Clause. As the *Thornton* Court observed with regard to the states' ability to alter the qualifications of their congressional delegation, "[I]t is inconceivable that the Framers would provide a specific constitutional provision to ensure that federal elections would be held while at the same time allowing States to render those elections meaningless by simply ensuring that no candidate could be qualified for office."[140]

Indeed, what is notable about *Thornton* is that the Court views Article I, Section 5 as being an *exclusive* grant of power to the House to determine the qualifications of its membership.[141] Similarly, Article I, Section 3 was viewed as an *exclusive* and express delegation to the states to elect Senators until the adoption of the Seventeenth Amendment.[142] The fact that the states could not add to the qualifications of their representatives in the House delegations because of the exclusivity of this provision and the fact that Congress could not add to the qualifications of duly appointed senators because states had the power to select them demonstrate how each polity has the final policymaking authority in its respective area. The Elections Clause, on the other hand, gives the final policymaking authority over congressional elections to Congress with no provision that a similar power be given to the states.

Along these lines, the Court has interpreted the states' Elections Clause power as being limited to procedural regulations but has not articulated similar limitations on Congress's veto power. In *Cook v. Gralike,* the Court invalidated a Missouri constitutional provision, Amendment 8, that instructed each member of Missouri's congressional delegation to work to pass a term-limits amendment

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138. *Id.* at 808–09.

139. *Id.* at 805 ("[I]n certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution. Thus, we have noted that 'while, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I.' ") (citing United States v. Classic, 313 U.S. 299 (1941)).

140. *Id.* at 811.

141. *Id.* at 804.

142. *Id.* at 804 n.16.

once elected or have the statement "Disregarded Voters' Instruction on Term Limits" printed next to his or her name on the primary and general election ballot.[142] The Court rejected Amendment 8 on the grounds that it was an attempt to dictate a specific substantive outcome—a constitutional amendment for term limits—rather than a procedural regulation that fell properly within the scope of the states' Elections Clause authority.[144] The Court's view that the states' Elections Clause authority is confined to procedural regulations illustrates the limited nature of state power and undermines any notion that it conveys "sovereignty" upon the states over the matter of elections.[145]

Moreover, sovereignty is not required in order for the states to exercise significant and effective power over elections, particularly where Congress has not acted. In an earlier piece, I suggested that Congress's failure to exercise its veto power over partisan gerrymandering allowed the states to use their redistricting authority in a profederalism manner.[146] Thus, state autonomy can thrive and, indeed, mimic sovereignty where Congress has not acted, but otherwise the states are limited in their ability to regulate their electoral mechanisms by Congress's express veto.

Because the Elections Clause is not a federalism provision, and instead concerns decentralization and autonomy, the Court is obligated to defer to Congress where it has exercised its "veto power" over the states. Such deference is also warranted where Congress has acted pursuant to other provisions, such as the Fourteenth or Fifteenth Amendments, in light of the fact that these provisions redefined the relationship between the state and federal governments to give the latter more authority with respect to regulating the franchise.[147] Thus, the fact that the Elections Clause does not give Congress a veto over pure state election practices does not preclude

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143. Cook v. Gralike, 531 U.S. 510, 514 (2001).

144. *Id.* at 523 (" '[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.' ") (citing *Thornton*, 514 U.S. at 833–34).

145. *See id.* at 527 (Kennedy, J., concurring) ("The Elections Clause thus delegates but limited power over federal elections to the States.").

146. *See generally* Tolson, *supra* note 21.

147. *See* Katzenbach v. Morgan, 384 U.S. 641, 647 (1966) ("[O]f course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution."). *See generally Ex Parte* Virginia, 100 U.S. 339, 344–46 (1880) (explaining that the Thirteenth and Fourteenth Amendments were intended to be "limitations of the power of the States and enlargements of the power of Congrese [sic]").

congressional authority to intervene. The Court has also recognized the Fourteenth and Fifteenth Amendments as express limitations on the states' authority over elections;[148] thus, congressional actions pursuant to these provisions also represent a type of "veto power" over state electoral authority.

B. Cementing Congressional Sovereignty: The Civil War Amendments

As the preceding sections show, the lack of state sovereignty over elections is consistent with both the constitutional text and history, but this delegation of state sovereignty to the federal government extends beyond the provisions of the Elections Clause. The Civil War amendments also represent the specific intention of the framers of those amendments to expand federal power at the expense of state sovereignty.[149] Although the Elections Clause speaks only to the election of "Senators and Representatives," the Civil War amendments extend Congress's authority to regulate state electoral practices that implicate the constitutional right to vote as protected by the Fourteenth and Fifteenth Amendments.[150] In *Harper v. Virginia State Board of Elections*,[151] the Court invalidated a state poll tax under the Equal Protection Clause, holding that the right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed."[152] Because Congress has the ability to enforce the mandates of the Fourteenth and Fifteenth Amendments, *Harper* illustrates that this power extends to preventing states from engaging in electoral practices that discriminate against voters on the basis of race, even if the practices used pertain only to state elections.[153] Thus, in *South*

148. *See infra* Part II.B.

149. City of Rome v. United States, 446 U.S. 156, 179 (1980) (noting that the Civil War amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty").

150. The Necessary and Proper Clause, as well as the Nineteenth and Twenty-Sixth Amendments, are also arguably a source of congressional authority, but are beyond the scope of this Article. *See* U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. amend. XIX; U.S. CONST. amend. XXVI.

151. 383 U.S. 663 (1966).

152. *Id.* at 665.

153. *Compare Harper*, 383 U.S. 663, *with* Oregon v. Mitchell, 400 U.S. 112 (1970), *superseded in part by constitutional amendment*, U.S. CONST. amend. XXVI, § 1 (finding that Congress cannot set the voting age in state and local elections). *Oregon v. Mitchell* is not inapposite here, given that Congress made no findings that the twenty-one-year-old voting age requirement was used by states to disenfranchise voters on the basis of race. As the Court noted, the enforcement powers were intended to help fulfill the framers' goal of "ending racial

Carolina v. Katzenbach, the Court upheld provisions of the VRA that prohibited the use of literacy tests in *all* elections, noting that these tests had been commonly used to contravene the requirements of the Fifteenth Amendment and therefore could be banned.[154] As the Court later recognized, "[T]he original design of the Founding Fathers was altered by the Civil War Amendments and various other amendments to the Constitution," and these changes were "intended to deny to the States the power to discriminate against persons on account of their race."[155]

Until recently, the Court had taken a broad view of Congress's enforcement power pursuant to these amendments.[156] The Court recognized that these provisions gave Congress power that had once been reserved to the states—a delegation, in effect, of some of the states' residual sovereignty. As such, Congress was entitled to deference and significant leeway when it acted pursuant to these amendments. But the Court's recent interpretation of congressional power in cases like *City of Boerne v. Flores*[157] and *Seminole Tribe v. Florida*[158] finds that congressional authority must yield to concerns of state sovereignty, which misallocates power between the states and the federal government.

Initially, the Court took a broad view of Congress's power to enforce the Fourteenth and Fifteenth Amendments. In *City of Rome v. United States*, for example, the Court rejected the argument that Congress's enforcement power under the Fifteenth Amendment was limited to remedying only purposeful discrimination, noting that "even if [Section] 2 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to [Section] 2, outlaw voting practices that are discriminatory in effect."[159] The Court further observed that Congress may pass legislation under Section 2 of the Fifteenth Amendment in order to prohibit acts that do not violate

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discrimination and [preventing] direct or indirect state legislative encroachment on the rights guaranteed by the amendments," 400 U.S. at 127, and Congress failed to link the regulation to discrimination based on race.

154. 383 U.S. 301, 333–34 (1966); *see also* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding provision of the VRA that outlawed an English literacy requirement as a condition for voting, even though the law conflicted with regulations for state and local elections in noncovered states).

155. *Mitchell*, 400 U.S. at 126.

156. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). *But see* The Civil Rights Cases, 109 U.S. 3 (1883); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

157. 521 U.S. 507 (1997).

158. 517 U.S. 44 (1996).

159. 446 U.S. 156, 173 (1980).

section 1 of the Act, "so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch v. Maryland*."[160]

The Court has described Congress's power to enforce the Fourteenth Amendment as broader than the judicial power to define the substantive reach of its provisions.[161] In *Katzenbach v. Morgan*, the Court held that legislation enacted pursuant to Section 5 of the Amendment would be upheld

> so long as the Court could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with 'the letter and spirit of the constitution' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.[162]

In effect, the Court has interpreted Congress's enforcement powers as "no less broad than its authority under the Necessary and Proper Clause," capable of addressing state action that has a discriminatory purpose, that has a discriminatory effect, and that may not even violate the substantive provisions of the Amendments.[163] And given the reach of the Necessary and Proper Clause,[164] Congress's power to renew the VRA should be beyond question.

Moreover, state sovereign immunity is not a limit on the reach of this authority. In *Fitzpatrick v. Bitzer*, for example, the Court explicitly held that Congress can use its Fourteenth Amendment power to abrogate state sovereign immunity. *Fitzpatrick*, like *City of Rome* and *Katzenbach*, recognized that the Civil War amendments altered the preexisting power constructs. As the Court observed, *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation."[165]

The *Fitzpatrick* plaintiffs argued that provisions of Connecticut's retirement plan violated Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment.[166] At issue was whether Congress could award backpay as a remedy under Title

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160. 17 U.S. (4 Wheat.) 316 (1819).

161. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (recognizing Congress's power under the Fifteenth Amendment to pass the VRA but seeing no need to overrule its own contrary precedents).

162. *City of Rome*, 446 U.S. at 176 (citing Katzenbach v. Morgan, 384 U.S. at 641 (1996)).

163. *Id.* at 175.

164. *See generally* United States v. Comstock, 130 S. Ct. 1949 (2010) (discussing the breadth of the Necessary and Proper Clause).

165. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

166. *Id.* at 448.

VII for state employees pursuant to its enforcement power under the Fourteenth Amendment.[167]

In finding that Congress can authorize private suits against the states, the Court noted that the Civil War amendments represented a "carving out" of state sovereignty—that these amendments are an "expansion of Congress'[s] powers with [a] corresponding diminution of state sovereignty," a reduction in power that extends to the principle of state sovereignty embodied by the Eleventh Amendment.[168] Thus, there is nothing wrong with Congress's decision to use its power to enforce the Fourteenth Amendment to provide a remedy for private individuals against state action, even if such a remedy interferes with state sovereignty.[169]

The Court's recent attempts to require an expansive evidentiary record in support of the VRA are contrary to this broad view of Congress's enforcement powers under the Fourteenth and Fifteenth Amendments embraced shortly after the Act was adopted. Recent case law represents an inexplicable departure from this earlier precedent.

In *City of Boerne v. Flores*, the Court substantially narrowed Congress's enforcement power under the Fourteenth Amendment. At issue was the refusal of city authorities to grant a building permit to the regional Catholic archbishop to enlarge a church building that had been designated a historic landmark.[170] The archbishop claimed that this refusal violated the Religious Freedom Restoration Act of 1993 ("RFRA"), which prohibited government from " 'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability" and subjected such laws to strict scrutiny.[171] In passing RFRA, Congress relied on its enforcement power under the Fourteenth Amendment based on the rationale that

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167. *Id.* at 452.

168. *Id.* at 455 ("Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.").

169. *Id.* at 454–55 ("[I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. . . . Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted."). *But see* Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that Congress could not lower the minimum age of voters from twenty-one to eighteen in state and local elections because the Constitution explicitly delegated this function to the states).

170. City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (evaluating a city ordinance that required preapproval for all construction affecting historic landmarks and buildings).

171. *Id.* at 515–16.

it was protecting one of the liberties guaranteed by the Fourteenth Amendment.[172]

Congress passed RFRA in order to overturn a Supreme Court decision, *Employment Division v. Smith*, which held that rational basis review applied to laws of general applicability that infringe on a person's exercise of religion.[173] The fact that RFRA increased the level of scrutiny for laws of general applicability beyond that required by *Smith* led the Court to conclude that RFRA was not a proper exercise of Congress's enforcement powers because it did not deter or remedy a constitutional violation.[174] Instead, Congress was trying to make it more difficult for states to defend laws that would be constitutional under the Court's jurisprudence.

According to the Court, Congress could not use its section 5 power to "decree the substance of the Fourteenth Amendment's restrictions on the states" because "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[175] In other words, Congress's enforcement powers are limited to remedial fixes and do not include the ability to make substantive changes to the scope of the Fourteenth Amendment.[176] In order to distinguish Congress's remedial power from acts that make a substantive change in the governing law, *Boerne* established that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[177]

RFRA could be perceived as an attempt by Congress to redefine an aspect of the state's relationship with its citizens. From this perspective, this case looks strikingly like the Civil Rights Cases, where the Court invalidated provisions of the Civil Rights Act of 1875 on the grounds that the states are the primary protectors of civil

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172. *Id.* at 519–20.

173. *Id.* at 512–16.

174. *Id.* at 519.

175. *Id.* (arguing that Congress "does not enforce a constitutional right by changing what the right is").

176. *Id.* at 520.

177. *Id.* at 519–20. The Court later expounded on the congruence and proportionality test. *See* Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (Congress could not subject states to suits under Title I of the American with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Congress could not subject states to suits under the Age Discrimination in Employment Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (Congress could not subject states to suits for patent infringement). *But see* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Pitts, *supra* note 30, at 247 (arguing that "the most important contribution *Hibbs* made to the congruence and proportionality body of jurisprudence is that the [Supreme] Court somewhat lessened Congress's burden to prove a widespread pattern of recent constitutional violations to justify a prophylactic remedy").

rights.[178] In the interest of preserving state sovereignty, Congress can intervene only if the states default on their obligation. A second—and equally plausible—interpretation is that RFRA was an attempt by a democratically elected body to play a role in defining the scope of constitutional rights, consistent with its duty to enforce the Fourteenth Amendment. But the Court believed that Congress, since it is democratically elected, should play a much more limited role in constitutional interpretation.[179]

Regardless of which view of RFRA one endorses, however, the holding of *Boerne* is in obvious tension with the Court's earlier interpretation of Congress's power under the Fourteenth Amendment as being broad enough to enforce remedies that arguably interfere with state sovereignty[180] and to prohibit acts that do not necessarily violate Section 1 of the Fourteenth Amendment.[181] More pointedly, if Congress can enforce a remedy against an act that does not violate Section 1 of the Fourteenth Amendment, it is a bit of a stretch to say that Congress is not allowed to make substantive changes as well.[182] Congress makes substantive changes whenever it prevents states from engaging in acts that are otherwise constitutional under the Fourteenth Amendment.[183]

By comparison, the VRA, by requiring that all state laws (even those that are not discriminatory or have not historically been used to perpetuate discrimination) be precleared in order to go into effect, is a clear example of Congress prohibiting acts that are otherwise constitutional. A general rule of preclearance, however, arguably furthers the mandates of the substantive provisions of the Fifteenth Amendment.[184]

Notably, the *Boerne* Court concluded that Congress's power to enforce equality in voting pursuant to the VRA of 1965 was appropriate because of the history of voting discrimination in this

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178. 109 U.S. 3 (1883).

179. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 865 (1999).

180. Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976).

181. City of Rome v. United States, 446 U.S. 156, 175 (1980).

182. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 171 (1997).

183. *See* City of Boerne v. Flores, 521 U.S. 507, 508 (1997) ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.").

184. South Carolina v. Katzenbach, 383 U.S. 301, 334–35 (1966) (rejecting the argument that section 5 of the VRA is too broad on the grounds that experience has taught Congress that a more narrow rule would not work).

country and the fact that the Act's most stringent provisions were limited to the most flagrant offenders.[185] This interpretation of the Act, based on geography and history, is particularly problematic,[186] but it stems from an artificial and judicially created limitation on Congress's ability to enforce equality in elections that originated in *Katzenbach*. The early VRA cases are unusual in that they recognized that Congress had extensive authority over elections and deferred to Congress's determinations about what measures were needed to combat discrimination in voting. But then the Court simultaneously limited this power by suggesting that a strong legislative record is needed in order to justify this "extraordinary legislation otherwise unfamiliar to our federal system."[187]

In *Katzenbach*, the Court dealt specifically with the argument that the VRA exceeded the powers of Congress to enforce the Fifteenth Amendment and encroached on an area reserved to the states by the Constitution.[188] The Court noted the extensive and pervasive history of voting discrimination in this country, the fact that Congress had tried to fix the problem on a case-by-case basis, and the persistence of voting discrimination in this country despite these efforts.[189] These factual findings allowed it to conclude that the VRA was an appropriate use of Congress's enforcement authority under the Fifteenth Amendment.[190] The Court found that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[191] Thus, the Court did not dispute that the ability to regulate

185. *City of Boerne*, 521 U.S. at 525.

186. *See* J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 743–44 (2008) ("Although Justice Kennedy referred favorably to the Voting Rights Act seven times in his [*Boerne*] opinion, contrasting the record of widespread and persisting racial discrimination that supported the passage of the VRA with the lack of 'examples of modern instances of generally applicable laws passed because of religious bigotry' in the past forty years to buttress the RFRA, voting rights supporters worried, and opponents hoped, that the Court would demand an overwhelming record of widespread, quite-recent racial discrimination in voting to justify a 2007 renewal.") (internal citations omitted).

187. *Katzenbach*, 383 U.S. at 323.

188. *Id.*

189. *Id.* at 308–14 ("Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964.").

190. *See id.* at 326 (noting that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting").

191. *Id.* at 324.

their electoral machinery is part of the reserved power of the states; rather, Congress's power trumps when state power is exercised in a manner contrary to the Constitution.[192]

The problem is that the Court's narrow view of congressional power as being limited to instances when a state explicitly attempts to circumvent the Constitution ignores that Congress, through its veto power under the Elections Clause, is not so limited. Recall that during the ratification debates, the framers rejected limiting constructions of the congressional veto under the Elections Clause. Besides the examples noted in Part II, other examples abound. Virginia, for example, proposed the following:

> Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.[193]

Yet this proposed modification and others were rejected. The framers anticipated that Congress's authority over elections would be kept in check through normal politics.[194] Thus, the Court's view in *Katzenbach* that Congress may act with regard to elections only if the states circumscribe the dictates of the Fifteenth Amendment is not only misguided and erroneous, but it is also inconsistent with the constitutional text and history.

Katzenbach is also an example in which the Court conflates state autonomy with state sovereignty. It is true that the states have broad power to regulate suffrage[195] and that Congress has broad authority to intervene in state electoral processes to enforce the dictates of the Fifteenth Amendment, as the Court assumes.[196] But because of the Elections Clause, congressional authority is not limited to the dictates of the Fifteenth Amendment, where the Court has restricted Congress's enforcement authority to enacting remedial

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192. *Id.* at 325 ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.") (quoting Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)).

193. *Amendments to the Constitution, reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 100, at 224 (June 27, 1788); *see also The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 100, at 244–45 (Dec. 18, 1787) (expressing concern that Congress's ability to alter the time, place, and manner of elections will lead to "life-estates in government").

194. Tolson, *supra* note 21, at 864–65 (discussing controversy over congressional reapportionment acts).

195. *Katzenbach*, 383 U.S. at 325.

196. *Id.* at 325–26.

legislation.[197] The veto power gives Congress broad authority to regulate state electoral mechanisms beyond the Fifteenth Amendment's dictates.

The *Katzenbach* Court, although ostensibly upholding the VRA, created a dangerous precedent. Indeed, the Court could not foresee that the legitimacy of the VRA would be called into question if Congress did not make factual findings similar to those that originally sustained the Act.[198]

Initially, the Justices were willing to endorse a broad reading of the Act. In *Allen v. State Board of Elections*, for example, the Court found that the VRA required that every change to a state's election laws had to be submitted for preclearance because even minor changes could be used to deny citizens the right to vote.[199] But this very broad reading, with the clear implication that the Act would extend to situations heretofore unimagined, has not had the precedential force that it could have had because of the initial limitations laid out by the *Katzenbach* Court. The Court's decision to confine the discussion of the Act's constitutionality to the Fifteenth Amendment; its finding that congressional authority over elections is limited to the Fifteenth Amendment; its determination that this authority is exceptional and uncommon; and, finally, its conclusion that the use of this power can only be justified by an extensive factual record have played a far more prominent role in the Court's recent interpretation of the Act.

Despite *Allen*'s broad reading of the VRA, what carried the day was the *Katzenbach* Court's failure to recognize that Congress's ability to intervene in state electoral processes is a part of its sovereign authority in this area. Continuing to ignore that the states delegated their final policymaking authority over elections with the adoption of the Constitution and their subsequent ratification of the Civil War amendments, the Roberts Court has deferred to state sovereignty in ways that are clearly inconsistent with both the constitutional text and history, as well as with the Court's own precedent.

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197. *See id.*

198. *Compare* Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504, 2511–12 (2009) (questioning continued constitutionality of some sections of the VRA), *with* United States v. Lopez, 514 U.S. 549, 616–17 (1995) (Breyer, J., dissenting) (criticizing the majority for not giving Congress "a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce" and asserting that the standard to be applied is akin to rational basis review), *and* FERC v. Mississippi, 456 U.S. 742, 755–56 (1982) (applying rational basis review to congressional findings).

199. 393 U.S. 544, 565–67 (1969).

III. DISTINGUISHING SOVEREIGNTY FROM AUTONOMY IN FEDERALISM THEORY: A THEORY OF THE ELECTIONS CLAUSE

Figuring out the meaning of the Elections Clause requires us to determine where the Clause—and, by implication, the VRA—fits in our larger system of federalism. Part III.A begins by defining sovereignty, which is at the core of this Article's theory of the Elections Clause. Part III.B shows how the Court's focus on state sovereignty has obscured the fact that the Clause is about decentralization, not about federalism. Finally, this Article concludes that this misunderstanding about the nature of state sovereignty has led the Court to employ a general federalism norm that has inappropriately and illegitimately rendered section 5 of the Act constitutionally suspect.

A. Defining Sovereignty: Using Final Policymaking Authority as a Baseline

Generally speaking, the tension between finding substantive limitations on congressional authority and developing doctrine that follows from the constitutional text and history has led to many fits and starts in the Supreme Court's federalism jurisprudence.[200] In reality, the Court has a definitional problem that makes policing federalism difficult and bleeds over into its analysis of the Elections Clause. Namely, what is sovereignty? Or more specifically, what does sovereignty mean in the context of the Elections Clause?

While sovereignty is certainly not an undisputed concept in law, history, political science, political theory, or any other discipline,[201] it does have some baseline features that the Court can

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200. *See* Rapaczynski, *supra* note 19, at 342 (observing that "the Court's attempts to impose federalism-related limitations on the national government have been, throughout history, frustrated by the political process, resulting three times in constitutional amendments").

201. *See, e.g.*, THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL 84 (2d ed. Ballyntyne Press 1886) (1660) (arguing that in exchange for internal order and protection from outside threats, man is obligated to obey the sovereign unconditionally); JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 149 (Peter Laslett ed., Cambridge University Press 1988) (1690) (maintaining that government's sovereign authority is limited by the rights of its subjects with recourse for rights violations being available in the form of rebellion or judicial action). Even though Locke believed that the people could rise up against a sovereign who abuses his authority, Locke recognized that the properly exercised power of the sovereign is supreme, or final:

> Though in a constituted commonwealth, standing upon its own basis, and acting according to its own nature, that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate; yet the legislative being only a fiduciary power to act for certain

draw on in articulating federalism doctrine—notably, the finality or supremacy of sovereign authority.[202]

The Merriam-Webster Dictionary defines sovereignty as "supreme power, especially over a body politic."[203] Similarly, Andrzej Rapaczynski has described sovereignty as both a descriptive theory that "in every actual political society there exists de facto an ultimate source of authority, legal or political," and a normative theory that "there ought to be such an authority."[204] In his view, "sovereignty" requires, at a minimum level, three things:

> (1) A sovereign must be sovereign (have authority) over someone and something (that is, there must be subjects and a domain over which the sovereign rules); (2) the authority of a sovereign over the subjects within the sovereign's domain must be of a political nature (that is, at a minimum, the types of commands issued by the sovereign must be capable of acquiring a legal status and be backed by an appropriate enforcement mechanism); and (3) the authority of a sovereign must be final (that is, the sovereign cannot in turn be dependent on another person or institution, and there is no further recourse for subjects who are not prepared to obey the sovereign's commands).[205]

Thus, the supremacy of the higher authority, and the finality accorded to its dictates, are the hallmarks of "sovereignty," even if there may be some disagreement as to what rights individuals and subunits have against this center. Contrary to these definitions, the Justices often divide over how much deference to show federal law that affects the ability of states to set their own regulatory policy, even if the states' sovereign authority is not directly implicated.[206] The

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> ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.

Id.

202. Robert Lansing, *A Definition of Sovereignty*, 10 PROC. AM. POL. SCI. ASS'N 61, 64 (1913) ("We think of sovereignty—and I mean by 'we' mankind in general—as the supreme and vital element in a political state, without which it cannot exist in an organized form or possess those other attributes, which enter into the concept of a state."); Hans J. Morgenthau, *The Problem of Sovereignty Reconsidered*, 48 COLUM. L. REV. 341, 341 (1948) ("When the conception of sovereignty was first developed in the latter part of the sixteenth century with reference to the new phenomenon of the territorial state, it referred in legal terms to the elemental political fact of that age, namely, the appearance of a centralized power which exercised its law making and law enforcing authority within a certain territory. This power, vested at that time primarily, but not necessarily, in an absolute monarch, was superior to the other forces which made themselves felt within that territory, and after a century was unchallengeable either from within or from without. In other words, it was supreme."). *But see* David G. Ritchie, *On the Conception of Sovereignty*, 1 ANNALS AM. ACAD. POL. & SOC. SCI. 385, 397 (1891) (discussing the argument that Congress and the states are "non-sovereign" because the Constitution can be amended).

203. *Sovereignty*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/sovereignty?show=0&t=1307124357 (last visited Mar. 1, 2012).

204. Rapaczynski, *supra* note 19, at 347.

205. *Id.* at 347–48 (footnote omitted).

206. *See, e.g.*, Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 887 (2000) (Stevens, J., dissenting); AT&T Corp. v. Iowa Utils. Bd., 525 U.S 366, 420 (1999) (Breyer, J., concurring in

Court often confuses the states' sovereign authority with their autonomous power to operate in a specific regulatory area.[207]

The Merriam-Webster Dictionary defines "autonomy" as "the quality or state of being self-governing."[208] With autonomy, there is significant authority to act—hence the focus on self-government—but that authority is not generally viewed as final.[209] Autonomy embraces the idea that there are some regulatory areas in which the states are immune from federal norms.[210] Since sovereignty can also embrace this principle of immunity,[211] there is considerable overlap between the two terms in federalism theory.[212]

Sovereignty and autonomy also are frequently conflated because not only do the two terms overlap, but sovereignty is a somewhat vacuous term, and its meaning is often driven by context.[213] In the case law, the meaning of "sovereignty" is either implied or inferred from the constitutional structure and text, or it is defined by negative implication from the powers granted to the states or the federal government.[214]

The defining characteristic of sovereignty, and what distinguishes it from autonomy, is finality in decisionmaking by the supreme authority. This basic distinction between sovereignty and autonomy helps us to determine how the state and federal governments stand in relation to each other over the matter of

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part and dissenting in part) ("[W]e are to interpret statutes . . . based on the assumption that Congress intended to preserve local authority."); Nat'l League of Cities v. Usery, 426 U.S. 833, 844–45 (1976).

207. Young, *supra* note 82, at 13.

208. *Autonomy*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/autonomy?show=0&t=1307125878 (last visited Mar. 2, 2012).

209. Young, *supra* note 82, at 14–15 (describing autonomy as "emphasiz[ing] the positive use of governmental authority, rather than the unaccountability of the government itself" although noting that autonomy is sometimes used to refer to the quality of being governed by one's own laws and no other higher authority).

210. *Compare id.* at 3–4 (defining sovereignty as "the notion that state governments should be unaccountable for violations of federal norms" and autonomy as "the ability of states to govern"), *with* Hills, *supra* note 15, at 816 (defining autonomy as immunity from federal norms).

211. *See* Alden v. Maine, 527 U.S. 706, 713 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634 (1999).

212. Young, *supra* note 82, at 14–15 (noting that sovereignty and autonomy both suggest "the ability to do things with power" and also that "[m]any actions that affect state sovereignty will impinge on state autonomy").

213. Rapaczynski, *supra* note 19, at 351 ("[S]o long as some domain of state power can be meaningfully identified, even if a state is not itself free to change it, the idea of state sovereignty does not lose all of its utility. The real problem is that even a moderately searching scrutiny of the powers of the federal government shows that the alleged existence of a residual category of exclusive state powers over any private, nongovernmental activity is in fact illusory.").

214. *See supra* note 16.

elections. In particular, if we focus on finality and treat this as the core of authority for the Elections Clause, it becomes easier to see how sovereignty is a factor that must be considered in allocating authority over elections.[215]

Defining sovereignty is an attempt, even by those who reject sovereignty as the core of federalism, to understand what "power" states and their citizens retain postratification.[216] The Elections Clause is most easily understood as juxtaposition between sovereignty and autonomy. Sovereignty requires a level of decisionmaking that is insulated from disruption. The Clause, therefore, cannot be understood without referencing this absence of sovereignty or the lack of final policymaking authority on the part of the states.[217] States have significant authority over elections that, over time, has grown into a strong autonomy that the Court has come to equate with sovereignty. Yet Congress's ability to modify, alter, or change state law prevents even the strongest account of autonomy from being equal to sovereign authority.[218] Congress's ability to change state law is the power to press uniformity with respect to a particular electoral rule.[219] This is contrary to the following values of federalism often touted by proponents of state sovereignty: citizen participation, regulatory diversity, and experimentation.[220]

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215. *See* Michelman, *supra* note 19, at 1167 ("[G]overnments are distinguished by their acknowledged, lawful authority—not dependent on property ownership—to coerce a territorially defined and imperfectly voluntary membership by acts of regulation, taxation, and condemnation, the exercise of which authority is determined by majoritarian and representative procedures.").

216. *See* Gerken, *supra* note 21, at 15 ("Process federalists emphatically resist the separate spheres approach that is so often paired with sovereignty. They rightly point out that it is exceedingly difficult to draw the line between state and federal functions. Yet floating in the background of their work is a similar conception of state power—the sense that states should have de facto autonomy over 'their' policies."); Young, *supra* note 82, at 52 (noting that "autonomy, not sovereignty" better promotes the values of federalism because "[j]ust having state governments is not enough; those governments need to have meaningful things to do. Federalism cannot provide regulatory diversity unless states have autonomy to set divergent policies; state governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora.").

217. Ernest Young, for example, has argued that sovereignty has to do with political accountability, a factor which by definition requires final policymaking authority in order for voters to know who to blame for perceived or actual governmental shortcomings. Young, *supra* note 82, at 59; *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (arguing that political accountability is a value of federalism).

218. Young, *supra* note 82, at 30–31.

219. Congress has used its power to regulate elections and reduce gerrymandering by passing the Apportionment Acts of 1842, 1862, and 1901, which initially instituted requirements of contiguity, compactness, and population equality. Vieth v. Jubelirer, 541 U.S. 267, 276 (2004).

220. *Gregory*, 501 U.S. at 458; Young, *supra* note 82, at 163.

The Court perceives the states' power under the Elections Clause as the creation of a powerful interest or right in the states against the federal government. It does so in the name of promoting the "values" of federalism and characterizes this power as a part of state sovereignty, ignoring that Congress still has substantial authority to intervene through the Clause (its veto power) and other provisions (the Fourteenth and Fifteenth Amendments). Equating sovereignty with autonomy, a mistake that the Court has made in other areas of its jurisprudence, perpetuates the confusion.

In *Printz v. United States*, for example, the Court found that Congress could not direct state law-enforcement officers to participate in a federally enacted regulatory scheme on the grounds that "laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution."[221] *Printz*, however, had more to do with political considerations rather than any concerns about state sovereignty.[222] Justice Scalia, writing for the majority, observed the following:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.[223]

This concern about political accountability—and Congress's ability to force the states to internalize the political and economic costs of administering federal programs—reflects "a distortion in the ordinary political process that we generally count on to protect state autonomy."[224] Thus, *Printz* articulates an anti-commandeering rule that, according to Professor Young, seeks to correct this distortion.[225] Couching the issue in terms of dual sovereignty rather than in terms of process correction, however, obscures the fact that the *Printz* decision actually does nothing to prevent Congress from preempting state and local laws thereby achieving the same result condemned in the decision.[226]

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221. Printz v. United States, 521 U.S. 898, 924–25 (1997).

222. Hills, *supra* note 15, at 820.

223. *Printz*, 521 U.S. at 930.

224. Young, *supra* note 82, at 128.

225. *Id.*

226. *Printz*, 521 U.S. at 932 ("But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."); *see also* Hills, *supra* note 15, at 822 ("Seen against a

In reality, *Printz*'s anti-commandeering rule—which suggests immunity from federal norms in the interest of preserving political accountability—and Congress's final policymaking authority over a particular policy area are not the same thing.[227] Congress can still act to preempt, modify, or alter state power in other ways and, as a result, state decisionmaking lacks the finality that defines true sovereignty.

Neither notions of political accountability nor determinations of the rights of subunits against the center are integral or unique to any notion of sovereignty and can just as easily be at issue if the state has autonomy in a particular policy sphere.[228] Thus, the lesson of *Printz*, particularly for the Court's interpretation of the VRA, is that even if the Court conceives of state sovereignty as a proxy for political accountability, as it does in *Printz*, this value is adequately protected by the fact that states draw the lines for congressional representatives in the first instance.[229] This power is sufficient to protect the autonomy interest that states have over elections even if it would be insufficient had state sovereignty really been at issue. *Printz* is a clear example of the Court conflating sovereignty with autonomy, a mistake that has bled over into its voting rights jurisprudence.

B. Understanding Sovereignty: Federalism, Decentralization, and the Illegitimacy of the Federalism Norm

As the prior sections show, the Court ignores that the Elections Clause gives the states strong autonomy power over elections and leaves sovereignty with Congress. The organizational structure of the Clause itself is not really federalist, but reflects a decentralized organizational structure that is often confused with federalism.

As Professors Feeley and Rubin have argued, "federalism grants subunits of government a final say in certain areas of

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background of almost unlimited national powers to regulate private persons directly, *New York* and *Printz* present something of a paradox: Why give state governments the right to withhold their regulatory processes while simultaneously giving the state governments nothing to regulate with those processes?").

227. *See, e.g.*, Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 4 (noting that "recognition of [state] immunity from private suit may encourage Congress to subject the states to other, more intrusive means of ensuring compliance with federal law").

228. New York v. United States, 505 U.S. 144, 169 (1992); Young, *supra* note 82, at 127.

229. Tolson, *supra* note 21, at 860 (arguing that the states' redistricting authority under the Elections Clause is a way for the states to wield influence with their congressional delegation and therefore protect their regulatory authority).

governance,"[230] whereas in a decentralized regime "the central government decides how decisionmaking authority will be divided between itself and the geographical subunits."[231] Decentralization is the best way of describing a policy area in which states are autonomous rather than sovereign—where they may be immune from certain norms but are not exempt from all intervention from the federal government. As such, the ability of Congress to preempt state regulatory regimes reflects that the founders were not overly concerned with protecting state sovereignty in this respect because, if this had been a concern, state authority would be final.

The distinction between autonomy and sovereignty is an important one because, as *Printz* shows, the creation of a powerful interest in the state, such as the ability to create the time, place, and manner of elections, means little if the final authority to preempt the entire field ultimately lies with Congress. The anti-commandeering rule is based on the notion that Congress should carry out federal responsibilities itself because state officials cannot be trusted, a view that has its antecedents in the previously discussed theories of dual sovereignty.[232] But because Congress can preempt the field entirely, there is very little about the anti-commandeering rule that is reflective of federalism.[233] For these same reasons, the time, place, and manner provision, also subject to the whims of Congress, is not really federalist either.

The Court's clear statement rule is another instance where the Court's characterization does not accurately capture the nature of our system. In *Gregory v. Ashcroft,* the Court held that Missouri's mandatory retirement age for state judges did not violate the Age Discrimination in Employment Act ("ADEA") because Congress did not clearly express its intention to apply the ADEA to state court judges.[234] The Court focused on the need for a clear statement from Congress because "congressional interference with the Missouri people's decision to establish a qualification for their judges would

230. FEELEY & RUBIN, *supra* note 100, at 20; *see also id.* at 16 ("[T]he subunits must exercise exclusive jurisdiction over some set of issues; that is, there must be some types of decisions that are reserved to the subsidiary governmental units and that the central government may not displace or countermand.").

231. *Id.* at 21.

232. Hills, *supra* note 15, at 842 (arguing that "[t]he legacy of dual federalism that Justice Scalia invokes [in *Printz*] is, indeed, a nationalistic legacy, forged by the Marshall Court and carried forward by Justice Story out of distrust for state institutions rather than love of state autonomy").

233. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1673 (2006).

234. 501 U.S. 452 (1991).

upset the usual constitutional balance of federal and state powers."[235] The presumption is that the ability to determine the qualifications of their government officials is integral to states' "sovereignty." However, by allowing for the possibility that Congress can abrogate state sovereign immunity with a clear statement of its intention to do so, the Court implicitly held that the state is not truly sovereign in this sphere because its decisions are not final.[236]

The *Gregory* Court's a priori references to "sovereignty" were further confused by the Court's discussion of the merits of federalism as a justification for its clear statement rule. Justice O'Connor argued that the clear statement rule furthers the principal benefits of a federalist system, which include checking abuses of government power; ensuring a "decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; increase[ing] the opportunity for citizen involvement in democratic processes; allow[ing] for more innovation and experimentation in government; and mak[ing] government more responsive by putting the States in competition for a more mobile citizenry."[237]

The states do not necessarily have to be "sovereign," however, in order to promote these values. As Professors Feeney and Rubin point out, the distinction between federalism and decentralization is particularly salient whenever the Court attempts to justify federalism as an ideal governing structure based on values that are not unique to federal systems.[238] Thus, *Gregory* and its discussion of the merits of federalism are misleading in part because the state is not truly sovereign with respect to determining the qualifications of its government officials, and the exhaustive list of federalism's values does little to change this fact. Instead, the states are autonomous with respect to the qualifications of their state officials so long as Congress does not issue a clear statement that it is abrogating state sovereign

235. *Id.* at 463 (arguing that states have the authority to "determine the qualifications of their most important government officials" and it is "an authority that lies at the 'heart of representative government' ").

236. *Id.* at 463–64, 468 (noting that the "authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit" and pointing to the Fourteenth Amendment and the Commerce Clause as potential limitations).

237. *Id.* at 458.

238. FEELEY & RUBIN, *supra* note 10, at 22–24; *see also id.* at 18 ("Different modes of governance should be described by different terms, and arguments in favor of each one should be based on its own distinctive features, not merged with other arguments through verbal obfuscation.").

immunity.[239] The states' power in *Gregory* is best explained by decentralization, which means that state law governs unless Congress indicates its intention to displace it.

1. Federalism vs. Decentralization: Defining the Federalism Norm

This distinction between federalism and decentralization has significant implications for the VRA, where the Court has characterized state sovereignty as encompassing a broad authority for states to regulate their electoral machinery.[240] In pursuing this end, the Court, as with *Gregory*'s clear statement rule and *Printz*'s anti-commandeering rule, has employed a general federalism norm to an area that is governed by a provision—the Elections Clause—that is not distinctly federalist.

The federalism norm, according to John Manning, refers to a nontextual, free-floating conception of the state/federal balance of power that the Court uses to police the boundaries of federalism.[241] This norm emerged during the "federalism revolution" of the

239. *See* Edward L. Rubin & Malcom M. Feeley, *Federalism and Interpretation*, PUBLIUS, Spring 2008, at 175 ("Autonomy necessarily implies multiple decision makers and permits each decision maker to set its own goals in the areas where such autonomy prevails.").

240. *See* Roudebush v. Hartke, 405 U.S. 15, 24 (1972) ("Unless Congress acts, Art. I, § 4 empowers the States to regulate the conduct of senatorial elections."); Oregon v. Mitchell, 400 U.S. 112, 123 (1970) ("In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them. A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws."); Smiley v. Holm, 285 U.S. 355, 366 (1932) ("It cannot be doubted that [the] comprehensive words [of the Elections Clause] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.").

241. *See* John Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009) (criticizing the federalism norm); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999) (attempting to find a textual basis for state immunities from federal law due to the Court's inability to derive these immunities from the text). Others have looked to political theory and pragmatic concerns to justify an expansive federalism doctrine. *See, e.g.*, Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1604 (2000) ("By linking the Framers' original understandings of the Constitution's structure to broader aspects of political theory, the 'big ideas' approach [to federalism] offers recourse to sources that may offer determinate answers when more familiar sources, such as text and specific history, run out."); *id.* at 1637 (discussing Justice Black's and Justice O'Connor's pragmatic approaches to federalism); *see also* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 8–22 (1969) (discussing the extratextual basis for federalism).

Rehnquist era, a series of cases in which the Court held that there are constitutional limitations to the exercise of federal authority over the states.[242] *United States. v. Lopez*, for example, was the first time in decades that the Court invalidated a federal statute as exceeding the scope of Congress's powers under the Commerce Clause.[243]

Recent cases have extended the limitations on congressional power beyond the text to both structural and historical arguments about the boundaries of federal authority.[244] Notably, in *Alden v. Maine,* the majority focused on this idea of a "free-floating" federalism, which is a concept of state sovereignty that extends beyond the boundaries of the Tenth Amendment.[245] As a result, Congress cannot subject nonconsenting states to private suit and, in effect, abrogate state sovereign immunity.[246] The Court found that this sovereignty

242. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (Congress exceeded scope of its powers under Section 5 of the Fourteenth Amendment in abrogating state sovereign immunity under the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act as exceeding Congress's commerce powers); City of Boerne v. Flores, 521 U.S. 507 (1997) (Religious Freedom Restoration Act was not a congruent and proportional remedy under Fourteenth Amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (Congress's Commerce Clause authority does not extend to abrogating state sovereign immunity in court); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not commandeer the legislative processes of the states by compelling them to enact and enforce a federal regulatory program); Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding that the ADEA did not prohibit a state from instituting a mandatory retirement age for its state court judges). *But see* Matthew Adler, *State Sovereign Immunity and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 158, 163 (noting that the Constitution has very few state sovereignty constraints, and as a result, "Congress is constitutionally permitted to exercise its commerce clause powers in a way that changes the structure of state government, sets the qualifications for state officers, and so forth; the states are not shielded from these outcomes by constitutional guarantees, but rather by the structure of the national political process, which makes such outcomes unlikely").

243. 514 U.S. 549 (1995) (invalidating a federal gun control statute as beyond Congress's authority under the Commerce Clause); *see also* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act on commerce clause grounds); Hammer v. Dagenhart, 247 U.S. 251 (1918) (Congress exceeded its commerce clause power by enacting legislation excluding the products of child labor from interstate commerce). During this time, the Court routinely struck down progressive legislation on a number of grounds. *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (striking down a state minimum wage law on freedom of contract grounds); Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923) (same for federal minimum wage law).

244. *See* Young, *supra* note 877, at 1736 ("Much of the Federalism debate has centered on textual and historical sources. But it seems fair to say that although those sources of law have been highly relevant to the Court's enterprise, neither text nor history has dictated many of the resulting doctrines.").

245. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. art. X.

246. Alden v. Maine, 527 U.S. 706 (1999).

derives from "the Constitution's structure, and its history, and the authoritative interpretations by this Court," which "reserve[] [to the states] a substantial portion of the Nation's primary sovereignty."[247] It is this residual state sovereignty, a concept that is not derived solely from the text, that the Court has relied upon to find that the powers delegated to Congress under Article I do not include the power to either subject nonconsenting states to suit in state or federal courts or commandeer state officials to enforce federal law.[248]

As John Manning has observed, this tendency to engage in "structural inference" has created a category of unenumerated states' rights that is significantly broader and more potent than Congress's Article I powers and extends beyond the Tenth and Eleventh Amendments. These unenumerated states' rights are usually tied to some federalism value, such as protecting state sovereignty, that the Court deems important enough to warrant looking beyond the text and tapping into a residual sovereignty left to the states.[249] The Court's recent federalism decisions look past the contested statutes' semantic meanings and rely on multiple constitutional provisions in order to reinstate the federalism balance that, in the Court's view, the framers intended.[250] The failure to point to a textual source for its conclusions, according to Manning, makes the Court's new purposivism in its federalism cases illegitimate.[251] Indeed, the fact

247. *Id.* at 713–14.

248. *See* cases cited *supra* notes 177 and 225. Some commentators thought that the Supreme Court curtailed judicially enforced federalism with its decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), holding that Congress did not exceed its powers under the Commerce Clause in passing the Controlled Substances Act, which forbid the use of homegrown marijuana even if such use was allowed by state law. *See e.g.*, Ilya Somin, Gonzales v. Raich: *Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 508 (2006) (arguing that the decision is wrong on textual and structural grounds). However, decisions following *Raich* illustrate that the Court is still very much willing to enforce these limits, especially in the context of the VRA.

249. *See* Manning, *supra* note 240, at 2036 (noting that the *Alden* Court, in finding states immune from suit, "invoked the overall tenor of the many constitutional clauses that presume the 'continued existence' and 'vital role' of the states").

250. *See id.* at 2006 ("This technique, a form of structural inference, identifies numerous discrete provisions that, in particular ways, divide sovereign power between state and federal governments and, in so doing, preserve a measure of state autonomy. Taking all of those provisions together, the Court ascribes to the document as a whole a general purpose to preserve a significant element of state sovereignty."); *see also* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (espousing the general rule that "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law") (internal citation omitted).

251. *See* Manning, *supra* note 240, at 2049; *id.* at 2051 ("Whatever indeterminacy marks provisions such as the General Welfare Clause, the Commerce Clause, or the Necessary and Proper Clause, the balance of Section 8 leaves little doubt that the drafters and adopters of Article I established a system of enumerated powers and made rather specific judgments about what constituted appropriate matters of federal concern.") (internal citation omitted). *But see*

that federalism is a political construct with unclear lines makes the notion of a free-floating, judicially enforced federalism norm dangerous for the area of voting rights.[252] The Court, for example, can easily rely on the changed racial environment as evidence that the statute's current implementation is no longer consistent with its original purpose and therefore unjustifiably undermines the original state/federal balance of the Constitution, even if this balance is nonexistent.[253]

A decentralization analysis, however, would defer to Congress's determination of both the scope of the VRA and the proposed remedy.[254] The denial of sovereignty to the states justifies deference toward legislative judgments in the form of rational basis review.[255] Instead, the Court has gone in the opposite direction, employing a type

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Gillian Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 101 (2009), *available at* http://www.harvardlawreview.org/media/pdf/Forum_Vol_122_metzger.pdf (arguing that because the Constitution has broad and ambiguous language, the founders likely intended that there be a general federalism norm).

252. *Cf.* EDWARD A. PURCELL JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE 34 (2007) (position of some founders before ratification with regards to whether the Constitution supported a strong central government changed post-ratification); Charlton C. Copeland, *Ex Parte* Young: *Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843, 872 (2009) (rejecting the notion that allocating regulatory authority between the state and the federal government is the sole way of ensuring fidelity to our federal structure in part because of the impossibility of determining the right balance that accurately reflects the duality of American federalism).

253. *Cf.* Manning, *supra* note 240, at 2024–25 ("[T]he Court has evidently concluded that, if modern Commerce Clause doctrine threatens its minimum conception of state sovereignty, it will handle the problem by recognizing implied limitations in federal power that are traceable to some form of historically reconstructed original understanding of the appropriate federal-state balance."). *But see id.* at 2046 (noting that the Court's actions are problematic because the Constitution operates at different levels of generality and "[e]nforcing the spirit rather than the letter of a document devalues the fundamental decision to design the bargaining process a particular way. . . . [T]he stakeholding states (through their delegates) exercised their allocated voting power to adopt a document that, in many respects, divided power between the state and federal sovereigns rather precisely.").

254. *See* FEELEY & RUBIN, supra note 10, at 80–81 ("[D]ecentralization, a centrally established strategy that favors transfers of authority from centralized to subsidiary units for specific purposes, fits perfectly with fiscal federalism's goal of allocating authority among levels of government in the most efficient manner.").

255. William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 107 (2001) (noting that in the time prior to *Boerne*, "[t]he rationality standard [] provided the framework for reviewing the basis of congressional action"); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1755 (2002) (arguing that the Court's requirement of due legislative deliberation is untenable); *see also* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 144 (2001); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 796 (1996) (arguing that areas of exclusive state power are a necessary condition of a system of constitutional federalism and attempting to identify those).

of freestanding federalism that protects state sovereignty to a greater degree than previously.

2. The Federalism Norm and Section 5 of the Voting Rights Act

The free-floating federalism norm poses the most problems for section 5 of the VRA, which requires states to preclear any change to their election laws before the change can go into effect. Critics of section 5 initially relied on a somewhat boundless notion of federalism in challenging the provision. In *South Carolina v. Katzenbach*, which upheld the constitutionality of section 5,[256] Justice Black argued in dissent that

> by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so [section 5] distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.[257]

Justice Black viewed the provision as not only violating the constitutional structure, but also as inconsistent with the original meaning of the Constitution.[258]

Similarly, Justice Powell, in *City of Rome*, argued in dissent that section 5's "encroachment [on state sovereignty] is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity," and "it strips locally elected officials of their autonomy to chart policy."[259] Thus, the

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256. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."); *id.* at 313–15 (observing that case-by-case litigation against voting discrimination under the Civil Rights Acts of 1957, 1960, and 1964, has not appreciably increased Negro registration and that voting suits have been onerous to prepare, protracted, and where successful have often been followed by a shift in discriminatory devices, defiance or evasion of court orders"); *see also* City of Rome v. United States, 446 U.S. 156, 176 (1980) ("[L]egislation enacted under authority of § 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with the letter and spirit of the [C]onstitution,' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.") (internal citations omitted).

257. *Katzenbach*, 383 U.S. at 358 (Black, J., concurring and dissenting).

258. *Id.* at 360–361; *see also* Georgia v. United States, 411 U.S. 526, 545 (1973) (Powell, J., dissenting) (forcing a state to submit its legislation for advanced review is incompatible with our constitutional structure, a state of affairs made worse because it applies to only a few states).

259. *City of Rome*, 446 U.S. at 201–02 (Powell, J., dissenting); *see also Georgia*, 411 U.S. at 543 (White, J., dissenting) ("Although the constitutionality of § 5 has long since been upheld, it remains a serious matter that a sovereign State must submit its legislation to federal authorities before it may take effect. It is even more serious to insist that it initiate litigation and carry the burden of proof as to constitutionality simply because the State has employed a particular test or

focus on values without any tie to the text, as in *Gregory*,[260] also purports to act as some constraint on congressional power in this context.[261] More recently, Justice Thomas criticized section 5 on federalism grounds, noting that "the section's interference with state sovereignty is quite drastic—covered States and political subdivisions may not give effect to their policy choices affecting voting without first obtaining the Federal Government's approval."[262]

The *NAMUDNO* Court has taken up the mantle, relying on structure and history in protecting state sovereignty from the broad provisions of section 5. *NAMUDNO*, although ostensibly upholding section 5 through questionable statutory interpretation, contains strong language that warns Congress about the costs that the provision imposes on the states, suggesting that the Court might later invalidate it.[263] However, the Court's analysis is flawed for several reasons. First, the structure of section 5 and its allocation of power between the states and the federal government reflect the decentralized nature of our system of elections. Section 5, according to the Court, "goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C."[264] As Professors Feeney and Rubin have noted, however, "in decentralization, in contrast to federalism, the central government identifies the [most efficient] result and thus defines the criteria for success or failure."[265] The Court has upheld the constitutionality of section 5 in the past for the reason articulated by these scholars: that it was the most efficient and effective way for Congress to address a

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device and a sufficiently low percentage of its citizens have voted in its elections.") (internal citation omitted).

260. 501 U.S. 452, 458–61 (1991) (discussing the numerous benefits of a federalist system and concluding that "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute" (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989))).

261. *See* PURCELL, *supra* note 251, at 23–24 (describing that judges and commentators often invoked "the so-called values of federalism . . . to limit national power"); *see also* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1543–45 (1998) (arguing that the Court uses clear statement rules in order to enforce values such as state autonomy at the expense of individual rights).

262. Lopez v. Monterey Cnty., 525 U.S. 266, 294 (1999) (Thomas, J., dissenting).

263. *See* Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504, 2512 (2009) (noting that the coverage formula is based on evidence that is over thirty-five years old and does not address the reality that "the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide").

264. *Id.* at 2511–12 (noting that "preclearance requirements in one State would be unconstitutional in another").

265. FEELEY & RUBIN, *supra* note 10, at 21.

problem that had defied resolution in the past through piecemeal legislation.[266]

Second, although the states are similarly situated sovereigns, as the *NAMUDNO* Court argues, they are not sovereign over Congress with respect to elections. And with decentralized regimes, "the central government decides how decisionmaking authority will be divided between itself and the geographical subunits."[267] The Court's decisions have, at times, reflected that the states are less powerful than Congress in this area. Recall that in *U.S. Term Limits, Inc. v. Thornton*,[268] the Court found the states' power to choose the time, place, and manner of elections is not broader than Congress's power to make or alter such provisions.[269] In fact, the *Thornton* Court limited the states' electoral authority to regulate procedure, a determination that stands in opposition to the Roberts Court's arguments that federal intervention into state electoral schemes undermines substantive policy preferences.[270]

The Roberts Court makes an error by viewing Congress's power to pass section 5 as limited to Congress's remedial authority under the Fifteenth Amendment and ignoring that the Elections Clause gives Congress broad authority over state electoral schemes more generally. As the sovereign authority, Congress has significant room to craft a regulatory regime that achieves the goals and values that are the aims of the policy. But the Court has erroneously focused on the ways in which section 5 prevents states from maintaining their local preferences, which is ironic given that the Court's case law has made it exceedingly unlikely that section 5 will prevent a jurisdiction's voting laws from going into effect.[271]

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266. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966) ("The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name. . . . Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future. In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary.").

267. FEELEY & RUBIN, *supra* note 10, at 21.

268. *See* discussion *supra* Part II.A.2.

269. 514 U.S. 779, 832 (1995) (arguing that if Congress cannot add qualifications to its members, then states also cannot under the guise of exercising their power to regulate the time, place, and manner of elections).

270. *Id.* at 834–35 ("Our cases interpreting state power under the Elections Clause reflect the same understanding. The Elections Clause gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932))).

271. As Nathaniel Persily and Jennifer Rosenberg recently pointed out, "[c]overage, by itself, which is the source of the complaint in *NAMUDNO*, only raises federalism concerns if

In *Reno v. Bossier Parish School Board*, for example, the Court held that the Attorney General could not deny preclearance under section 5 for a plan that was nonretrogressive, even if the proposed changes were discriminatory and violated section 2 of the Act.[272] Moreover, the Court limited the section 5 inquiry to the search for retrogressive, as opposed to discriminatory, intent.[273] As Michael Pitts has argued, the *Bossier Parish* cases represent the Court's attempt to limit the substantive reach of section 5 by curbing the federal government's ability to deny preclearance to state voting practices.[274] The *Bossier Parish* cases reflect the Court's misunderstanding about the scope and nature of congressional authority to effectuate the goals of the VRA.

Thus, the Court's unfavorable treatment of section 5 of the VRA is unsurprising given this emerging view in its jurisprudence of state sovereignty as lying not only within the contours of the text but also in the Constitution's structure and history.[275] Given the explicit

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jurisdictions have a legitimate fear that their voting laws will not be allowed to go into effect." Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1678 (2009).

272. Reno v. Bossier Parish Sch. Bd. (*Bossier Parish I*), 520 U.S. 471, 486–87 (1997).

273. Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320, 335–36 (2000) (reinstating the rule that the presence of any discriminatory purpose is grounds for denying preclearance).

274. Michael J. Pitts, *What Will the Life* of Riley v. Kennedy *Mean for Section 5 of the Voting Rights Act?*, 68 MD. L. REV. 481, 520–21 (2009) ("In the 1990s, the Attorney General had prevented the implementation of many voting changes solely because the changes had been adopted with a discriminatory purpose; in the early 2000s [after *Bossier Parish I & II*], the Attorney General prevented the implementation of only a few changes solely because the changes were adopted with a discriminatory purpose.") (internal citation omitted); *see also* Abrams v. Johnson, 521 U.S. 74, 96 (1997) (holding that the benchmark for comparing whether a new plan is retrogressive is the previous plan that had been in effect, a holding that resulted in older plans with less minority representation serving as the benchmark for retrogression); Halberstam, *supra* note 34, at 954–55 ("Section 5 does not go beyond what is substantively already required of states and localities. To the contrary, in making preclearance decisions, the DOJ was forced to tolerate unconstitutional and, under *Bossier Parish II*, even intentional discrimination, so long as it did not make minorities worse off. Section 5, as the Supreme Court has stated on several occasions, is therefore less burdensome than the Constitution itself.") (internal citations omitted).

275. *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (developing a clear statement rule requiring Congress to announce its intent to preempt state law without relying on a specific textual provision in the Constitution); *see also* Manning, *supra* note 240, at 2031 ("[T]he Court abstracted from the specific enumeration of powers in Article I a general purpose of 'federalism' that is both broader and more potent than the enumeration from which it is derived. However sensible *Gregory*'s particular limitation on federal interference with state judicial tenure may seem when imagining the contours of a dual sovereignty, the fact remains that the Court rested its authority on the abstraction of a freestanding federalism found nowhere in the text.") (internal citations omitted).

textual commitment that states determine the time, place, and manner of elections, at least in the first instance, the concerns of Justices Powell and Black, although they did not carry the day forty years ago, have manifested themselves in recent years as the federalism concerns allegedly raised by the Act have become more salient.[276]

CONCLUSION

The Supreme Court conflates state autonomy with state sovereignty in the context of the VRA, in effect promoting the dualist undertones that characterize much of its federalism case law and giving the states significantly more power over elections than they otherwise would have. Its voting rights jurisprudence presupposes that the states still retain a large amount of "sovereignty" over elections, leaving room for the Court to characterize the federal/state relationship over elections as one of shared power instead of viewing the state as subordinate to federal authority. The view of electoral authority as "shared" has led the Court to defer more to the states over the matter of elections.[277] This deference is due in part to the misconception that placing meaningful limits on congressional authority extends to all federalism issues, including those issues such as elections, which are not truly "federalist" in nature but instead reflect a decentralized system of authority.

This focus on sovereignty—with special emphasis on the state side of the equation—has raised concerns that judges have become ill-suited to implement far-reaching civil rights legislation, mostly

276. For further discussion, see Persily, *supra* note 30, at 117 ("That measure [Section 5] stands alone in American history in its alteration of authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws. No other statute applies only to a subset of the country and requires covered states and localities to get permission from the federal government before implementing a certain type of law.") and Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of A Conservative Court*, 5 DUKE J. CONST. LAW & PUB. POL'Y 125, 134 (2010) ("In asking select states and local jurisdictions to preclear any and all changes to their voting laws, section 5 essentially places these jurisdictions in a status akin to a receivership. To critics, this bears an unmistakable resemblance to Reconstruction."); *see also* City of Rome v. United States, 446 U.S. 156, 210–11 (1980) (Rehnquist, J., dissenting) (arguing that "Rome [by maintaining an at-large election system] has not engaged in *constitutionally* prohibited conduct" and "prohibition of these changes can[not] genuinely be characterized as a remedial exercise of congressional enforcement powers" and effectively gives Congress "the power to determine for itself that this conduct violates the Constitution").

277. For a recent example, see Perry v. Perez, 132 S. Ct. 934 (2012) (per curiam) (finding that a district court, in drawing interim redistricting plans, should defer to the State's recently enacted plans even if those plans have not been precleared as required under section 5 of the VRA and are being challenged under section 2 of the provision).

because their concerns about reigning in federal authority and ceding power to the states have trumped issues of individual rights. Indeed, the presence of a free-floating federalism norm can raise the evidentiary threshold so high that Congress could never amass enough evidence of voting discrimination to justify the renewal of section 5 or develop a coverage formula that would allay the federalism concerns raised by the *NAMUDNO* Court.

In reality, Congress's power under the Elections Clause and its power to enforce the dictates of the Fourteenth and Fifteenth Amendments ensure the constitutionality of the VRA. Consequently, the Court should employ rational basis review of the legislative record of the VRA for any new constitutional challenges going forward.

"In Whom is the Right of Suffrage?":[1] *The Reconstruction Acts as Sources of Constitutional Meaning*

Franita Tolson†

Introduction

The Civil War ended in the spring of 1865 and attention promptly turned to escalating the process of reconstructing the South. Reconstruction, which involved dismantling the planter-dominated slaveocracies and turning these political communities into multi-racial, egalitarian societies centered around civil and political rights, fundamentally changed the nature of our system of federalism, as well as the universe of rights to which individuals were now entitled.

Much of the recent legal scholarship on voting rights focuses on the main pillars of Reconstruction, namely the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as statutes passed pursuant to these provisions, in assessing the crisis of democracy that the country now faces.[2] Unsurprisingly, the U.S. Supreme Court has dictated the terms of this debate, gutting the Warren Court jurisprudence that read these Amendments expansively at the height of the Civil Rights Movement.[3] In *Shelby County v. Holder*, for example, the Court held that Congress' enforcement powers under the Fourteenth and Fifteenth Amendments do not extend to reauthorizing certain provisions of the Voting Rights Act absent substantial evidence of intentional racial discrimination in voting. By imposing conditions on certain jurisdictions with a history of voting rights violations,

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[1] Dr. Benjamin Franklin, Remarks, *in* 3 THE CASKET, OR FLOWERS OF LITERATURE, WIT AND SENTIMENT 181, 181 (1828).

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[2] *See, e.g.*, Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 218 (2019) (analyzing voter suppression claims using an Equal Protection framework); Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1569 (2019) (discussing Section 2 of the Voting Rights Act); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1549 (2020) (starting "a conversation about reorienting voting rights doctrine toward the Fifteenth Amendment"); Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 239 (2018) (arguing that the Court must intervene in partisan redistricting). There is also scholarship exploring these issues beyond the Reconstruction Amendments. *See generally* Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 J. CONST. L. 1105 (2019) (proposing a framework for voting rights claims under the Twenty-Sixth Amendment); Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 185 (2020) (arguing that the Constitution's Guarantee Clause should be used to protect voting rights).

[3] Compare Shelby Cnty. v. Holder, 570 U.S. 529, 535 (2013) (reasoning that an increase in Black voter turnout in the south renders the Voting Rights Act's preclearance requirement unnecessary), Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 195 (2008) (finding state voting restrictions justified based on general evidence of voter fraud nationally), and Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 310 (2014) (upholding Michigan's ban on affirmative action out of deference to the state's voters), with South Carolina v. Katzenbach, 383 U.S. 301, 308, 310 (1966) (placing the Voting Rights Act in the historical context of voter suppression, and finding that this history justified aggressive action), Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (using the Equal Protection Clause to invalidate Virginia's poll tax), and Hunter v. Erickson, 393 U.S. 385, 387, 391-93 (1969) (invalidating a city charter amendment prohibiting ordinances regulating housing on the basis of race as discriminatory under the Equal Protection Clause). *See also* Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 9-10 (2020) (discussing the Court's role in undermining our democracy through its voting rights decisions); Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131, 132 (2020) ("[T]he decisions of the Roberts Court are contributing substantially to the fact that ordinary Americans have so little political power.").

but not states with similar records, the Act violated the Constitution's principle that all states have equal standing as sovereigns.

Shelby County stands as one example of the ways in which the scope and meaning of the Reconstruction Amendments of the Roberts Court bear little resemblance to their 1960s counterparts.[4] The attempt by some states to circumscribe the right to vote and suppress turnout in the wake of *Shelby County* is yet another marker of why the past—and the true meaning of the Amendments—remains important for clarifying the protections to which the right to vote is entitled.

This Essay seeks to correct this oversight by looking to the Reconstruction Acts, which readmitted the former confederate states into the union,[5] as a source of constitutional meaning. These statutes inform not only the right to vote under the Reconstruction Amendments, and in particular, Section 2 of the Fourteenth Amendment,[6] but also the requirement of republican government embraced by the Guarantee Clause of Article IV, Section 4.[7] Section 2 and the Guarantee Clause remain unenforced and under-enforced constitutional texts, respectively, but as this Essay will show, their principles are relevant to the Court's jurisprudence in areas such as redistricting and felon disenfranchisement. Despite the fact that Congress enacted these statutes contemporaneously to the ratification of the Fourteenth and Fifteenth Amendments[8] and, importantly, at a time when Congress aggressively enforced the Guarantee Clause, these provisions are overlooked because scholars have long viewed their terms as legally unenforceable.[9]

As this Essay will show, this view is mistaken. The Reconstruction Acts memorialize those aspects of Reconstruction that make it a second founding,[10] by requiring that each of the states have "framed constitutions of State government which are republican"[11] and informing the scope and reach of the Guarantee Clause. In 1787, it was unclear whether the majoritarianism that James Madison and other founding fathers advocated as central to republicanism and embraced by the Guarantee Clause had to reflect either the will of a majority of the people of the state or a majority

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[4] See Shelby Cnty., 570 U.S. at 590 (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").

[5] *See* An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73 (1868); An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67 (1870).

[6] U.S. CONST. amend XIV, § 2.

[7] U.S. CONST. art. IV, § 4.

[8] The Fourteenth Amendment was ratified in 1868 and the Fifteenth Amendment in 1870. *The Constitution: Amendments 11-27*, Nat'l Archives, https://www.archives.gov/founding-docs/amendments-11-27 [https://perma.cc/ZHB9-PLXH] (Jan. 12, 2021).

[9] Richard M. Re & Christopher M. Re, Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments, 121 YALE L.J. 1584, 1628 n.240; *see also* Michael J. Klarman, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 29 (2004) ("[P]romises that Congress had extracted from southern states seeking readmission not to restrict suffrage were of dubious constitutionality, as they deprived states of equal rights.").

[10] *See generally* Eric Foner, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

[11] *See, e.g.*, pmbl., 15 Stat. at 73.

of its voters.[12] During the Antebellum period, Congress assessed whether territories seeking admission as new states were republican in form, yet slavery politics dictated the rigor with which Congress policed these political systems.[13] By 1868, Congress' position on this issue was clear—majoritarianism had to reflect the will of a majority of the *voters* within the state, and Congress took an active role in defining the parameters of this community. The readmission of the former Confederate states was the first time that Congress clearly articulated the requirements of republicanism, free from the albatross of slavery and in light of the suffrage requirements of the new Amendments. In the post-Civil War era, majoritarianism now required that civil and political rights be extended to all eligible individuals on a nondiscriminatory basis.

Notably, these statutes imposed limitations on southern states with respect to the voting rights of their citizens as a condition of reentering the union, shedding light on the reach of Section 2 of the Fourteenth Amendment and, importantly, the universe of crimes for which one can be disenfranchised consistent with its terms. Section 2 allows Congress to reduce a state's delegation in the House of Representatives by removing disfranchised voters from the basis of population used for apportionment, but permits states to disenfranchise "for participation in rebellion or other crime."[14] Clarifying Section 2, the Acts readmitting Arkansas, North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida, Virginia, and Mississippi all contain similar language specifying the circumstances in which these states can disenfranchise their residents.[15] These statutes also counter the Supreme Court's contention in *Shelby County v. Holder* that the Constitution applies equally to all states.[16] The former Confederacy re-entered the union subject to conditions that were not imposed on the northern states, a disability that was memorialized by Section 2's penalty targeting states with large African-American populations (which, not coincidentally, were all located in the South).

Even if unenforceable on their own terms, the Reconstruction Acts have significant implications for how we conceive of the right to vote under the U.S. Constitution today, in the midst of some of the most contentious voting wars in decades.[17] Importantly, when states in the former Confederacy impermissibly disenfranchise their residents contrary to these statutes, this disenfranchisement

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[12] *See* FRANITA TOLSON, IN CONGRESS WE TRUST? ENFORCING VOTING RIGHTS FROM THE FOUNDING TO THE JIM CROW ERA (forthcoming 2021) (manuscript at 2-3) (on file with author) (arguing that the controversy over the election of 1800 and the subsequent adoption of the Twelfth Amendment helped clarify the centrality of voters to republican theory).

[13] *Id.* (manuscript at 30) ("The debate over the Kansas-Nebraska Act in the early 1850s and the resulting violence in the territory reveal how much of Congress' power as well as the meaning of the republican guarantee was increasingly shaped by the national political controversy over slavery").

[14] U.S. Const. amend. XIV, § 2.

[15] *See* An Act To Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868) (conditioning state readmission on the requirement that the constitutions of these States never be amended to deprive a citizen the right to vote "except as a punishment for such crimes as are now felonies at common law"); An Act To Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72, 72 (1868) (including a similar provision while readmitting Arkansas); An Act To Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870) (including a similar provision while readmitting Virginia); An Act To Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870) (including a similar provision while readmitting Mississippi).

[16] Franita Tolson, *The Equal Sovereignty Principle as Federalism Sub-Doctrine: A Reassessment of* Shelby County v. Holder, *in* CONTROVERSIES IN AMERICAN FEDERALISM AND PUBLIC POLICY 171, 172-74 (Christopher P. Banks ed., 2018).

[17] *See generally* RICHARD L. HASEN, ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY (2020) (detailing the numerous legal and political battles fought over voting rights during the 2020 election).

violates the Guarantee Clause and Section 2 of the Fourteenth Amendment. The Court has ignored Section 2, the Guarantee Clause, and related federal statutes like the Reconstruction Acts in assessing the scope of congressional power to address these violations, a question that was front and center in the *Shelby County* case.[18] Turning to the recent debate in Florida over the re-enfranchisement of individuals with felony convictions, this Essay concludes that, when states disenfranchise their citizens in violation of Section 2 and the Guarantee Clause, the scope of which is informed by the Reconstruction Acts, these violations constitute an abridgment of the right to vote, rendering their governments unrepublican in form. Because Congress' enforcement authority empowers it to prevent such abridgments, that body has substantial authority, pursuant to Section 5 of the Fourteenth Amendment, to remedy this disenfranchisement through either reduced representation or other appropriate penalties.[19]

I. A Promise Unfulfilled?: Section 2, the Guarantee Clause, and the Ghost of Madison's Constitution

The ratification of the U.S. Constitution in 1789 was not the only period in which states entered the Union, with each successive admission triggering a debate about the requirements of republicanism, but this fact is not readily apparent from the *Shelby County v. Holder* decision. In *Shelby County*, the Supreme Court invalidated Section 4(b) of the Voting Rights Act of 1965, arguably one of the most successful pieces of civil rights legislation of the twentieth century and one of the crown jewels of the Civil Rights Movement of the 1960s.[20] In striking down Section 4(b), which determined those jurisdictions required to preclear any changes to their voting laws with the federal government before those changes could go into effect, the Court opined that the racial discrimination that permeated the 1960s and earlier decades was a relic of the past.[21] Instead, the strides made with respect to racial equality, as illustrated by the parity that African Americans enjoyed with whites in voter registration and turnout, meant that previously covered jurisdictions had returned to their pre-1965 status as sovereigns with equal rights and authority as their non-covered counterparts over voting and elections.

The Court's assessment of state authority over elections is based on its view that the Constitution of 1789 is the baseline from which state sovereignty should be measured. According to the Court, "[n]ot only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States" that is "essential to the harmonious operation of the scheme upon which the Republic was organized."[22] In criticizing the Voting Rights Act for applying to "only nine States (and several additional counties)" "despite the tradition of equal sovereignty," the majority ignored that Reconstruction—a period in which there was substantial constitutional and statutory change to the very structure of our government—altered "the scheme upon which the Republic was organized."[23]

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[18] *See* Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 436 (2015) (noting that "the U.S. Supreme Court has mostly overlooked Section 2," despite it being the only provision in the Fourteenth Amendment that mentions voting).

[19] *See generally* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379 (2014) (arguing that Section 2, like Section 1 of the Fourteenth Amendment, informs the scope of congressional enforcement authority under Section 5 of that provision).

[20] Shelby Cnty., 570 U.S. at 557.

[21] *Id.* at 547-49.

[22] Id. 544 (internal citations omitted).

[23] Id.

Given the *Shelby County* Court's myopic focus on 1789, the fact that the Reconstruction Acts have not featured more prominently in constitutional interpretation is not surprising. Reconstruction fundamentally transformed our system of federalism, resulting in a more active federal presence in which Congress was willing to aggregate its powers to protect voting rights. The goal of remaking southern governments and expanding their electorates was a multi-year, multi-step process, involving numerous pieces of legislation that all shed light on how the Reconstruction Amendments altered Madison's Constitution. While this Essay focuses on the Reconstruction Acts, Congress passed a number of statutes to implement the Reconstruction project and expand/protect civil and political rights including the Civil Rights Act of 1866;[24] the Military Reconstruction Act of 1867;[25] the Enforcement Acts of 1870 and 1871;[26] and the Civil Rights Act of 1875,[27] to name a few. This list is by no means exhaustive but makes the point: this contemporaneous legislation, much of which is either ignored or used in a piecemeal fashion by the courts, informs constitutional meaning. These provisions should have just as much import as the congressional debates, newspapers, ratification debates, statements by political elites, and so on in shedding light on the scope of constitutional provisions that bear on voting and elections.

This pluralism is important because history teaches us that Congress' understanding of its powers in this area was complex and varied. The Guarantee Clause legitimized much of the Reconstruction program, especially as Congress brought the southern states under federal control to facilitate the creation of new, postwar governments. The Military Reconstruction Act of 1867 put the former confederacy into federal receivership,[28] necessitating the creation of new governments and new state constitutions that would, in the process, update the standard for republican government. For their part, the Reconstruction Acts set a baseline level of enfranchisement necessary to meet the threshold of republicanism.

Likewise, Section 2 of the Fourteenth Amendment penalized states for disenfranchising individuals who were now entitled to be within the political community of voters, pursuant to the requirements of the Guarantee Clause, by reducing the states' representation in Congress. Through Section 2, congressional Republicans formally recognized the political existence of African-American men, a group that had been denied such recognition, first, with the *Dred Scott*[29] decision and, then post-Thirteenth Amendment, with the adoption of the "Black Codes" in southern states that relegated this group to quasi-slave status.[30] Section 2 also informed the scope of Congress's enforcement authority under Section 5, with its penalty providing a basis for when congressional legislation is "appropriate."[31]

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[24] Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
[25] Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428.
[26] Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement Act of Feb. 1871, Ch. 99, 16 Stat. 433; Enforcement Act of Apr. 1871, ch. 22, 17 Stat. 13.
[27] Civil Rights Act of 1875, ch. 114, 18 Stat. 335.
[28] § 1, 14 Stat. at 428.
[29] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (holding that Black people were not citizens).
[30] *See* Part III, *infra.*
[31] Tolson, *supra* note 19, at 385.

While Section 2 did not create an affirmative right to vote that would have further limited state authority over voter qualification standards,[32] this provision recalibrated the relationship between the states and the federal government over the scope of (and protections entitled to) the right to vote. Specifically, the language of Section 2, with its relatively low threshold to trigger congressional action (abridgment of the right to vote on almost any grounds) and its high penalty (reduced representation) balanced these twin concerns of state sovereignty and voter access. States can still choose the qualifications of electors and set the ground rules for state and federal elections, but Congress, pursuant to its authority under Section 5 of the Fourteenth Amendment,[33] can intervene to protect the right to vote from "abridgment,"[34] consistent with Section 2, and keep state governments republican in form, consistent with the Guarantee Clause. This authority is important, as it gives Congress the ability to legislate beyond the scope of the Fifteenth Amendment, which focuses on racially discriminatory denials of the ballot, and prohibits abridgment of the right to vote, on any grounds, under facially neutral state legislation.[35]

Section 2 and the Guarantee Clause, when viewed collectively, vastly expanded congressional oversight of state and federal elections, making it impossible to return to the world envisioned by the Founders, when the federal role was more modest. These provisions gave Congress a role in defining the political community entitled to exercise a newly redefined right to vote, a right that was now federally protected and disconnected from its original status as a privilege reserved to the propertied elite. Voting now would serve as the vehicle through which "We the People" could join the community of "We the Voters" and express their sovereign authority.[36]

The Reconstruction Acts, by prohibiting states from amending their constitutions to disenfranchise otherwise eligible voters and to disenfranchise for crimes not felonies at common law, reflected this shift of authority from the states to Congress over voting and elections. For example, the Reconstruction Act readmitting North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida provided, in relevant part:

> [T]he constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State . . . .[37]

In passing this statute, Congress sought to cement the political rights that African Americans obtained in the wake of the Civil War. It complimented Section 2's penalty by setting the perimeters

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[32] As I have argued elsewhere, we need this amendment. *See generally* Franita Tolson, Legal Analysis of the Durbin-Warren Right to Vote Amendment (unpublished manuscript) (July 2020), https://advancementproject.org/wp-content/uploads/2020/08/Professor-Franita-Tolsons-Legal-Analysis-of-the-Right-to-Vote-Amendment.pdf [https://perma.cc/LPZ7-NZSU] (analyzing the proposed amendment and explaining why it would be a powerful tool to protect voting rights).

[33] U.S. CONST. amend XIV, § 5.

[34] U.S. CONST. amend XIV, § 2.

[35] Tolson, *supra* note 18, at 435-36.

[36] TOLSON, *supra* note 12 (manuscript at 3).

[37] An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868).

of "lawful" disenfranchisement and emphasizing the republican principle of majority will. The new state constitutions and state governments in the south served as a baseline for republican government, consistent with the Guarantee Clause, from that point forward, maintenance of which would preserve the Republican Party coalition in the south.[38]

Towards this end, Congress aggressively policed the state procedures for ratifying these new constitutions, seeking to ensure that former confederates did not use violence and intimidation to defeat the will of a majority of the qualified electors. For example, the gaps between voter registration and voter turnout became a significant issue in Alabama, in which turnout for the election to ratify the new constitution was almost 100,000 less than the number of registered voters.[39] A similar issue arose in Florida, where 76,500 voters (or a majority of the registered voters) had to vote in favor of the new constitution for it to be adopted, but the total vote was 71,817 votes in favor.[40] Various senators asserted that the gap between turnout and registration was attributable to factors such as threats of violence against or blacklisting of African-Americans should they show up to vote.[41] Congress approved these constitutions, which could have been thwarted by voter intimidation, to elevate majoritarian principles—or the rights of those entitled to be within the community of voters—over the brute force that had superficially produced an outcome in which the proposed constitution garnered less than majority support.

Given the difficulties of guaranteeing that these new state constitutions would be ratified in elections free of fraud, violence, and intimidation, it was no surprise that the Reconstruction Acts sought to memorialize these governments as the sine que non of republican government, and even more, to clarify the scope of the recent amendments expanding federal power over elections. Yet, the Supreme Court has, by and large, ignored this key legislation and constitutional text in interpreting the scope of congressional power over elections under the Reconstruction Amendments.

II. Ignoring the Second Founding: Section 2 and the Guarantee Clause in Recent Supreme Court Caselaw

Ignoring the Reconstruction Acts and many of the other provisions that bear on voting and elections reflects a broader jurisprudential trend among both the Supreme Court and lower courts of treating core voting rights issues as distinct from questions of institutional design and the aggregation of political power.[42] This strategy allows the Court to pick and choose the legislation and

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[38] TOLSON, *supra* note 12 (manuscript at 21-30).

[39] *See* CONG. GLOBE, 40th Cong., 2d Sess. 2930-31 (1868) (comments of Sen. Lyman Trumbull) (arguing that Alabama's constitution was not valid because it had not been ratified by a majority of the registered voters in the state). These objections were ultimately unsuccessful because turnout for the election to ratify the constitution was affected by a number of unrelated events (storms, the fact that some AL counties didn't vote, etc), but the extended discussion signaled Congress' concerns over whether the new states comported with the majoritarianism required by the Guarantee Clause, if for no reason other than there needed to be a loyal government in Alabama to ratify the Fourteenth Amendment. *See id.* at 2934 (comments of Sen. William Stewart) ("[T]he object of submitting this question to a vote at all was to ascertain if there were loyal men enough in the State willing to accept the congressional plan, to sustain a loyal State government.").

[40] [to be added]

[41] *See Id.* at 2861 (1868) (comments of Sen. John Sherman) (detailing the freedmen were often turned away when they showed up to vote and arguing that Congress should not "exclude this State on a barren technicality when we know that the exclusion will prevent the local government of the State from falling into loyal instead of rebel hands").

[42] See Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 603-04 (2007) (describing Supreme Court caselaw that has not acknowledged the institutional and structuralist failings inherent in political gerrymandering).

constitutional text that it deems relevant to any given voting dispute. For example, the Court has treated structural disputes over the drawing of district lines to involve the right to vote of the citizens living within a challenged district, despite the incoherence of using an individual rights framework to resolve disputes that implicate the political power of groups rather than individuals.[43] Such a singular approach to these issues also fails to capture how Congress legislates in this area. When it comes to elections, Congress regulates at the intersection of both structure and rights, invoking multiple sources of constitutional power over elections rather than just one or two specific clauses.[44] The range of legislation adopted pursuant to these provisions is therefore immediately relevant to questions that arise about the scope of the constitutional right to vote.

But the Court's narrow approach means that when provisions such as Section 2 of the Fourteenth Amendment and the Guarantee Clause have made appearances in a number of U.S. Supreme Court opinions, it is for reasons other than clarifying the scope of congressional authority over voting and elections. This oversight arguably stems from the Court's desire to keep the constitutional structure, which expressly delegates to Congress authority over various areas of the political system, as a separate and distinct entity from the right to vote under the Fourteenth and Fifteenth Amendments, which Congress has the power to protect subject to parameters set by the Court.

For example, the Court discussed the Guarantee Clause in *Rucho v. Common Cause,* which held that partisan gerrymandering claims are nonjusticiable political questions despite evidence that these gerrymanders rendered meaningless the votes of political minorities.[45] In *Rucho,* the Court asserted that any argument "that partisan gerrymanders violate 'the core principle of [our] republican government' . . . 'that the voters should choose their own representatives' . . . is an objection more properly grounded in the Guarantee Clause," which "does not provide the basis for a justiciable claim."[46]

Notably, the malapportionment cases, starting with *Baker v. Carr* in 1962, were premised on the idea that judicial intervention was warranted *precisely* because the failure to redistrict violated the voters' right to choose their representatives. *Baker* rejected the argument that the political nature of malapportionment meant that such claims were nonjusticiable.[47] In making this distinction between "political questions" and "political cases," *Baker* sought to evade the line of precedents finding Guarantee Clause claims to be nonjusticiable. But in doing so, the Court inadvertently rendered the Clause's broader purpose and meaning inconsequential as it relates to issues other than justiciability, choosing instead to confine core questions of voting and representation to the Equal Protection

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[43] See Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 HARV. L. REV. 1663, 1718 (2001) (questioning why the Supreme Court has "ignored the possibility that dilution claims are different than individual rights" and insisted on using an individual rights framework for a dispute over the drawing of district lines).

[44] *See* TOLSON, *supra* note 12 (manuscript at 3-4) (discussing how Congress used multiple sources of constitutional power in the lead-up to the civil war to regulate and resolve election questions, including the Guarantee Clause and the Elections Clause); *see also* H.R. 1, 117th Cong. § 3 (1st Sess. 2021) (invoking no fewer than five provisions, including the Guarantee Clause and the Fourteenth Amendment, as the sources of constitutional authorization).

[45] Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019); *see also id.* at 2512 (Kagan, J., dissenting) (noting that partisan gerrymandering can make elections "meaningless").

[46] *Rucho*, 139 S. Ct. at 2506 (alteration in original) (quoting Common Cause v. Rucho, 318 F. Supp. 3d 777, 801 (2018)).

[47] See Baker v. Carr, 369 U.S. 186, 217 (1962) ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.").

Clause.[48] *Rucho* exploits *Baker*'s distinction between political questions and political cases, further obscuring that the Guarantee Clause's conception of republicanism marries rights based questions about the disbursement of political power with structural questions about how political power is aggregated and organized.

Similarly, the Supreme Court has not wholly ignored Section 2 of the Fourteenth Amendment, recognizing its potential for informing the scope of related constitutional provisions, but neglecting the provision when it comes to core disputes over protections for the right to vote.[49] In *Evenwel v. Abbott*, for example, the Court held that the Fourteenth Amendment's principle of one person, one vote did not require states to draw their state legislative districts based on eligible voters.[50] Instead, states are permitted to construct districts based on total population figures because this practice is consistent with the Court's precedents, longstanding practice, and constitutional history.[51] In reaching this conclusion, Section 2 figured prominently in the Court's analysis, with particular attention being paid to the rejection of an apportionment standard based on total voters in the Thirty-Ninth Congress.[52]

But the Court's selective use of Section 2, without considering the universe of contemporaneous material that bear on its meaning, has led to disastrous results. In *Richardson v. Ramirez*, the Court held that states do not violate the Equal Protection Clause by disenfranchising those with felony convictions.[53] The Court concluded that, because Section 2 expressly exempts disenfranchisement grounded on prior conviction of a felony, states do not violate section 1 of the Fourteenth Amendment by excluding these individuals from the franchise.[54] Notably, the majority opinion referenced the Reconstruction Acts, but for the proposition that states retain significant authority to disenfranchise on the basis of felony conviction provided that the law is administered equally, rather than focusing on the Act's limitation to disenfranchisement only for felonies at common law.[55]

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[48] *See id.* at 218 ("We shall discover that Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.")

[49] *See, e.g.*, Evenwel v. Abbott, 136 S. Ct. 1120, 1128 (2016) (using Section 2 of the Fourteenth Amendment to permit total population as the congressional apportionment base).

[50] See id. at 1130 (noting that "[c]onsistent with constitutional history, this Court's past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations" rather than "the voter-eligible population of districts").

[51] See id. at 1123 "Texas, like all other States, draws its legislative districts on the basis of total population.").

[52] *Id.* at 1127-28 (emphasizing the explicit consideration the Thirty-Ninth Congress gave to the issue of apportionment and its ultimate rejection of apportionment based on voter population).

[53] The Court in *Richardson* noted that

> [T]he understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.

Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

[54] See id. ("As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment.")

[55] *Id.* at 52-53.

Similar to its approach under the Guarantee Clause, the Court has opportunistically used Section 2 to shed light on some constitutional controversies while ignoring its relevance to others.[56] The Reconstruction Acts clarified a core concern raised in the context of debates over Section 2 of the Fourteenth Amendment—whether states could arbitrarily expand the list of felonies to disenfranchise more people than Section 2 and the Guarantee Clause permits. As Richard and Christopher Re have argued, Section 2—and its "relatively narrow references to 'felony' disenfranchisement"— addressed concerns by leading radicals in Congress "that the former slaves were being unjustly disenfranchised for 'a thousand and one trivial offenses.'"[57] The requirement that disenfranchisement only be for crimes that were felonies at common law has broad implications for one of the battles in the current voting wars, namely, the debate over whether states can require payment of all fines and fees as a condition of re-enfranchisement. Using Florida as a case study, the next section shows that Section 2, as illuminated by the Reconstruction Acts, provides a blueprint for when states must enfranchise their populations, consistent with the Guarantee Clause.

III. The Reconstruction Acts as a Blueprint for Republican Government: Felon Disenfranchisement and the Constitutionality of Florida's Amendment 4

Florida leads the nation in the number of individuals disenfranchised due to felony conviction.[58] Over 1.1 million individuals cannot vote, representing 7.7% of the voting age population in the state and 22% of the disenfranchised population nationally.[59] As of 2020, 15.42% of African Americans in Florida are disenfranchised.[60] In 2018, Florida voters passed Amendment 4, which provided that "any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation."[61] The effect of Amendment 4 would have been quite far reaching; approximately 1.4 million people disenfranchised due to prior felony conviction would have been eligible to vote.[62]

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[56] *See* John R. Cosgrove, Four New Arguments Against the Constitutionality of Felony Disenfranchisement, 26 T. Jefferson L. Rev. 157, 178 n.97 (2004) (arguing that references crimes of insurrection and rebellion in Sections 3 and 4 of the Fourteenth Amendment are a limiting principle on Section 2); see also Abigail M. Hinchcliff, Note, The "Other" Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement, 121 Yale L.J. 194, 216 n.127 (2011) (noting that some jurisdictions have found disenfranchising for misdemeanors violates the Fourteenth Amendment and others allow it).

[57] Re & Re, *supra* note 9, at 1628; *see also id.* at 1628-29 (noting in their discussion of statements by Representatives Thaddeus Stevens and John Bingham that "the Republicans realized—as later events would bear out—that it was easier both to invent and to prosecute trumped-up misdemeanor offenses like vagrancy, as compared with more serious and well-recognized common law crimes, such as murder").

[58] Lawrence Mower, Florida Leads Nation in Voter Disenfranchisement, Criminal Justice Group Says, Tampa Bay Times (Oct. 14, 2020), https://www.tampabay.com/news/florida-politics/elections/2020/10/14/florida-leads-nation-in-voter-disenfranchisement-criminal-justice-group-says [https://perma.cc/RL4D-ZVM5].

[59] THE SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 16 tbl.3 (2020), https://www.sentencingproject.org/wp-content/uploads/2020/10/Locked-Out-2020.pdf [https://perma.cc/9NH9-7PDR].

[60] Benjamin Conarck, Report: Felony Convictions Bar More than 1.5 Million Floridians From Voting, Fla. Times-Union (Oct. 6, 2016, 12:05 AM), https://www.jacksonville.com/news/2016-10-06/report-felony-convictions-bar-more-15-million-floridians-voting [https://perma.cc/L9F2-VSYZ].

[61] Jones v. DeSantis, 462 F. Supp. 3d 1196, 1205 (N.D. Fla. 2020) (quoting Fla. Const. art. VI, § 4).

[62] See Lawrence Mower, What Happened to Florida's Amendment 4? Five Takeaways from our Investigation, Tampa Bay Times (Oct. 11, 2020), https://www.tampabay.com/news/florida-politics/2020/10/11/what-happened-to-floridas-amendment-4-five-takeaways-from-our-investigation [https://perma.cc/9PW9-28FQ] ("[T]he amendment was supposed to be America's greatest expansion of civil rights in decades, allowing an estimated 1.4 million to vote.").

After Amendment 4 went into effect, the state legislature passed SB 7066, which defined the phrase "completion of all terms of sentence" to include all fines and fees imposed as a part of any criminal sentence.[63] The bill directly affected more than 774,000 people who are disenfranchised because of outstanding financial obligations, most of whom do not have the ability to pay.[64] In September 2020, the Eleventh Circuit, in a 200-page opinion in a case entitled *Jones v. Governor of Florida*, upheld SB 7066, rejecting the argument that the financial obligation imposed by the statute was unconstitutional wealth discrimination in violation of the Fourteenth and Twenty-Fourth Amendments of the U.S. Constitution.[65] The district court had found that SB 7066 violated the Equal Protection Clause as applied to indigent defendants unable to pay their fines and fees.[66] Sitting en banc, the court reversed the district court's ruling. Detailing Florida's long history of prohibiting those with felony convictions from casting a ballot, the court concluded that, unlike a poll tax, the requirement that those with felony convictions pay all fines and fees is "highly relevant to voter qualifications" because it "ensures full satisfaction of the punishment imposed for the crimes by which felons forfeited the right to vote."[67]

Notably, the court discussed Florida's first constitution, enacted in 1838, which disenfranchised those "convicted of bribery, perjury, or other infamous crime."[68] After briefly noting that Florida has disenfranchised those convicted of "infamous crime" since its entry into the union in 1845, the opinion then skipped ahead to the adoption of Amendment 4 in 2018.[69] Noticeably absent from this discussion is Florida's exit from the union to join the Confederacy in 1861 and its subsequent re-entry into the union, subject to certain conditions, in 1868.[70] As a condition of re-entry, Florida, like the other confederate states, had to adopt a new constitution providing for universal male suffrage.[71] But, as noted in Part I, Congress also imposed other limitations on Florida's ability to alter its state constitution upon re-entry in the Reconstruction Act of June 15, 1868, prohibiting disenfranchisement for crime unless they "are now felonies at common law."[72]

This language has significant implications for Florida's regime of felon disenfranchisement. Notably, the *Jones* Court assumed that paying fines and fees was an integral part of satisfying the debt that one

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[63] S.B. 7066, 2019 Leg., Reg. Sess. (Fla. 2019), 2019 Fla. Laws 28 (defining "completion of all terms of sentence" to include "[f]ull payment of fines or fees ordered by the court").

[64] See Patricia Mazzei, Ex-Felons in Florida Must Pay Fines Before Voting, Appellate Court Rules, N.Y. Times (Sept. 11, 2020), https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rights.html [https://perma.cc/RTT7-RKPJ] (reporting that an American Civil Liberties Union (ACLU) voting rights expert testified that over 774,000 felons in Florida have outstanding fines). Another study estimated that this number was as high as 900,000. THE SENT'G PROJECT, *supra* note 59, at 13.

[65] See Jones v. Governor of Florida, 975 F.3d 1016, 1025, 1042 (11th Cir. 2020) ("[T]he text of the Constitution creates an inference that the right to vote stands in a different relationship to race, sex, and age than it does to the nonpayment of taxes.").

[66] *DeSantis*, 462 F. Supp. 3d at 1234.

[67] *Jones*, 975 F.3d at 1031.

[68] *Id.* at 1025 (citing FLA. CONST. art. VI, § 4 (1838)).

[69] *Id.*

[70] *See Today in History – January 10*, LIBRARY OF CONGRESS, https://www.loc.gov/item/today-in-history/january-10 [https://perma.cc/W985-3GRJ] (listing January 10 as the date of Florida's secession from the Union).

[71] *See* An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868) ("[T]he constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized . . . .); *see also* FLA. CONST. art. VI, § 1 (1838)

[72] 15 Stat. at 73.

owes to society; however, the Court ignores that disenfranchisement as a punishment for crime can only be "highly relevant" to voter qualifications in the context of common law felonies.

Importantly, a felony at common law was a serious crime punishable by death.[73] The nine traditional common law felonies under English law were murder, robbery, manslaughter, rape, sodomy, larceny, arson, mayhem and burglary.[74] To this list, one can add the crimes listed in the Florida constitution of 1868 as a ground for disenfranchisement, since these crimes were implicitly sanctioned by the 1868 Reconstruction Act that deemed the "framed constitutions of [Florida's] government . . . republican."[75] Under the 1868 Florida Constitution:

> The Legislature shall have power and shall enact the necessary laws to exclude from every office of honor, power, trust, or profit, civil or military, within the State, and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime, or who shall make or become, directly or indirectly, interested in any bet or wager, the result of which shall depend upon any election; or who shall hereafter fight a duel, or send or accept a challenge to fight, or who shall be a second to either party, or be the bearer of such challenge or acceptance; but the legal disability shall not accrue until after trial and conviction by due form of law.[76]

It is clear, from the list of common law felonies as well as the crimes added to this list by the 1868 Florida Constitution—i.e., bribery, perjury, larceny, betting on the election, participating in a duel—the realm of felonies that should result in disenfranchisement is appreciably small. Even the term "infamous crime" had a specific meaning at common law, referring to crimes that disqualify one from serving as a juror or testifying in court.[77] These crimes include "treason, felony, piracy, perjury, and forgery . . . as well as any crime that was punished by the pillory, whipping, or branding."[78] Nevertheless, it is undeniable that the Reconstruction Acts did not completely eliminate the possibility for official mischief, given the open-ended "infamous crime" language in the 1868 constitution that could arguably be used as a predicate to disenfranchise individuals for a host of new crimes, particularly those that sprang up in the wake of the Civil War.

Florida, like many other former confederate states enacted "Black Codes", which imposed various restrictions on African Americans in the wake of emancipation by, for example, requiring them to sign yearly contracts or face re-enslavement; limiting the type of property that African Americans could own; and imposing a host of restrictions on their freedom of movement.[79] The Codes also expanded the criminal justice system, making minor offenses that legislators thought were more likely to be committed by African Americans, such as certain types of theft, vagrancy, burglary, and

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[73] *Id.*

[74] FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 1 (Philadelphia, James Kay, Jun. & Brother 1846).

[75] 15 Stat. at 73.

[76] FLA. CONST., Suffrage and Eligibility, § 4 (1868).

[77] See Will Tress, Unintended Collateral Consequences: Defining Felony in the Early American Republic, 57 Clev. St. L. Rev. 461, 466 (2009) ("At common law, the term 'infamous' came to mean a person rendered incapable of being a juror or testifying in court.").

[78] *Id.*

[79] See FLA. RIGHTS RESTORATION COAL., BRENNAN CTR. FOR JUST., HISTORY OF FLORIDA'S FELONY DISENFRANCHISEMENT PROVISION 1 (2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_38222.pdf [https://perma.cc/9YSV-LR7F] ("Studies show that many states, especially those of the former Confederacy, passed restrictive felony disenfranchisement laws in the period directly following the extension of voting rights to freedmen.")

assault, into crimes subject to the penalty of death or, alternatively, imprisonment and, later, disenfranchisement.[80]

Written with the perniciousness of the Black Codes in mind, the Reconstruction Acts inform the scope of the Guarantee Clause, both by their very terms and within the context of Section 2's penalty, which has an exception for disenfranchisement for the commission of a crime.[81] The Acts suggest that the "treason, or other crime" language should be interpreted narrowly, for example, by applying the *noscitur a sociis* interpretive canon to limit "other crime" to those crimes that are of similar seriousness as treason.[82] A government that disenfranchises for a broader swath of crimes is, by definition, unrepublican.

The Acts not only serve as explicit limitations on the universe of crimes that can disenfranchise ("except as a punishment for such crimes as are now felonies at common law"), but also as a limit on the ability of the state to disenfranchise under laws not "equally applicable to all the inhabitants."[83] For this reason, the so-called Black Codes that were common in Florida from 1865-1868 could never serve as a predicate for disenfranchisement because of their racially discriminatory intent and effect. Even more significantly, there is no reasonable interpretation of "infamous crime" in the Florida Constitution of 1868—or any of the later iterations of that document—that could support Florida's current system, which disenfranchises individuals who commit any one of 533 different felonies, the overwhelming majority of which are not felonies at common law.[84]

The fact that people are impermissibly disenfranchised for crimes that were not felonies at common law makes the Florida statute requiring payment of all fines and fees a poll tax. Because of the Reconstruction Act of 1868, disenfranchisement cannot be imposed for crimes that are not felonies at common law. Requiring the payment of fines and fees thus functions as "a prerequisite to the registration for voting," independent of the underlying offense, in violation of both the Fourteenth and Twenty-Fourth Amendments. In finding that Florida's system requiring payment of fines and fees to be "highly relevant" to voter qualifications, the Eleventh Circuit ignored that the very system it endorses cannot, by definition, be a basis for determining voter eligibility since many individuals are disenfranchised in violation of the republican ideal.

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[80] See id. ("A crucial component of the Codes was an expansion of the criminal justice system to deal with minor offenses that legislators believed blacks were likely to commit and that had been formerly punished by their masters."); *see also generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (arguing that the post-Civil War practice of leasing black convict labor to private corporations was a continuation of slavery).

[81] U.S. Const. amend. XIV, § 2.

[82] *See* Yates v. United States, 574 U.S. 528, 543 (2015) ("We rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995))).

[83] An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868).

[84] See Abigail Weinberg, The Last-Ditch Effort to Stop Florida's Century-Old Campaign of Racist Disenfranchisement, Mother Jones (July 21, 2020), https://www.motherjones.com/2020-elections/2020/07/florida-felon-disenfranchisement [https://perma.cc/7Q5K-8MMK] (describing Florida's "ugly, racist history" of criminal disenfranchisement of "people convicted of relatively minor crimes").

Conclusion

The controversy over felon disenfranchisement in Florida illustrates the continued relevance of the Reconstruction Acts and the poverty of a jurisprudence that ignores these provisions to the detriment of our democratic republic. The Reconstruction Acts, by their terms, deemed each state republican in form upon its re-entry into the union. Florida has violated the terms upon which it reentered the union by disenfranchising those convicted of crimes that were not felonies at common law. Falling below what the statutes require—here by disenfranchising for many more crimes than the Acts permit—means that Florida's current government is no longer republican in form. As such, Congress can remedy this disenfranchisement and lack of republicanism by imposing the penalty of reduced representation under Section 2 of the Fourteenth Amendment, or alternatively, by prohibiting this disenfranchisement outright through Section 5 of the Fourteenth Amendment.[85]

[85] See generally, H.R. 1, 117th Cong. § 3 (1st Sess. 2021) (invoking Congress's powers under Section 2 and Section 5 of the Fourteenth Amendment to enfranchise those convicted of felonies for purposes of voting in federal elections).

Congress of the United States
House of Representatives
Committee on House Administration
Hearing on
"The Elections Clause: Constitutional Interpretation and Congressional Exercise"
July 12, 2021

Statement of Guy-Uriel E. Charles
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Chairperson Lofgren, Ranking Member Davis, and members of the Committee on House Administration:

My name is Guy-Uriel Charles. I am a tenured member of the Harvard Law School where I am also the Charles J. Ogletree Jr. Professor of Law and the Faculty Director of the Charles Hamilton Houston Institute.[1] I teach Civil Procedure, Constitutional Law, Race and Law, and Election Law. Much of my research is on the law of democracy. I have written in many areas of election law, including voting rights, campaign finance, and redistricting. I also research and write about issues of racial justice and racial equality.

I regret that my schedule did not allow me to testify before the Committee in person. I am grateful for the opportunity to submit this written testimony on the significant power that Congress can wield under Article I, section 4 clause 1, the Elections Clause, of the Constitution of the United States. The main takeaway of my testimony is that for almost 150 years the Supreme Court of the United States has asserted repeatedly that the Elections Clause vests Congress with broad authority to specify the rules that govern federal elections and to displace or preempt contrary state regulations. Moreover, though the number of statutes that can be justified under Congress's Elections Clause powers are not innumerable, they are significant and notable. Further, when Congress has regulated pursuant to the Elections Clause, its regulations have generally been pervasive and systematic.

The Court has Long Held that Congress has Broad Power to Under the Elections Clause

Article I, Section 4, Clause 1 ("Elections Clause"), authorizes the states to prescribe the "Times, Places and Manner of holding" congressional elections and provides that "Congress may at any time by Law make or alter such regulations."[2] Almost one hundred years ago, in *Smiley v Holm*,[3] the Supreme Court of the United States explained the meaning of this clause. The Court stated that "it cannot be doubted," that the "comprehensive words" of the text of the Elections Clause grants to the states the authority to promulgate "a complete code for congressional elections."[4] In the Court's view, the power provided by the Elections Clause is not limited "only as to times and places," but encompasses the power to provide for "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[5]

The Court went on to state that the Constitution's designation of supervisory authority to Congress via the Elections Clause, specifically stating that "Congress may at any time by Law make or alter such Regulations," means that Congress has the same substantive power to regulate federal elections equivalent to that possessed by the states. As the Court stated: "The phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the

[1] My testimony draws from and builds on my prior testimony before this Committee.
[2] U.S. CONST. ART. I § 4 CL. 1.
[3] *Smiley v. Holm*, 285 U.S. 355 (1932).
[4] *Smiley*, 285 U.S. at 366.
[5] *Id.*

State is authorized to prescribe with respect to Congressional elections."[6] This means, just as the Elections Clause grants the states the power to promulgate "a complete code for Congressional elections," it grants the same substantive power to Congress as well. Put differently, the Elections Clause grants to Congress the authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[7] Or, as the Court said in *Smiley*: "Prescribing regulations to govern the conduct of the citizen, under the first clause [the Times, Places, and Manner clause,] and making and altering such rules by law under the second clause, involve action of the same inherent character."[8] Thus, whatever rules the states can enact to regulate federal elections, the Elections Clause extends equivalent substantive authority to Congress.

Moreover, the Elections Clause not only grants to Congress the same substantive power that it grants to the states to make substantive rules that govern the manner of conducting congressional elections, the Elections Clause, importantly and notably, places Congress as an overseer of the states. As the Court stated in *Smiley*, quoting a line from its decision in *Ex parte Seibold*, Congress "'has a general supervisory power over the whole subject.'"[9] Understood differently, in the context of federal elections, the states and Congress are not equal; Congress is supreme. Under the Elections Clause, Congress has the power to displace state regulation that is inconsistent with what Congress wants. Pursuant to the Elections Clause, the substantive policy preferences of Congress supersede the substantive policy preferences of the states. As the Court stated clearly in *Smiley*: "In exercising this power, the Congress may supplement these state regulations or may substitute its own."[10]

The Court's understanding in *Smiley* of the "broad authority" that Congress can exercise under the Elections Clause is not aberrational.[11] In fact, the Supreme Court has long understood that the Elections Clause provides extremely broad authority specifically to Congress to regulate federal elections. In *Ex parte Siebold*, which the Court decided in 1879,[12] Justice Bradley, who wrote the opinion for the Court, stated that the power of Congress to regulate congressional elections "may be exercised as and when Congress sees fit to exercise it" and "necessarily supersedes" conflicting State regulations.[13] Almost in passing, as if making an obvious and incontrovertible point, Justice Bradley, noted as a "fact," that "Congress has plenary and paramount jurisdiction over the whole subject."[14]

In addition, the Court there also made it very clear that the principle of state sovereignty does not extend to federal elections. When it comes to the regulation of federal elections, Congress and the states are not co-sovereigns. Though the Constitution gives the states a role to play in setting the terms for the conduct of federal elections, the states are, as the Court put it, "subordinate" to the

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[6] *Smiley*, 285 U.S. at 366.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 367.
[10] *Id.* at 366-67.
[11] *Id.* at 367.
[12] Ex parte Siebold, 100 U.S. 371 (1879).
[13] *Ex parte Siebold*, 100 U.S. at 384.
[14] *Ex parte Siebold*, 100 U.S. at 388.

federal government.[15] On this point, the Court was emphatic and doctrinaire. "The true doctrine, as we conceive, is this," Justice Bradley wrote the Court, "that whilst the states are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land."[16] And just to remove ambiguity, Justice Bradley added "and, when they conflict with the laws of the States, they are of paramount authority and obligation."[17]

The responsibility for the conduct and for the substantive rules that govern the operation of federal elections ultimately lie with Congress. "The due and fair election of [congressional representatives]," the Court stated, "is of vital importance to the United States."[18] Congress, the Court concluded, need not be indifferent to the integrity of federal elections even though the states were the entities who administered federal elections. Congress "certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State."[19] Congress has both the duty and responsibility to safeguard federal elections.

A few years later, in the 1884 case of *Ex parte Yarborough*,[20] the Court returned to the same ground and affirmed, in even stronger terms, the same set of principles. In *Ex parte Yarborough*, a number of Klansmen were charged and convicted after they beat a black man to prevent him from exercising his right to vote in a federal election. The defendants argued that the federal government did not have the power to prosecute them. The Court responded to the objection—that the federal government did not have the power to protect the right to vote and safeguard the integrity of federal elections—with incredulity. "That a government whose essential character is republican, whose executive head and legislative body are both elective," the Court observed, "whose numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration."[21]

Not surprisingly, the Court went to find that the Elections Clause clothes Congress with more than sufficient power to both protect the right to vote in federal elections and to safeguard the integrity of federal elections. The Court stated that Congress had regulatory authority whenever it "finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting."[22] The Court concluded that the Elections Clause allows Congress to "protect the act of

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[15] *Ex parte Siebold*, 100 U.S. at 392-93 ("Generally, the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the State governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.")

[16] *Ex parte Siebold*, 100 U.S. at 398-99.

[17] *Ex parte Siebold*, 100 U.S. at 399.

[18] *Ex parte Siebold*, 100 U.S. at 388.

[19] *Ex parte Siebold*, 100 U.S. at 388.

[20] Ex parte Yarborough, 110 U.S. 651 (1884).

[21] Ex parte Yarborough, 110 U.S. at 657.

[22] *Ex parte Yarborough*, 110 U.S. at 662.

voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud."[23]

The Court has More Recently Reaffirmed the Plenary Power of Congress to Regulate Federal Elections Under the Elections Clause

The Court has repeatedly affirmed its longstanding understanding that the power of Congress under the Elections Clause is plenary. For example, in the 1997 case of *Foster v. Love*, the Court affirmed a court of appeals decision, which struck down a Louisiana election law on the ground that the law was unconstitutional under the Elections Clause. Noting that "it is well settled that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the States,"[24] *Foster* reaffirmed the Court's prior reasoning in its late nineteenth century and early twentieth century cases.

More recently, in *Arizona v. Inter Tribal Council of Arizona Inc.*,[25] the Court struck down an Arizona law, which required proof of citizenship as condition for voting, on the ground that the law was inconsistent with the federal National Voter Registration Act ("NVRA"). Congress, through the NVRA requires the states to allow prospective voters seeking to register for federal elections to register in person, to register by mail, and to register when they apply for a driver's license. In summarizing the reach and scope of the NVRA, Justice Scalia, who wrote the majority opinion for the Court stated, "Congress has erected a complex superstructure of federal regulation atop state voter registration systems," via the NVRA.[26]

The Arizona case concerned the mail registration requirements of the NVRA. Congress, through the NVRA, compels the states to use a standard form designed by the U.S. Election Assistance Commission. The federal form does not require voters to prove their citizenship. Registrants only have to swear that they are citizens of the United States. By contrast, Arizona law requires individuals to prove that they are citizens in order to register to vote. Arizona law precludes state officials from accepting a voter registration application unless the application is accompanied by proof of citizenship. The question presented in the case was whether federal law preempts Arizona's requirement.

In striking down the Arizona proof of citizenship requirement, Justice Scalia's opinion in *Arizona Inter Tribal* reaffirmed the now familiar mantra that the Elections Clause's "substantive scope is broad" and that it "empowers Congress to preempt state regulations governing the 'Times, Places, and Manner' of holding congressional elections."[27] So, long as Congress is regulating the time, place, or manner of regulating federal elections, its substantive policy preferences are supreme to that of the stats and can preempt that of the states. Quoting *Ex parte Siebold*, Justice Scalia underscored that the power of Congress under the Elections Clause "'is paramount, and may be

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[23] *Id.* at 661.

[24] *Foster v. Love*, 522 U.S. 67, 69 (1997) (internal quotations removed). *See e.g. Smiley v. Holms* (1932); *United States v. Classic* (1941); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) ("Unless Congress acts, Art. I, § 4, empowers the States to regulate."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–833 (1995).

[25] *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013).

[26] *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. at 5.

[27] *Id.* at 8.

exercised at any time and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'"[28]

In Contrast to Congress's Power Under the Reconstruction Amendments, Congress's Power Under the Elections Clause is Unencumbered by Federalism Constraints

Congress's exercise of power under the Elections Clause does not raise the federalism and state sovereignty constraints that the Court has discovered exist when Congress exercises its regulatory power under the Reconstruction Amendments. This is because when Congress regulates in the context of federal elections, it is not intruding into sensitive areas of state policy making or areas in which the states are entitled to have the last word on policymaking. By the very terms of the Elections Clause, it is Congress that is entitled to the last word on how federal elections are held. The rules under which federal elections are conducted are a matter of federal, not state, sovereignty. Consequently, the federalism and state sovereignty constraints that may be relevant when Congress uses its power pursuant to other constitutional provisions are not in play when Congress uses its power under the Elections Clause.[29]

By contrast, when Congress is regulating elections under other provisions, the exercise of its powers may be subject to federalism constraints. For example, In *Lopez v. Monterey County*,[30] quoting its earlier decision in *Miller v. Johnson*, the Court stated that while it true that the Voting Rights Act, enacted pursuant to Congress's power under section 2 of the Fifteenth Amendment, "authorizes federal intrusion into sensitive areas of state and local policymaking" the Act also "imposes substantial 'federalism costs.'"[31] In *Northwest Austin Utility District No. 1 v. Holder*,[32] the Court stated that the federalism costs of the VRA raised serious questions about the Act's constitutionality.[33] A few years later, in 1993, in *Shelby County v. Holder*,[34] the Court concluded that the provision that identified the jurisdictions that were subject to preclearance, section 4(a) of the Act, is unconstitutional on the ground Congress's exercise of power under the Reconstruction Amendments, specifically the Fourteenth and Fifteenth Amendments, exceeded principles of federalism, state sovereignty, and equal state sovereignty.[35]

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[28] *See Arizona Inter Tribal*, 570 U.S. at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)) (internal quotations removed). *See also*, Franita Tolson, The Elections Clause and the Underenforcement of Federal Law, 129 YALE L.J. FORUM 171 (2019); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317 (2019).

[29] *Compare Smiley v. Holm*, 285 U.S. 355, 366–67 (1932) (describing Congress's power to legislate pursuant to Elections Clause power: "The phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It 'has a general supervisory power over the whole subject.'") with *Shelby County*, 133 S. Ct. at 2621-24, 2630-31 (invalidating VRA Section 4(b) for infringing on "equal sovereignty" when there was no rational reason for the federal government's continued reliance on the 40-year-old coverage formula).

[30] 525 U.S. 266 (1999).

[31] *Lopez v. Monterey County*, 525 U.S. at 282.

[32] 557 U.S. 193 (2009).

[33] *Northwest Austin Utility District No. 1 v. Holder*, 557 U.S. at 202.

[34] 570 U.S. 529 (2013).

[35] *See, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113.

Likewise, the anti-commandeering principle, another limitation that the Supreme Court has articulated in other contexts to limit the power of Congress on federalism grounds,[36] is inapposite when the Congress regulates pursuant to its authority under the Elections Clause.[37] The anti-commandeering doctrine precludes Congress from taking over the "legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[38] However, the reality of the American electoral system is that it is the states that administer federal elections; there is no separate federal apparatus that administers federal elections or registers voters to vote in federal elections. Moreover, the States administer certain services exclusively, such as driver's licenses, and Congress takes advantage of those arrangements by compelling the states to use them as opportunities to register voters in federal elections. Thus, whenever Congress exercises power under the Elections Clause, it almost always does so in a manner that commandeers—it commands—the states and state officials.

This is the reason that the lower federal courts have consistently rejected anti-commandeering challenges to a statute like the NVRA,[39] which as the Court in *Arizona Inter Tribal* stated, imposes a complex federal voting registration infrastructure astride the state system.[40] In turning aside a broad constitutional challenge to the NVRA, a panel of the Ninth Circuit stated: "Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators."[41] Similarly, a panel of the Sixth Circuit noted that the Elections Clause "specifically grants Congress the authority to force states to alter their regulations regarding federal elections."[42]

Congress has Previously Enacted Statutes Pursuant to or Justified by the Elections Clause

Despite the tremendous power the Elections Clause confers upon Congress, Congress has regulated under the Elections Clause judiciously. As the *Yarborough* Court observed, it was not until 1842, when it passed the 1842 Apportionment Act,[43] that Congress first regulated under the Elections Clause. The Apportionment Act required the States to use single-member districts, instead of at-large districts, to elect members of the House of Representatives.[44] The fact that Congress has used its authority under the Elections Clause judiciously should not cast doubt on the availability and scope of Congress's power to regulate federal elections. As the Court in *Yarborough* nicely reminded us:

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[36] *See, e.g., New York v. United States*, 505 U.S. 144 (1992) and Printz v. United States, 521 U.S. 898 (1997).
[37] *See* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 102, 101-102.
[38] *New York v. United States*, 505 U.S. 144, 161 (1992).
[39] *See* Morley, *supra*, at 102 n. 136-138 (2016) (citing *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995)); see also *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997) (affirming the NVRA's constitutionality because the Elections Clause empowers Congress to direct states to amend their laws governing federal elections); *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995) (pre-Printz case affirming NVRA).").
[40] *See Arizona Inter Tribal*, 570 U.S. at 5.
[41] *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995).
[42] *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997).
[43] 2 U.S.C. §2; and 13 U.S.C. §141; *see also Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion of Scalia, J., also joined by Thomas, J.).
[44] An Act for the Apportionment of Representatives Among the Several States According to the Sixth Census, 5 Stat. 491 (1842).

> it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted.[45]

Congress has not just dictated to the states what electoral structure they must use to elect members of the House pursuant to the Elections Clause, additionally, as the Court has held,[46] the states must hold elections for the House of Representatives and for the Senate on the date set by Congress.[47] Further, as noted above, Congress has pervasively regulated the manner in which the States are to conduct registration for federal elections through the NVRA, which the both the Court and the lower courts have protected against constitutional attack.[48]

In addition to those noted above, Congress has enacted other legislation regulating federal elections that can be easily justified under the Elections Clause. Consider for example, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), which requires the States to allow certain voters—uniformed service members and voters living overseas as well as uniformed service members living in the United States but outside of their voting jurisdictions—to vote an absentee ballot in federal elections.[49]

In *United States v. Alabama*,[50] the United States sued Alabama for failing to comply with UOCAVA's requirement that the States must provide absentee ballots, to voters who are entitled to request and receive those ballots under the statute, 45 days before a federal election. Alabama scheduled run-off elections 42 days after a primary election. The United States argued that the State's failure to comply with the statute deprived qualified voters of the time they needed to request and return their absentee ballots as required by the statute. Alabama argued that fewer voters would participate in run-off elections if it scheduled the runoff more than 42 days after the primary, which it would have to do to comply with UOCAVA's requirements.

The Court noted that even though Alabama raised a compelling policy argument, the text of the statute was clear and Alabama had no choice but to conform its elections laws to Congress's directive. The Eleventh Circuit stated, the statute is a "comprehensive series of requirements aimed at ending the widespread disenfranchisement of military voters stationed overseas."[51] It "includes

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[45] *The Ku Klux Cases*, 110 U.S. 651, 660 (1884).

[46] *See Foster v. Love*, 522 U.S. 67, 69 (1997).

[47] *See* 2 U.S.C. §§ 1, 7 (setting the date for biennial election of congresspersons). *See also* U.S. GEN. ACCOUNTING OFFICE, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION 11-12 (2001) (discussing 1872 legislation which set date for popular election of Representatives, 1914 legislation setting same date for senator election following ratification of the Seventeenth Amendment, and under 3 U.S.C 1 establishing the date for the selection of presidential electors").

[48] National Voter Registration Act of 1993 (establishing voting procedures designed to "increase the number of eligible citizens who register to vote in elections for Federal office," without compromising "the integrity of the electoral process" or the maintenance of "accurate and current voter registration rolls."); *see also Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 20 (2013) (holding NVRA preempted Arizona's proof-of-citizenship requirement); *Ass'n of Cmty. Organizations for Reform Now v. Edgar*, 56 F.3d 791, 795-96 (7th Cir. 1995) and *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) (both upholding the National Voter Registration Act of 1993 as constitutional pursuant to Congress's Elections Clause powers.)

[49] Uniformed Overseas Citizens Absentee Voting Act, 52 U.S.C. §§20301-20311.

[50] 778 F.3d 926 (11 Cir. 2015).

[51] *United States v. Alabama*, 778 F.3d at 928.

a variety of measures that the states are required to adopt in order to accommodate military voters when they administer federal elections." Given the clarity and purpose of the statute, to allow military and certain overseas voters to be able to vote in federal elections, Alabama was obliged to comply.

Similarly, Congress passed the Voting Accessibility for the Elderly and Handicapped Act of 1984, which can be justified under the Elections Clause. The purpose of this Act is to compel the states to make "all polling places for federal elections . . . accessible to handicapped and elderly voters."[52] Finally, Congress has passed a law make it crime to engage in fraudulent voting activity in federal elections.[53]

Not only does Congress have very broad powers to determine the processes that govern federal elections and to protect the integrity of federal elections under the Elections Clause, it has exercised those powers repeatedly, without any doubt cast on the constitutionality of the Congress's ability to regulate.

Congress Should Exercise its Power and Preempt State Laws that Make is Harder for Voters to Vote in Federal Elections and to Protect the Integrity of Federal Elections

The bottom line is that though Congress has not pervasively regulated the time, places, and manner under which federal elections can be conducted, it has not been an absentee overseer. Congress has exercised that power and has done so periodically for well over one hundred years. Moreover, when Congress has regulated, particularly with respect to the NVRA and UOCAVA, it has done so comprehensively and systematically. Finally, both the Supreme Court and lower courts have upheld federal legislation that have been challenged on Elections Clause grounds. As the Supreme Court has repeatedly stated, when Congress is operating within the confines of its Election Clause powers, its authority to regulate is plenary.

The text of the Constitution and the Court's jurisprudence interpreting the Constitution leave no doubt that Congress has the power under the Elections Clause to preempt state laws that make it harder for voters to vote in congressional elections. As long as Congress is regulating federal elections, it can use the Elections Clause to require the states to provide for automatic registration, same-day registration, on-line registration, early voting, vote by mail, and standardized rules for counting provisional ballots. These types of regulations are similar to what Congress has done under the NVRA. They pertain to the registration and would be clearly constitutional. In fact, almost all of voting rights portions of For the People Act are constitutional under the Congress's Elections Clause powers precisely because they are about the times, places, and manner of conducting federal elections.

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[52] Voting Accessibility for the Elderly and Handicapped Act of 1984, as enacted, *see* P.L. 98-435, as currently codified, *see* 52 U.S.C. §§20101-20107 (conferred responsibility on states' political subdivisions to ensure polling places and registration sites were accessible to handicapped and elderly voters).

[53] 52 U.S.C. §20511(2); *see also Ex parte Clark*, 100 U.S. 399 (1879); *Ex parte Siebold*, 100 U.S. 371 (1879) (reading congressional power under the Elections Clause broadly to uphold criminal prosecutions under the Enforcement Acts of 1870 and 1871); *United States v. Slone*, 411 F.3d 643, 650 (6th Cir. 2005) (upholding Congressional legislation under the VRA criminalizing voting fraud, pursuant to Congress's authority under the Elections Clause and the Necessary and Proper Clause).

Congress can address, if it wishes, the problem of political gerrymandering of the electoral districts for the House of Representatives. Regulating political gerrymandering is consistent with the 1842 Apportionment Act. Precluding the states from diminishing the power of voters through at-large districts is consistent with precluding them for diluting the power of voters through gerrymandering House electoral districts. If Congress has done the former, it can surely do the latter.

Additionally, as the Court in *Ex parte Yarborough* and *ex Parte Siebold* both recognized, Congress can enact rules to protect the integrity of federal elections. Congress is not impotent against threats to federal elections such that it must allow state officials to fraudulently manipulate electoral outcomes by refusing to count valid votes or allow state officials to be intimidated such that they are cowed into changing legitimate election results because of threats of violence or political pressure.

When it comes to the manner of conducting federal elections, Congress is the sovereign and it is supreme, not the states. There is much that it can do protect the right to vote in federal elections and to safeguard the integrity of electoral results, provided it has the political will to do so.

The Elections Clause

JULY 28, 2021

REPRESENTATIVE RODNEY DAVIS, U.S. CONGRESS
RANKING MEMBER, COMMITTEE ON HOUSE ADMINISTRATION

Executive Summary:

Republicans believe that every eligible voter who wants to vote must be able to do so, and all lawful votes must be counted according to state law. Through an examination of history, our practice, the Framers' words, debates concerning ratification, the Supreme Court, and the Constitution itself, this document explains the constitutional division of power envisioned by the Framers between the States and the federal government with respect to election administration. Article 1, Section 4 of the Constitution explains that the States have the primary authority over election administration, the "times, places, and manner of holding elections". Conversely, the Constitution grants the Congress a purely secondary role to alter or create election laws only in the extreme cases of invasion, legislative neglect, or obstinate refusal to pass election laws. As do other aspects of our federal system, this division of sovereignty continues to serve to protect one of Americans' most precious freedoms, the right to vote.

The[1] Constitution reserves to the States the primary authority to set election legislation and administer elections—the "times, places, and manner of holding of elections"—and Congress' power in this space is purely secondary to the States' power. Congress' power is to be employed only in the ***direst*** of circumstances.[2] And, despite Democrats' insistence that their power over elections in this country is unfettered and permits Congress to enact sweeping legislation like H.R. 1, history, our practice, the Framers' words, debates concerning ratification, the Supreme Court, and the Constitution itself make clear their view is incorrect.

The Framing Generation grappled with the failure of the Articles of Confederation, which provided for only a weak national government incapable of preserving the Union. Under the Articles, the States had *exclusive* authority over federal elections held within their territory;[3] but, given the difficulties the national government had experienced with State cooperation (*e.g.*, the failure of Rhode Island to send delegates to the Confederation Congress),[4] the Federalists, including Alexander Hamilton, were concerned with the possibility that the States, in an effort to destroy the federal government, simply might *not hold* elections or that an emergency, such as an invasion or insurrection, might prevent the operation of a State's government, leaving the Congress without Members and the federal government unable to respond. Indeed, as counsel for the Majority so keenly observed:

> For the Founders, particularly during the Federal Constitutional Convention, the primary concern was informing the discussions of federal elections in Article I was the risk of uncooperative states. For example, Alexander Hamilton noted that by providing states the authority to run congressional elections, under Article I, Section 4, "risk[ed] 'leaving the existence of the Union entirely at their mercy.'" Following the failings of the Articles of Confederation, the Founders looked for processes that would insulate Congress from recalcitrant states. Indeed, "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation[,]" and that ***"the Clause 'was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.'"***[5]

[1] I delivered a version of this document as my opening remarks at the Committee's July 12, 2021, hearing.
[2] *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1 (Nov. 2010) (describing the origins of the Elections Clause, the meaning of "manner of" versus "manner of holding" elections, the debates leading to its adoption, and the promises made and compromises reached that led the author to conclude quite plainly, "In any event, the ratifiers clearly informed future generations how to resolve such questions: The power of Congress to regulate its own elections is a power that, while necessary to address unusual situations, nevertheless invites self-dealing and abuse. In cases of doubt, it must be narrowly construed." (*Id.* At 15.))
[3] Articles of Confederation, Article 5, Section 1.
[4] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 12 (Nov. 2010) (citing to various historical documents).
[5] Sean J. Wright, *The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections*, 81 Alb. L. Rev. 609 (2017-2018) (internal citations omitted) (alternations in original).

Quite plainly, Alexander Hamilton, a leading Federalist and proponent of our Constitution, understood the Elections Clause as serving only as a sort of emergency fail-safe, not as a cudgel used to nationalize our elections process.[6] Writing as Publius to the people of New York, Hamilton further expounds on the correct understanding of the Elections Clause: "T[he] natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, ***in the last resort***, the election of its own members."[7]

When questioned at the States' constitutional ratifying conventions with respect to this provision, the Federalists confirmed this understanding of a constitutionally limited, secondary congressional power under Article 1, Section 4:[8]

Maryland: "[C]onvention delegate James McHenry added that the risk to the federal government [without a fail-safe provision] might not arise from state malice: An insurrection or rebellion might prevent a state legislature from administering an election."[9]

N. Carolina: "An occasion may arise when the exercise of this ultimate power of Congress may be necessary . . . if a state should be involved in war, and its legislature could not assemble, (as was the case of South Carolina and occasionally of some other states, during the [Revolutionary] war)."[10]

Pennsylvania: "Sir, let it be remembered that this power ***can only operate in a case of necessity***, after the factious or listless disposition of a particular state has rendered an interference essential to the ***salvation*** of the general government."[11]

John Jay made similar claims in New York.[12] And, as Prof. Natelson notes,

> Alexander Contee Hanson, a member of Congress whose pamphlet supporting the Constitution proved popular, stated flatly that Congress would exercise its times, places, and manner authority ***only in cases of invasion, legislative neglect or obstinate refusal to pass election laws*** [providing for the election of Members of

[6] *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 11 (Nov. 2010) (quoting *Federalist* no. 59).
[7] Alexander Hamilton (writing as Publius), *Federalist* no. 59, *Concerning the Power of Congress to Regulate the Election of Members*, N.Y. PACKET (Fri., Feb. 22, 1788), *available at* https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493435 (emphasis added).
[8] *See, generally*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1 (Nov. 2010).
[9] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 12 (Nov. 2010).
[10] *Id.*
[11] *Id.* at 13.
[12] *Id.* at 13.

> Congress], or if a state crafted its election laws with a 'sinister purpose' or to injure the general government."[13]

Cementing his point, Hanson goes further to decree, "The exercise of this power must at all times be so very invidious, that congress will not venture upon it without some very cogent and substantial reason."[14] Here is language from Floor debate this Congress on H.R. 1, where I argued, as I have many other times, that:

> According to Article 1, section 4 of the Constitution, States have the primary role in establishing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Under the Constitution, Congress has a purely secondary role in this space and must restrain itself from acting improperly and unconstitutionally. Federal election legislation should never be the first step and must never impose burdensome, unfunded federal mandates on state and local elections officials. When Congress does speak, it must devote its efforts only to resolving highly significant and substantial deficiencies. State legislatures are the primary venues to correct most issues.[15]

In fact, had the Majority's view of the Elections Clause been accepted at the time of the Constitution's drafting—that is, that it offers Congress unfettered power over federal elections—it is likely that the Constitution would not have been ratified or that an amendment to this language would have been required. Indeed, at least seven[16] of the original 13 states—over half and enough to prevent the Constitution from being ratified—expressed specific concerns with the language of the Elections Clause. However, "[l]eading Federalists . . ." assured them, ". . . that, even without amendment, the [Elections] Clause should be construed as limited to emergencies."[17]

Three states, New York, North Carolina, and Rhode Island, specifically made their ratification contingent on this understanding being made express:[18]

New York:

> Under these impressions and declaring that the rights aforesaid cannot be abridged or violated, and the Explanations aforesaid are consistent with the said Constitution, And in confidence that the

[13] *Id.* at 12-13 (quoting in part *infra* n. 11).
[14] Alexander Contee Hanson (writing as Astrides), *Remarks on the Proposed Plan: 31 January*, reprinted in John P. Kaminski, Gaspare J. Saladino, and Richard Leffler (eds.), 3 *Commentaries on the Constitution, public and private 18 December 1787 to 31 January 1788* 522- 26 (1984), *available at* https://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=goto&id=History.DHRCv15&isize=M&submit=Go+to+page&page=522.
[15] Ranking Member Rodney Davis, U.S. House of Representatives Committee on House Administration, *Republican Election Law Principles* (available in this hearing's record).
[16] A record of congressional debate of August 21, 1789, as recorded in the *Annals of Congress*, suggests Maryland might also be included, which would bring the total to eight states. 1 Annals of Cong. 799 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=401.
[17] *See supra* n. 7 at 12.
[18] *Id.* at 13.

> Amendments which have been proposed to the said Constitution will receive early and mature Consideration: We the said Delegates, in the Name and in [sic] the behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution. In full Confidence . . . that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding Elections for Senators or Representatives unless the Legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same, and that in those cases such power will only be exercised until the Legislature of this State shall make provision in the Premises[.][19]

N. Carolina:[20]

> That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse or be disabled by invasion or rebellion, to prescribe the same.

Rhode Island:

> Under these impressions, and declaring, that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid, are consistent with the said constitution, and in confidence that the amendments hereafter mentioned, will receive an early and mature consideration, and conformably to the fifth article of said constitution, speedily become a part thereof; We the said delegates, in the name, and in [sic] the behalf of the People, of the State of Rhode-Island and Providence-Plantations, do by these Presents, assent to, and ratify the said Constitution. In full confidence . . . That the Congress will not make or alter any regulation in this State, respecting the times, places and manner of holding elections for senators and representatives, unless the legislature of this state shall neglect, or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that

[19] *Ratification of the Constitution by the State of New York* (July 26, 1788), *available at* https://avalon.law.yale.edu/18th_century/ratny.asp. *See also Id.* at 13 and n. 189.

[20] North Carolina's ratification document handled the issue slightly differently. It included a Declaration of Rights and several proposed amendments to the Constitution. The Convention "[r]esolved, That a Declaration of Rights, asserting and securing from encroachment the great Principles of civil and religious Liberty, and the unalienable Rights of the People, together with the Amendments to the most ambiguous and exceptional Parts of the said Constitution of Government, ought to be laid before Congress, and the Convention of States that shall or may be called for the Purpose of Amending the said Constitution, for their consideration, previous to the ratification of the Constitution aforesaid, on the part of the State of North Carolina." *Ratification of the Constitution by the State of North Carolina* (Nov. 21, 1789), *available at* https://avalon.law.yale.edu/18th_century/ratnc.asp.

> [i]n those cases, such power will only be exercised, until the legislature of this State shall make provision in the Premises[.][21]

We see clearly that the Framing Generation designed and the ratifying States understood the Elections Clause to serve as a protective backstop to ensure the preservation of the Federal Government,[22] not as a font of limitless power for Congress to wrest control of federal elections from the States.

This understanding was also reinforced by debate in the first Congress under the Constitution. "During the first session of the First Congress . . . . Representative Aedanus Burke unsuccessfully proposed a constitutional amendment to limit the Times, Places and Manner Clause to emergencies."[23] The recorded description of Representative Goodhue's comments notes that he believed the Elections Clause—according to the understanding explained in my remarks—was intended to prevent ". . . the State Governments [from] oppos[ing] and thwart[ing] the general one to such a degree as finally to overturn it. Now, to guard against this evil, he wished the Federal Government to possess every power necessary to its existence."[24] With this understanding, Mr. Goodhue voted against the proposed amendment.[25] Representative Smith of South Carolina also believed the original text of the Elections Clause already limited the Federal Government's power over federal elections to emergencies and so thought there was no harm in supporting an amendment to make that language express.[26] So, even the records of the First Congress reflect a recognition of the emergency nature of congressional power over federal elections.

Similarly, the Supreme Court has supported this understanding. In *Smiley v. Holm*, the Court held that Article 1, Section 4 of the Constitution reserved to the States the primary

> . . . ***authority to provide a complete code for congressional elections***, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements

[21] *Ratification of the Constitution by the State of Rhode Island* (May 29, 1790), *available at* https://avalon.law.yale.edu/18th_century/ratri.asp. *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 13 and at n. 183 (Nov. 2010).
[22] *See supra* n. 5 ("EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION."). *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 12 (Nov. 2010).
[23] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 13 (Nov. 2010) (citing 1 Annals of Cong. 797 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=400).
[24] 1 Annals of Cong. 801 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=402.
[25] *Id.*
[26] *Id.* at 799.

> would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections," and involves lawmaking in its essential features and most important aspect.[27]

This holding, of course, is consistent with the understanding of the Elections Clause since the framing of the Constitution. The *Smiley* court also held that while Congress maintains the authority to " . . . supplement these state regulations or [to] substitute its own[]", such authority remains merely "'a general supervisory power over the whole subject.'"[28] More recently, the Court noted in *Arizona v. Inter-Tribal Council of Ariz., Inc.* that "[t]his grant of congressional power [that is, the fail-safe provision in the Elections Clause] was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress."[29] The Court explained that the Elections Clause " . . . imposes [upon the States] the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators[.]"[30] And, while, as the Court noted, "[t]he power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith[]",[31] the *Inter-Tribal* Court explained, quoting extensively from *The Federalist no. 59*, that it was clear that the congressional fail-safe included in the Elections Clause was intended for the sorts of governmental self-preservation I've talked about today: "[E]very government ought to contain in itself the means of its own preservation[.]"; "[A]n exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs."[32]

It is clear in every respect that the congressional fail-safe described in the Elections Clause vests purely secondary authority over federal elections in the federal legislative branch and that the primary authority rests with the States. Our authority is intended to be, and as a matter of constitutional fact is, limited to addressing the worst imaginable issues, such as invasion or other matters that might lead to a State not electing representatives to constitute the two Houses of Congress.[33] Our authority has never extended to the day-to-day authority over the "Times, Places and Manner of Election"[34] that the Constitution clearly reserves to the States. Unfortunately for the Majority, this clear restriction on our authority means that we do not have the power to implement the overwhelming majority—if not the entirety—of their biggest legislative priority, H.R. 1 and related legislation, which would purport to nationalize our elections and centralize their

[27] *Smiley v. Holm*, 285 U.S. 355, 366 (1932).
[28] *Id.* (also quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)).
[29] *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1, 7-9 (2013).
[30] *Id.* at 8.
[31] *Id.* at 9 (quoting U.S. Const., Art. 1, Sec. 4 and *Ex parte Siebold*, 100 U.S. at 392).
[32] *Inter-Tribal*, 285 U.S at 8.
[33] *See, e.g., supra* n. 4.
[34] U.S. Const., Art. 1, Sec. 4.

administration in Washington, D.C. Thankfully, the Framers had the foresight to write our Constitution so as to prevent those bad policies from going into effect and preserve the health of our republic.

ZOE LOFGREN, CALIFORNIA
CHAIRPERSON

JAMIE RASKIN, MARYLAND
VICE CHAIRPERSON

SUSAN DAVIS, CALIFORNIA
G.K. BUTTERFIELD, NORTH CAROLINA
MARCIA FUDGE, OHIO
PETE AGUILAR, CALIFORNIA

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RODNEY DAVIS, ILLINOIS
RANKING MINORITY MEMBER

MARK WALKER, NORTH CAROLINA
BARRY LOUDERMILK, GEORGIA

ONE HUNDRED SIXTEENTH CONGRESS

JEN DAULBY, MINORITY STAFF DIRECTOR

November 5, 2020

The Honorable Katie Hobbs
Secretary of State
1700 W. Washington, 7th Floor
Phoenix, AZ 85007

Dear Secretary Hobbs:

Under the power granted to the House in Article I, Section 5 of the U.S. Constitution to "be the Judge of the Elections, Returns, and Qualifications of its own Members," the Committee on House Administration of the United States House of Representatives is vested under House Rules with jurisdiction over contested House elections.

Given the narrow margin in the race for the Office of Representative from the Sixth Congressional District of Arizona, the Committee is sending staff to observe the counting of votes in this election and to gather information about the conduct of the election.

The purpose of the observers is solely to gather information with respect to the election should the election later be contested in the House of Representatives. The staff has been instructed that they are to play no formal role in the vote counting process and are to function solely as observers.

The Committee requests your assistance to the staff charged with observing in this information gathering process. Your attention and cooperation in this matter are greatly appreciated. If you have any questions or concerns about ballot counting or recounting, please contact the Committee on House Administration and ask for Caleb Hays, Chief Legal Counsel for Elections, at (202) 225-8281.

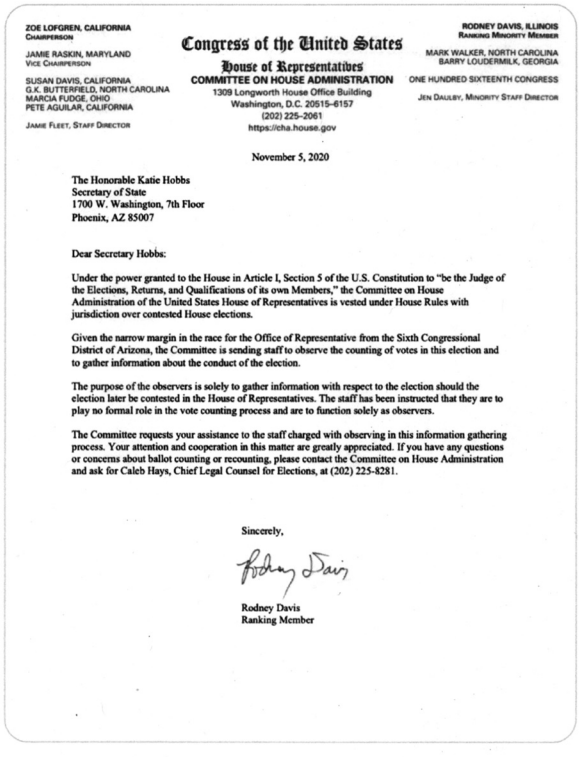
Sincerely,

Rodney Davis

Rodney Davis
Ranking Member

House Admin. Committee GOP
@HouseAdmnGOP

Maricopa County election officials are blocking entrance of Official House Election Observers, as authorized by the Speaker, to execute constitutional responsibilities of overseeing administration of congressional elections. This is an essential part of ensuring fair elections.



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