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Citation: 56 B.C. L. Rev. 159 2015

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Fri May 5 14:34:51 2017

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PROTECTING POLITICAL PARTICIPATION THROUGH THE VOTER QUALIFICATIONS CLAUSE OF ARTICLE I

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Abstract: The Voter Qualifications Clause of Article I, Section 2 of the U.S. Constitution makes federal voting rights dependent upon participation in state elections. This Article argues that the right to vote in federal elections, as defined by Article I, incorporates both i) state constitutional law governing the right to vote and ii) the democratic norms that existed within the states at the founding as the basis for determining the qualifications of federal electors. The democratic norms governing political participation can be traced to founding-era state constitutions that preserved the fundamental right of citizens to “alter or abolish” their governments at will, similar to the “right of revolution” exercised by the colonists against the British during the Revolutionary War. It is this understanding of the right to vote in federal elections, parasitic upon the robustly democratic notion of participation that existed at the state level and enshrined in state constitutional “alter or abolish” provisions, that is protected by the Voter Qualifications Clause of Article I. Contrary to this provision, courts have divorced state and federal elections, resulting in excessive judicial deference to state regulations that govern the right to vote. As this Article demonstrates, the Voter Qualifications Clause requires that states aggressively safeguard political participation in order to protect federal voting rights, which in turn requires courts to apply a higher level of scrutiny when assessing the constitutionality of state election laws.

INTRODUCTION

Recent political and legal debates over elections have focused on the authority that states have under federal law and their respective state constitutions to enact regulations that are more restrictive of voting rights than prior

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practices.¹ For example, several state legislatures have enacted strict voter identification laws on the grounds that such laws are necessary to combat the risk of in-person voter fraud, a claim that some courts and commentators have found to be insufficient to justify the burden on the right to vote.² Other battles have focused on the constitutionality of documentary proof of citizenship and English proficiency requirements as prerequisites to voter registration.³ All of these disputes have centered on the scope and contours of the states' authority to regulate access to the ballot, although it is widely assumed that states have broad authority in this area.⁴

The caselaw regarding the states' power to circumscribe voting rights is inconsistent, and much of the blame is due to the asymmetrical framework established by the U.S. Supreme Court more than four decades ago. In a series of cases, the Court held that the Voter Qualifications Clause of Article I, Section 2 of the U.S. Constitution confers a fundamental right to vote in federal elec-

¹ See Brittney Martin, *Voter ID Woes Could Soar in Higher-Turnout Elections, Officials Fear*, DALLAS MORNING NEWS, Nov. 24, 2013, <http://www.dallasnews.com/news/politics/headlines/20131124-voter-id-woes-could-soar-in-higher-turnout-elections-officials-fear.ece>, archived at <http://perma.cc/4HSU-DXNQ> (discussing a 2011 Texas law requiring voters to present a government-issued form of identification); Evan Perez, *Justice Department Sues North Carolina over Voting Law*, CNN, Sept. 30, 2013, <http://www.cnn.com/2013/09/30/us/north-carolina-voting-lawsuit/>, archived at <http://perma.cc/WAF8-SCHZ> (discussing a lawsuit filed by the Department of Justice challenging a new North Carolina law that, among other things, requires voters to have photo identification); see also *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (invalidating section 4(b) of the Voting Rights Act of 1965, which determined the jurisdictions that had to pre-clear any changes to their election laws with the federal government before the changes could go into effect because of the jurisdiction's history of racial discrimination in voting).

² See, e.g., *Frank v. Walker*, No. 11-CV-01128, 2014 WL 1775432, at *32–33 (E.D. Wis. Apr. 29, 2014) (invalidating Wisconsin's voter identification law under section 2 of the Voting Rights Act, which prohibits any law that has the purpose or effect of abridging the right to vote on the basis of race); *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988, at *18, 26 (Pa. Commw. Ct. Jan. 17, 2014) (permanently enjoining Pennsylvania's voter identification law on state constitutional grounds).

³ See *Kobash v. U.S. Election Assistance Comm'n*, 6 F. Supp. 3d 1252, 1271 (D. Kan. 2014), *rev'd*, 772 F.3d 1183 (10th Cir. 2014) (upholding a proof of citizen requirement for voter registration in federal elections); see also Erik Eckholm, *After Ruling, Alabama Joins Two States in Moving to Alter Voting Rules*, N.Y. TIMES, Mar. 22, 2014, at A13; Kerry Dougherty, *In Plain Language: Voters Should Know Their English*, VA.-PILOT, Oct. 14, 2011, <http://hamptonroads.com/2011/10/plain-language-voters-should-know-their-english>, archived at <http://perma.cc/FJ8H-NQEC?type=pdf>.

⁴ The Supreme Court recently held that, despite Congress's authority under the Elections Clause to regulate the time, places, and manner of federal elections, states have primary authority over voter qualifications. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2263 (2013) [hereinafter *Arizona Inter Tribal*] (observing that state control over voter qualifications is plenary, limited only by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments). Given this authority, states take different approaches to regulating the right to vote. See Wendy R. Weiser & Erik Opsal, *The State of Voting in 2014*, BRENNAN CTR. FOR JUSTICE (June 17, 2014), available at <http://www.brennancenter.org/analysis/state-voting-2014>, archived at <http://perma.cc/X953-DKXE> (stating that, since 2010, 22 states have passed new voting restrictions and 16 states have passed laws to improve the voting process).

tions.⁵ Yet the Court stopped short of according the same protection to the right to vote in state elections, even though Article I links state and federal political participation by requiring federal voters to “have the qualifications requisite for the electors of the most numerous branch of the state legislature.”⁶ In *Harper v. Virginia Board of Elections*, the Supreme Court opted instead to ground the right to vote in state elections in the Equal Protection Clause of the Fourteenth Amendment, which permits the state to choose whether to extend the right to vote, but once available, the state must offer it on equal terms.⁷ The equal protection framework, modified in decisions subsequent to *Harper* to be more deferential to state authority,⁸ has come to dominate the assessment of all regulations governing the right to vote, regardless if the law applies to state elections, federal elections, or both.⁹

Application of the current standard of review rarely leads to the invalidation of restrictive voting laws because the Supreme Court does not place the onus on the state to justify them.¹⁰ Contrary to this approach, this Article contends that the Voter Qualifications Clause of Article I requires that states aggressively protect political participation in order to safeguard federal voting

⁵ U.S. CONST. art. I, § 2, cl. 1 (“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.”); *id.* amend. XVII (similar requirement for senate elections); see *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (stating that “the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (holding that Art. I, § 2, of the Constitution “gives persons qualified to vote a constitutional right to vote and to have their votes counted”).

⁶ U.S. CONST. art. I, § 2, cl. 1.

⁷ See *id.* amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *Harper*, 383 U.S. at 665 (relying on the Equal Protection Clause because “the right to vote in state elections is nowhere expressly mentioned” in the Constitution); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 114 (1973) (Marshall, J., dissenting) (“The right to vote in federal elections is conferred by Art. I, § 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is ‘preservative of other basic civil and political rights.’” (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964))).

⁸ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (applying a balancing test, rather than strict scrutiny, to assess the burdens imposed on the right to vote by Indiana’s voter identification law that applied to both state and federal elections); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (same for Hawaii’s ballot access law).

⁹ Commentators have been critical of the equal protection framework. See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 110 (2000) (“[I]t is clear—a word that can rarely be used in this field of law—that the Equal Protection Clause was not originally understood by its framers to encompass voting rights.”); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 50–55 (2004) (listing a number of reasons why “the conventional understanding of individual rights and equality cannot readily be transferred to the domain of democracy”). However, scholars have not acknowledged that much of its ill-fit has to do with the implicit assumption in cases, after *Harper*, that the substance of the right to vote in federal elections also derives from the Equal Protection Clause, thus compounding the problems with the framework. See *infra* notes 42–73 and accompanying text.

¹⁰ See *infra* notes 28–116 and accompanying text.

rights.¹¹ Because Article I funnels all political participation through the aegis of the state, courts should be more attentive to state electoral rules and apply heightened scrutiny to all regulations governing the right to vote. 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.

Applying heightened scrutiny is more consistent with the constitutional text and history than the current approach because the original understanding of Article I was that political participation in federal elections would mimic the robust levels of participation that existed in the states.¹² Historically, states have always had high levels of citizen involvement in elections and governance.¹³ This remains true, as the American people enjoy an explicit right to vote under 49 out of 50 state constitutions; directly elect almost all of their state officials; and participate in lawmaking through direct democracy in many states.¹⁴ This history reveals that the right to vote in state elections is best understood, not as an equal protection fundamental interest subject to retraction,

¹¹ See *infra* notes 261–306 and accompanying text.

¹² This Article makes several historical claims about the meaning of the Voter Qualifications Clause, but these claims should not be taken as advocating for an originalist approach to constitutional interpretation. Unlike originalists, I do not believe that “constitutional interpretation should be characterized exclusively by an effort to determine the Constitution’s meaning by means of some form of historical inquiry.” Gary Lawson, *No History, No Certainty, No Legitimacy...No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1551 (2012). Nonetheless, I do believe that the original understanding of a text (as evinced by the statements of the framers, the ratifiers, and the general public) remains an important constraint on judicial interpretations of the text’s meaning, but other factors also are important in determining the meaning of the text. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 35 (2011) (arguing that constitutional law develops through “various constructions, institutions, laws, and practices that have grown up around the text”); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1372 (1993) (advocating for an interpretive approach known as “translation,” which requires courts to “locate a meaning [of the text] in an original context” and then “ask how that meaning is to be carried to a current context” in order to serve the framers’ more general purposes in light of changed circumstances). History is an important interpretative tool in both originalist and nonoriginalist approaches to constitutional interpretation.

¹³ See WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 18–19 (1972) (“‘Democracy,’ referring to a distinctive form of government, meant the direct, complete, and continuing control of the legislative and executive branches of government by the people as a whole [A]ll but extreme conservatives by 1787 conceded that a ‘democratic element’ was essential, or at least unavoidable, in the composition of state governments.”). James Madison defined a pure democracy as “a Society, consisting of a small number of citizens, who assemble and administer the Government in person.” *THE FEDERALIST* NO. 10 (James Madison), *reprinted in* 1 *DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION* 404, 408 (Bernard Bailyn ed., 1993).

¹⁴ See *Minor v. Happersett*, 88 U.S. 162, 175–76 (1874) (“All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specifically provided. These governments the Constitution did not change.”); see also Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 104 (2014) (stating that forty-nine out of fifty state constitutions contain an affirmative right to vote).

but as the centerpiece of a bundle of participatory rights derived from state law that citizens used during the founding era to directly influence and participate in government.¹⁵

In particular, the democratic nature of state governments can be traced to founding-era state constitutions that preserved the fundamental right of citizens to “alter or abolish” their governments, which was similar to the “right of revolution” exercised by the colonists against the British during the Revolutionary War.¹⁶ By the Reconstruction era, the right to vote had largely replaced the “alter or abolish” authority as the mechanism through which the people expressed their sovereign authority.¹⁷ Although scholars have acknowledged the connection between voting and popular sovereignty,¹⁸ none have properly conceptualized voting as the rightful heir of the “alter or abolish” authority. Because Article I links voter qualifications for state and federal elections, arguably it is this understanding of the right to vote in federal elections that is implicit in its text.¹⁹

This Article is divided into four parts. Part I critiques the Court’s voting rights jurisprudence where it has erroneously deferred to the states’ authority

¹⁵ Some court decisions allowed states to limit who can be an elector and have since been overruled, but these decisions rightly recognized that the right to vote derives from state law. *See, e.g.*, *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51 (1959) (inferring from various provisions of the Constitution that “the right of suffrage is established and guaranteed” for federal elections but noting that the substance of the right is “established by the laws and constitution of the State”); *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937) (“[S]ave as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate.”); *Minor*, 88 U.S. at 170 (“The United States has no voters in the States of its own creation.”).

¹⁶ *Compare* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (decreeing that “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness”), *with* PA. CONST. art. V (1776) (“[T]he community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.”), VA. CONST. § 3 (1776) (“[A] majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish [government], in such manner as shall be judged most conducive to the public weal.”), *and* THE FEDERALIST NO. 40 (James Madison) (Ian Shapiro ed., 2009) (invoking the “transcendent and precious right of the people to ‘abolish or alter their governments’” as a justification for the new constitution).

¹⁷ *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994); Christian G. Fritz, *Recovering the Lost Worlds of America’s Written Constitutions*, 68 ALA. L. REV. 261, 268 (2005).

¹⁸ *See* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002) (proposing a campaign finance system that would allow voters to donate government provided funds anonymously to candidates, resulting in more voter control over elected officials and the direction of policy); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301, 315 (1991) (arguing that voting is “a means to affirm the philosophy of popular sovereignty”); *see also* *Gray v. Sanders*, 372 U.S. 368 (1963) (linking an equally weighted vote directly to the principle of popular sovereignty).

¹⁹ *See infra* notes 117–148 and accompanying text.

over elections, ignoring that states safeguard federal rights and therefore should be subject to higher scrutiny.²⁰ As Part II demonstrates, this scrutiny is justified because Article I, Section 2 of the U.S. Constitution incorporates state substantive law governing voter qualifications as well as democratic norms regarding access to the franchise that were nascent during the founding era, but quickly developed over the course of the nineteenth century.²¹ The historical analysis in Part III illustrates that the American people have had robust political participation since the founding, first through their natural right to “alter or abolish” their state governments and later through the right to vote.²² The extension of the franchise to non-freeholding males in the first half of the nineteenth century; the decline of state “alter or abolish” provisions during the Civil War; and the significance of political rights in the wake of emancipation made voting an obvious replacement for the once vigorous “alter or abolish” authority. The Civil War era cemented the evolution of this power from one focused on violent overthrow to one centered on the premise that the legitimacy of government is determined by periodic elections that are an accurate gauge of public sentiment.

Given the democratic nature of most state governments for over two hundred years, Part IV makes the normative claim that, because states safeguard federal voting rights, Article I requires that courts apply heightened scrutiny to state voting regulations.²³ By focusing on voter identification laws and proof of citizenship requirements, this Part shows that heightened scrutiny is consistent with the original understanding of Article I, which was that citizen par-

²⁰ See *infra* notes 28–116 and accompanying text.

²¹ See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 24 (2000) (stating that the “experience of the revolution—the political and military trauma of breaking with a sovereign power, fighting a war, and creating a new state—served to crack the ideological framework that had upheld and justified a limited voting”); see also *infra* notes 117–148 and accompanying text. I recognize that most women and minorities could not vote for extended periods of time throughout American history, and universal suffrage in the eighteenth and nineteenth centuries referred to extending the right to vote to nonfreeholding white males and, in some cases, noncitizens. Nonetheless, the term “democracy” and references to “democratic norms” should be read in light of our evolving constitutional tradition of expanded access to the ballot from the founding onward. See U.S. Const. amends. XIV; XV; IXX; XXIV; XXVI; see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 974–77 (2002) (arguing that the Fourteenth and Nineteenth Amendments have to be read together despite section 2 of the Fourteenth’s language prohibition of abridgments on the right of males to vote); RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 2 (2004) (“When the states joined the Union after ratification of the Constitution in 1789, only three permitted blacks to vote: Maine, Tennessee, and Vermont. . . . By 1865, free African American men voted only in Maine, Massachusetts, New Hampshire, Vermont, and Rhode Island.”).

²² See *infra* notes 149–260 and accompanying text. Arguably, there was a consensus until at least the mid-nineteenth century that the right to alter or abolish government was a natural right that belonged to the people. See *supra* note 16 and accompanying text; see also ALA. CONST. art. 1, § 2 (1819) (referring to the alter or abolish power as “an inalienable, and indefeasible right”); MISS. CONST. art. I, § 2 (1832) (same).

²³ See *infra* notes 261–306 and accompanying text.

ticipation in the political process would continue to be dynamic and expansive post-ratification.²⁴ Thus, the state-friendly balancing test derived from *Anderson v. Celebrezze*,²⁵ *Burdick v. Takushi*,²⁶ and *Crawford v. Marion County Election Board*,²⁷ used to assess restrictions on the right to vote in state and federal elections under the Equal Protection Clause, has to be reformulated in light of these considerations. Although states have considerable authority to regulate elections, the Voter Qualifications Clause of Article I requires that courts sharpen their scrutiny of state interests in assessing regulations of the right to vote.

I. THE SUPREME COURT'S INVERSION OF THE CONSTITUTIONAL TEXT AND STRUCTURE IN ASSESSING STATE ELECTION LAWS

The Supreme Court has developed a federal right to vote that has little connection to the positive law of the states.²⁸ Under the Court's jurisprudence, the right to vote in federal elections not only has a different textual home than its state counterpart, it is also substantively different; consequently, the states' obligations to their voters can change depending on the election at issue.²⁹ In recent cases, however, the Equal Protection Clause has come to dominate the Court's assessment of all state electoral regulations.³⁰ Although commentators have criticized the dubious origins of the Court's equal protection framework, many agreed with the Court's decision to assess state voting regulations under strict scrutiny.³¹ Applying this standard, the Court struck down a series of re-

²⁴ See *infra* notes 261–306 and accompanying text.

²⁵ 460 U.S. 780, 789 (1983).

²⁶ 504 U.S. 428, 434 (1992).

²⁷ 553 U.S. 181, 190 (2008).

²⁸ See *infra* notes 29–116 and accompanying text.

²⁹ See generally Douglas, *supra* note 14 (arguing that “[t]he textual and substantive differences between U.S. and state constitutional voting-rights protections requires a state-focused methodology for state constitutional clauses that grant the right to vote”). Arguably, this “state-focused” methodology should also apply when construing the right to vote under the U.S. Constitution, precisely because Article I, Section 2 links the qualifications of federal electors to those same state constitutional provisions. See *infra* notes 261–306 and accompanying text.

³⁰ See *infra* notes 42–73 and accompanying text.

³¹ See, e.g., Alfred Avins, *The Equal “Protection” of the Laws: The Original Understanding*, 12 N.Y.L.F. 385, 427 (1966) (“[T]he right to vote is not the type of ‘protection’ contemplated by this clause. The Supreme Court’s slogan, ‘one person, one vote’ which it alleges it has derived from the Equal Protection Clause is simply a figment of that Court’s imagination.” (quoting *Reynolds v. Sims*, 377 U.S. 533, 558 (1964))); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1065–66 (1979) (arguing that, from a textual standpoint, “*Harper v. Virginia State Board of Elections*” seems a less defensible result than *Roe v. Wade*]; the framers were silent about abortion, but rather vocal about the source of authority to regulate distribution of the franchise,” but justifying the decision on the grounds that the Constitution, “taken together with the series of enfranchising amendments, evinces a commitment to political participation values”). But see William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 73–74 (arguing that some of the framers believed that section 1 of the Fourteenth Amendment allowed Congress and the courts to regulate voting rights).

strictive regulations in the 1960s and 1970s including the poll tax, malapportioned redistricting plans, and laws that impermissibly narrowed the field of eligible voters.³²

But concerns about relying on the Equal Protection Clause as the source of the right proved to be well-founded, as the Court's failure to develop an affirmative theory of voting has allowed varied, sometimes troubling, assessments of state election laws.³³ As scholars have recognized, the Court oscillates between individual and structuralist theories of the right to vote instead of developing a coherent theory.³⁴ Structuralists argue that the right cannot be divorced from the democratic values that underlie our system of elections as a whole, and in determining harm, courts must consider values such as overall competitiveness and voter participation.³⁵ Individual rights scholars, on the other hand, focus on harms independent of electoral outcomes, notably the

³² See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reynolds*, 377 U.S. at 560–61; *infra* notes 42–90 and accompanying text.

³³ Vote dilution claims present a special problem for the equal protection framework because, technically, all eligible individuals can still vote, which means it is not outright vote denial in the traditional sense, but the state has drawn legislative districts in a manner that frustrates the ability of minority groups to elect their candidate of choice. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1700 (2001) (assessing the Court's racial gerrymandering cases and arguing that "[b]y applying the same form of strict scrutiny used for conventional individual rights, the Court necessarily endorsed a conception of dilution that fails to capture what makes that injury unique.").

³⁴ There is an extensive literature debating the structuralist versus individual rights framework for conceptualizing the right to vote. Compare Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1202 (1996) ("[T]he very purpose of apportionment is to treat voters as members of groups. Thus, the usual alternative to group-based treatment, individualized decisionmaking, is unavailable."), and Pildes, *supra* note 9, at 40 ("Understandings of rights or equality worked out in other domains of constitutional law often badly fit the sphere of democratic politics The kinds of harms that constitutional law recognizes, the tools of doctrinal analysis, and the remedial options ought to be viewed distinctly in the domain of democratic institutions."), with RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 139, 154 (2003) (rejecting a structuralist approach to voting rights cases), Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1292 (2011) (arguing that the individual rights framework is appropriate for assessing the new vote denial cases, which deal with issues of who can vote rather than questions of how to aggregate votes to ensure fairness and equality among groups), and Chad Flanders, *How to Think About Voter Fraud (And Why)*, 41 CREIGHTON L. REV. 93, 150 n.138 (2008) (siding with the "individualist" rather than the "structuralist" analysis of voter fraud controversies). But see Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1102 (2005) (arguing that the rights-structure debate "does not significantly advance the goal of understanding and evaluating the role of the Court in democratic politics" because in these cases, "[w]hether styled as [involving] individual rights claims or structural claims, courts can, and most likely will and sometimes must, use an individual rights framework to confront the structural pathologies of the electoral process").

³⁵ See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998).

value intrinsic in the right to vote that, when denied, causes an expressive or dignitary harm to the voter.³⁶

In reality, the right to vote can be explained by one of these theories, all of these theories, and possibly, none of these theories, at any given time.³⁷ There will be instances of vote denial that implicate the expressive, or as Joseph Fishkin frames it, the “dignitary” dimensions of voting that signal one’s place in the community as a full citizen.³⁸ Similarly, the right to vote also factors into democratic design and electoral outcomes such that judicial decisions concerning politics and governance must account for the right in critiquing the rules and regulations that structure democracy.³⁹

Despite these approaches, one cannot develop an affirmative theory of voting without a full appreciation of the framework created by the constitutional text with respect to voter qualifications and, by implication, political participation.⁴⁰ Yet courts and commentators have ignored the text and structure, and as a result, much of the case law has developed exactly backwards. As this Part shows, the strict scrutiny analysis once used by courts to assess voting regulations has devolved into a highly deferential balancing test derived from cases dealing with presidential elections, which are inapposite to the state and federal elections governed by Article I. Moreover, the Court has divorced state and federal voting rights in its reapportionment cases, further distancing its assessment of state electoral laws from the rigorous scrutiny that Article I demands. Finally, its jurisprudence under the Voting Rights Act of 1965 further illustrates the harms of the Court’s approach to state election laws because these cases tend to vindicate state sovereignty at the expense of protecting voter participation in the electoral process.⁴¹

³⁶ See Fishkin, *supra* note 34, at 1333–34 (arguing that the structuralist approach ignores the “equal citizenship dimension of the right to vote” where the individual voter participates, not solely because of the prospect of altering electoral outcomes, but because it signifies one’s status as a full citizen).

³⁷ See James A. Gardner, *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 900 (1997) (arguing that “[v]oting has no intrinsic value”). But see Fishkin, *supra* note 34, at 1296 (discussing the dignitary and expressive value of voting).

³⁸ Fishkin, *supra* note 34, at 1296, 1334.

³⁹ See Richard H. Pildes, *What Kind of Right Is “The Right To Vote”?*, 93 VA. L. REV. IN BRIEF 45, 46 (2007), <http://www.virginialawreview.org/sites/virginialawreview.org/files/pildes.pdf>, archived at <http://perma.cc/78XV-YVY2>.

⁴⁰ This Article does not seek to engage in the individual/structuralist debate, and instead focuses on the logical starting point for determining the substance of voting rights—the constitutional text and history—which would precede any analysis about the scope of judicial review.

⁴¹ 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 (codified as amended in scattered sections of 42 U.S.C.). The Voting Rights Act is also referred to herein as “VRA” or “the Act.”

A. Turning Left Instead of Right: Voter Participation and Judicial Confusion between Article I and Article II Elections

Arguably, the Court's current methodology has been harmful to voting rights, but oddly, its deferential approach derives from cases that were extremely protective of the right to vote. In *Harper v. Virginia Board of Elections*, the Court applied strict scrutiny and invalidated the poll tax on the grounds that the tax invidiously discriminated on the basis of wealth.⁴² *Harper* marked a notable departure from a case, decided just seven years earlier, applying rational basis review to a state law that imposed a literacy test as a prerequisite to voting.⁴³ Similarly, *Reynolds v. Sims* held that the states' failure to reapportion their state legislative districts violated the Equal Protection Clause because malapportionment, like the poll tax at issue in *Harper*, unduly infringed upon "the fundamental principle of representative government in this country [which] is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."⁴⁴ The Court then adopted a principle designed to prevent the vote dilution that had persisted through the states' failure to redistrict: one person, one vote.⁴⁵

Notably, neither *Harper* nor *Reynolds* stand for the proposition that the right to vote in state elections has to exist, even if the corresponding right to vote in federal elections must exist. *Harper* made this explicit by grounding the right to vote in federal elections in the Voter Qualifications Clause of Article I while searching elsewhere for a right to vote in state elections (including the First Amendment) before settling on the Equal Protection Clause.⁴⁶ Cases decided subsequent to *Harper* initially accorded very strong protection to the right to vote, but this trend quickly reversed itself. In *Kramer v. Union Free School District*, for example, the Supreme Court held that a childless stockbroker who lived with his parents could not be excluded from school board elections because the governing statute unduly narrowed the scope of the rele-

⁴² 383 U.S. 663, 670 (1966).

⁴³ *Lassiter v. Northampton Cnty Bd. of Elections*, 360 U.S. 45, 53–54 (1959).

⁴⁴ 377 U.S. 533, 560–61 (1964).

⁴⁵ *Id.* at 569. The Court stated:

We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Id.

⁴⁶ 383 U.S. at 666–67.

vant electorate.⁴⁷ Similarly, in *Bullock v. Carter*, the Court invalidated the filing fees Texas imposed on candidates for certain state and federal offices, finding that the fees had an appreciable effect on voting even though there were other avenues available for candidates to get on the ballot that did not require the payment of a fee.⁴⁸ Notably, the Court did not find that ballot access laws imposed the same burden on the right to vote as they did on the candidate's ability to get on the ballot.⁴⁹ Nonetheless, the Court recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation," and opted to assess the impact of Texas's ballot access law under the rigorous analysis commanded by *Harper*.⁵⁰

Kramer and *Bullock* are extensions of *Harper*'s strong conception of the right to vote as a fundamental interest, yet the caselaw quickly devolved from treating voting as a means of facilitating political power to allowing states to circumscribe political participation without adequate justification.⁵¹ Arguably, the decrease in judicial scrutiny of state electoral regulations occurred because the Court appropriated the balancing test for assessing regulations that govern presidential elections into the context of all elections. While the Court has interpreted Article I to require that the right to vote in federal elections be mandatory, Article II gives state legislatures significantly more flexibility in determining whether to extend the right to vote in presidential elections to its citizens.⁵² But once the state allows its citizens to vote for President, the Court closely scrutinizes the terms upon which the right is extended because of the weighty national interest involved.⁵³ The Court has taken a similar approach in interpreting the Equal Protection Clause, implicitly allowing states to rescind

⁴⁷ 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.").

⁴⁸ 405 U.S. 134, 146 (1972) (rejecting the State's argument that "a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition" on the grounds that it forces the candidate to bypass the primary election which "may be more crucial than the general election in certain parts of Texas").

⁴⁹ *Id.* at 142 (applying the *Harper* standard for review of ballot access laws).

⁵⁰ *Id.* at 143; *see also* *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (invalidating Tennessee's one year durational residency requirement for state voters as an infringement on the fundamental right to vote).

⁵¹ *See infra* notes 61–73 and accompanying text.

⁵² U.S. CONST. art. I, § 2, cl. 1; *id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."); *see* *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.").

⁵³ *Cf.* *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) ("We deal here not with an ordinary election, but with an election for the President of the United States.").

the right to vote in state elections, and scrutinizing only the terms upon which the right has been extended.⁵⁴ However, borrowing from Article II to determine the appropriate level of scrutiny for elections governed by Article I has led to the development of a strict-scrutiny-like balancing test that gives significant weight to the national interest implicated in presidential elections, but is overly deferential to the states when this interest is absent.

For example, in *Anderson v. Celebrezze*, the Court applied the balancing test to a restrictive law that limited the ability of presidential candidates to get on the Ohio ballot.⁵⁵ The law at issue required independent candidates to declare their candidacy earlier than the nominees of the two major political parties.⁵⁶ The majority recognized that its earlier cases had upheld ballot access restrictions in order to promote the state's interest in avoiding political fragmentation, but this precedent was "in the context of elections wholly within the boundaries" of the state.⁵⁷ In contrast, the "State's interest in regulating a nationwide Presidential election is not nearly as strong," leading the Court to invalidate the restrictive ballot access regulation in this context.⁵⁸ *Anderson* applied a version of the balancing test that was virtually identical to *Harper's* strict scrutiny standard.⁵⁹ In both cases, the Court closely scrutinized and rejected the state's reasons for its regulation.⁶⁰ However, cases purporting to follow *Anderson* weakened this standard once it was appropriated outside of the

⁵⁴ See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[I]t is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment").

⁵⁵ 460 U.S. 780, 789 (1983).

⁵⁶ *Id.* at 783.

⁵⁷ *Id.* at 804.

⁵⁸ *Id.*; see *Storer v. Brown*, 415 U.S. 724, 732 (1974) (finding that there is an "important state interest in requiring some preliminary showing of a significant modicum of support" before allowing a candidate to be on the ballot, but remanding for consideration of whether the five percent signature requirement placed an unconstitutional burden on ballot access for congressional and presidential candidates (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971))).

⁵⁹ Prior to *Anderson*, the strict scrutiny analysis required that the Court assess "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). The Court also required the state to come forward with "a substantial and compelling reason" for the regulation. *Id.* This is very similar to *Anderson's* requirement that the Court "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments," "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," "determine the legitimacy and strength of each of those interests," and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789.

⁶⁰ See *Anderson*, 460 U.S. at 796–806; *Harper*, 383 U.S. at 668; see also *Williams v. Rhodes*, 393 U.S. 23, 31–32 (1968) (invalidating a restrictive ballot access law that kept a third party off the presidential ballot on the grounds that the law was designed to insulate the two political parties from competition and therefore was not a "compelling interest" that justified the regulation).

presidential election context because the strong national interest that justified heightened scrutiny was missing.⁶¹

In *Burdick v. Takushi*, for example, the petitioner challenged a state law that prevented him from writing in Donald Duck as his candidate of choice for a Hawaiian congressional election.⁶² The Court rejected his argument on the grounds that state law provided a myriad of opportunities for the petitioner to get his preferred candidate on the ballot.⁶³ Given the other avenues for participation, the Court characterized the burden on the right to vote as “limited,” and relaxed its scrutiny of the state’s reasons for imposing the write-in ban.⁶⁴ *Burdick* treated the state’s interest as paramount to that of the petitioner because, unlike *Anderson*, there was no countervailing national interest that warranted heightened scrutiny of the state regulation.⁶⁵ As a result, the Court applied a watered-down version of the balancing test, accepting at face value the state’s interest in “avoiding the possibility of unrestrained factionalism at the general election” without requiring proof that the write-in ban furthered this interest.⁶⁶

In the years since *Burdick*, the Court has not acknowledged that the case significantly undermined *Anderson*, an outcome that was propelled by the ab-

⁶¹ Arguably, elections for members of the House of Representatives can have national implications, but unlike the elections for President and Vice President, House elections are not “national” in the sense that those elected represent the entire population of the United States. See *Anderson*, 460 U.S. at 794–95 (“In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.”).

⁶² 504 U.S. 428, 430 (1992).

⁶³ *Id.* at 436–37. The Court explained:

Although Hawaii makes no provision for write-in voting in its primary or general elections, the system outlined above provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary. Consequently, any burden on voters’ freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary.

Id.

⁶⁴ *Id.* at 438–39.

⁶⁵ *Id.* at 434. The Court explained:

Under [the *Anderson*] standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.

Id. (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)); see also *Anderson*, 460 U.S. at 788.

⁶⁶ *Burdick*, 504 U.S. at 439 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986)). But see *id.* at 448–49 (Kennedy, J., dissenting) (arguing that the state has failed to justify the ban “under any level of scrutiny” because the ban does not serve the state’s interest in preventing sore loser candidacies).

sence of a national interest that would have otherwise justified increased scrutiny of the state's interests under the balancing approach. Recently, in *Crawford v. Marion County Election Board*, the Court applied the *Anderson* balancing test to assess the burdens of Indiana's voter identification law on the right to vote.⁶⁷ Prior to *Crawford*, most litigation strategies challenging voter identification laws on constitutional grounds equated these laws to an unconstitutional poll tax.⁶⁸ This analogy forced the Court to confront the inconsistencies in its caselaw regarding the appropriate standard of review given that *Harper* had resolved the constitutionality of the poll tax using strict scrutiny; even *Anderson* applied a balancing test that was strict-scrutiny-like and proper application could have led to the invalidation of Indiana's voter identification law.⁶⁹ However, the manner in which the Court had resolved the issues in *Burdick* raised questions about the appropriate standard of review because of the Court's extreme deference to the state's regulatory interests in that case while purporting to apply *Anderson*.⁷⁰ In *Crawford*, the Court struggled to reconcile all of these conflicting cases, ultimately reserving strict scrutiny for "rational restrictions on the right to vote . . . unrelated to voter qualifications," and holding that, for the remaining regulations, courts must "identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule."⁷¹ *Crawford* thus endorsed a version of the balancing test that mimicked the Court's approach in *Burdick*, demanding little evidence from Indiana to corroborate its asserted interest in preventing fraud through its voter identification law.⁷² The Court ignored that *Burdick*'s watered down balancing test is ill-suited to protect the political participation safeguarded by the Voter Qualifications Clause. Despite the absence of a national interest, this Article will show that the appropriate standard of review is much closer to the strong version of the balancing test embraced by the *Anderson* Court.⁷³

⁶⁷ 553 U.S. 181, 190 (2008).

⁶⁸ See *id.* at 203 (noting that the petitioners' brief stressed that all the Republicans in the General Assembly had voted for the voter identification law while all the Democrats opposed it); see also *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1354–55 (N.D. Ga. 2006) (rejecting plaintiff's claim that the Georgia photo identification requirement functioned as a poll tax).

⁶⁹ See *Crawford*, 553 U.S. at 189–91.

⁷⁰ See *Burdick v. Takushi*, 504 U.S. 428, 438–39 (1992).

⁷¹ See *Crawford*, 553 U.S. at 189–90 ("[E]ven rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."). But see *id.* at 204 (Scalia, J., concurring) (arguing that the *Burdick* standard applies "[t]o evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process" and it "calls for application of a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote").

⁷² *Id.* at 194 (majority opinion) ("The only kind of voter fraud that SEA 483 addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.").

⁷³ See *infra* notes 261–306 and accompanying text.

B. Reapportionment and the Well-Intentioned, but Misguided, Judicial Safe Harbor

Drawing on *Harper's* distinction between state and federal elections, the Supreme Court's reapportionment jurisprudence has distinguished state legislative redistricting from congressional redistricting in a manner contrary to the structure of Article I.⁷⁴ In *Reynolds v. Sims*, the Court grounded the equipopulation rule of one person, one vote in the Equal Protection Clause of the Fourteenth Amendment for state legislative redistricting,⁷⁵ but in *Wesberry v. Sanders*, the companion case to *Reynolds*, the Court read the language in Article I, Section 2 that Representatives be chosen "by the People of the several States," as the source of the equipopulation principle for congressional redistricting.⁷⁶ In making this distinction, the Court ignored that Article I, Section 2 makes federal voting rights dependent upon state law, suggesting that there has to be some continuity between the standards used to assess redistricting plans at both levels of government.⁷⁷ This remains true even if the Equal Protection Clause sets minimum standards that all states must comply with in the course of drawing districts.

Thus, just as the *Harper* standard evolved from strict scrutiny into an overly-deferential balancing test, cases decided subsequent to *Reynolds* developed a safe harbor in the reapportionment context that insulated state legislative—but not congressional—redistricting plans from constitutional attack if the plan's deviation from the one person, one vote principle was less than ten percent from the ideal district.⁷⁸ In *Kirkpatrick v. Preisler*, the Supreme Court held that states have to minimize population variances and achieve precise mathematical equality "as nearly as practicable" for congressional districts.⁷⁹

⁷⁴ See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

⁷⁵ 377 U.S. 533 (1964).

⁷⁶ *Wesberry*, 376 U.S. at 7–8.

⁷⁷ See *infra* notes 117–148 and accompanying text.

⁷⁸ The Court had, on prior occasions, suggested that states must have a compelling reason for deviating from the equipopulation principle, but the Court has not been consistent in this approach. Compare *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (holding that to comport with Art. I, § 2, deviations have to be "unavoidable"), and *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (stating that the Equal Protection Clause requires states to make "an honest and good faith effort" to construct districts with equal population), with *Voinovich v. Quilter*, 507 U.S. 146, 160–62 (1993) (allowing deviations of more than ten percent from the ideal district because "[t]he Equal Protection Clause does require that electoral districts be 'of nearly equal population, so that each person's vote may be given equal weight in the election of representatives.' . . . But the requirement is not an inflexible one" (internal citation omitted)), and *infra* note 85 and accompanying text (discussing two decisions where the Supreme Court allowed deviations from the ideal district because of the state's interest in maintaining the integrity of political subdivision lines).

⁷⁹ *Kirkpatrick*, 394 U.S. at 530–31 ("The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' the 'as nearly as practica-

Although later cases interpreted the “as nearly as practicable” language from *Kirkpatrick* to impose a zero deviation standard for congressional redistricting,⁸⁰ the Court did not hold state legislative districts to the same standard because “the command of Art. I, § 2, as regards the national legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures.”⁸¹ Like the Court’s scrutiny of regulations governing presidential elections, the presence of a national interest justified heightened scrutiny of the state’s congressional redistricting plan.⁸²

In contrast, the Court has lessened its scrutiny for elections “wholly within the boundaries” of a state.⁸³ The Court has applied rational basis review to state legislative redistricting plans with deviations that resulted from policy considerations such as “making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.”⁸⁴ For example, in *Mahan v. Howell*, the Supreme Court allowed a deviation of 16.4% from the ideal district in a Virginia state legislative redistricting plan on the grounds that the state’s policy of maintaining the integrity of political subdivision lines justified the deviation.⁸⁵ In upholding the plan, the Court ignored that adhering to political subdivision lines can dilute the voting rights of residents within those districts without adequate justification.⁸⁶ In fact, the Court’s retreat from strict enforcement of the equi-

ble” standard requires that the State make a good-faith effort to achieve precise mathematical equality.” (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964))).

⁸⁰ See *Karcher v. Daggett*, 462 U.S. 725, 727 (1983) (finding that a plan with a .1384% deviation violated the one person, one vote principle).

⁸¹ *Id.* at 732–33.

⁸² See *id.*

⁸³ See *Anderson v. Celebrezze*, 460 U.S. 780, 804 (1983); *White v. Weiser*, 412 U.S. 783, 793 (1973) (“Keeping in mind that congressional districts are not so intertwined and freighted with strictly local interests as are state legislative districts and that, as compared with the latter, they are relatively enormous, with each percentage point of variation representing almost 5,000 people, we are not inclined to disturb *Kirkpatrick* and *Wells*.”).

⁸⁴ *Karcher*, 462 U.S. at 740; see also *Reynolds v. Sims*, 377 U.S. 533, 622–23 (1964) (Harlan, J. dissenting) (holding that states may consider history, economic and group interests, area, geography, “effective representation for sparsely settled areas,” “availability of access of citizens to their representatives,” theories of bicameralism, occupation, balancing urban and rural power, and voter preference).

⁸⁵ 410 U.S. 315, 324–25 (1973); see also *Brown v. Thompson*, 462 U.S. 835, 847–48 (1983) (upholding a state legislative redistricting plan that had a deviation of 89 percent from the ideal district because of state’s interest in preserving county boundaries and political subdivisions).

⁸⁶ Cf. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1327, 1329 (N.D. Ga. 2004), *aff’d*, 542 U.S. 947 (invalidating a state legislative redistricting plan in Georgia, despite having a deviation from the ideal of less than ten percent, because the plan represented “an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another”).

population principle stemmed from pragmatic concerns that did little to justify the deviation. The Court concluded that state legislative redistricting can involve significantly more seats than congressional plans, and thus “[a]pplication of the ‘absolute equality’ test . . . to state legislative redistricting may impair the normal function of state and local governments.”⁸⁷ Yet the state did not advance any arguments in *Mahan* that strict application of the one person, one vote doctrine, or instituting a plan with smaller deviations, would “impair the normal function” of its government.⁸⁸ The Court simply deferred to the state without requiring evidence that would illustrate that the deviations were necessary.⁸⁹ Because of the safe harbor, states can depart from the one person, one vote standard with impunity, despite the existence of constitutional text that strongly implies that more scrutiny is warranted.

Given this, the juxtaposition between the Court’s voter participation, ballot access, and reapportionment cases is striking. The Court ultimately concluded, in all of these contexts, that the presence of local interests justified extreme deference to the state’s regulatory prerogatives, an odd result when Article I arguably commands parity between the standards applied to state and federal elections. In recent years, the Court has responded to this need for equivalence by further decreasing its standard of review in the reapportionment context and expanding the safe harbor. In *Tennant v. Jefferson County Commission*, the Supreme Court imposed a safe harbor for congressional redistricting by expanding *Kirkpatrick*’s “as nearly as practicable” language to allow states to deviate from the equipopulation principle for policy reasons.⁹⁰ As this Part

⁸⁷ *Mahan*, 410 U.S. at 323.

⁸⁸ See *id.* at 338 (Brennan, J., dissenting). Justice Brennan criticized the majority for allowing deviations in the context of state legislative redistricting, arguing that states must come forward with a compelling justification to justify deviations in both contexts. See *id.*

⁸⁹ See *id.* at 323 (Majority opinion). Because federal voting rights are dependent upon state law, it is all but certain that population variances in state legislative redistricting will have some impact on federal voting rights. In addition, state and federal elected officials also use redistricting as a mechanism to further the common goals of their respective political party, often at the expense of voters. See generally Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 282 (2000) (“Candidates may need the parties somewhat less than they used to; state parties may be somewhat less powerful than they were formerly; but there is no doubt that political parties continue to play a crucial role in forging links between officials at the state and federal level. The political dependency of state and federal officials on each other remains among the most notable facts of American government.”); see also Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2380–81 (2006). In the context of congressional districts, there are federalism considerations that justify partisan gerrymandering in certain circumstances. See Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395, 398 (2012); Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 862–63. This justification is missing with respect to state legislative redistricting, making the safe harbor even more difficult to justify.

⁹⁰ *Tennant v. Jefferson Cnty. Comm’n*, 133 S. Ct. 3, 5 (2012) (holding that a congressional redistricting plan with a 0.79 deviation from the ideal did not violate the one person, one vote principle because the deviations were necessary to achieve legitimate state objectives).

shows, this development in the doctrine, from strict scrutiny to a rational-basis-like balancing standard that governs judicial review across the board, arguably can be traced back to *Harper*'s delineation of state and federal voting rights in contravention of the structure established by Article I.

C. The State Sovereignty Narrative and the Voting Rights Act of 1965

Like the Supreme Court's voter participation and reapportionment cases, the Court's Voting Rights Act jurisprudence reflects similar concerns about whether federal law frustrates the states' ability to carry out their constitutional tasks regarding election regulation.⁹¹ Yet the Court has ignored that Article I speaks to this very issue, instead relying on a "free-floating" federalism norm to vindicate the state interests in this area.⁹² While states enjoy broad authority to regulate state and federal elections, Article I (like the Fourteenth and Fifteenth Amendments) limits their ability to restrict voting rights in both contexts.

Until recently, sections 4(b) and 5 of the Voting Rights Act suspended all voting related changes in certain jurisdictions, mostly in the south, until those changes were approved by the federal government.⁹³ In *South Carolina v. Katzenbach*, the Supreme Court upheld section 5 of the Act on the grounds that the law was an appropriate means of carrying out the objectives of the Fifteenth Amendment, which "supersedes contrary exertions of state power."⁹⁴ *Katzen-*

⁹¹ See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.) (1965).

⁹² Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1200 (2012) [hereinafter Tolson, *Reinventing Sovereignty*]. As I have argued:

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 [Voting Rights] Act. . . . 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.

Id. (citations omitted). While the Court relies on the Tenth Amendment as the source of the state's authority over state elections, it has interpreted the Elections Clause to empower states to regulate federal elections so long as Congress chooses not to displace state regulations. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253–54 (2014). Yet the persistence of this federalism norm has led the Court to discount the breadth of congressional authority over both state and federal elections. See Franita Tolson, *Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal*, 13 ELECTION L.J. 322, 327 (2014) [hereinafter Tolson, *Congressional Authority*] (noting that recent decisions acknowledge "that various constitutional provisions bear on congressional authority over elections but . . . fail[] to incorporate them into any meaningful analysis regarding the scope of this power").

⁹³ 42 U.S.C. § 1973(c) (2006).

⁹⁴ 383 U.S. 301, 325 (1966).

bach recognized that unprecedented actions were necessary to ensure that the right to vote was extended equally to all individuals; the VRA was a necessary outgrowth of the southern states' recalcitrant and unapologetic denial of basic rights to African-Americans.⁹⁵ In upholding the Act, the Court interpreted Congress's enforcement authority under the Fifteenth Amendment to embody "the same broad powers expressed in the Necessary and Proper Clause," an expansive reading of congressional power sufficient to justify legislation that would otherwise raise federalism concerns.⁹⁶

In the years since *Katzenbach*, the Court has increased its scrutiny of legislation enacted pursuant to Congress's enforcement authority under the Fourteenth Amendment, a move that has had far reaching consequences for the VRA.⁹⁷ In recent cases, the Court has been more receptive to the state sovereignty objections lodged against the Act, circumscribing its reach in a series of decisions.⁹⁸ In particular, in the 2009 decision *Northwest Austin Municipal Utility District Number One v. Holder*, the Supreme Court explicitly recognized the tension between state sovereignty and the requirements of the Voting Rights Act.⁹⁹ Rather than invalidating sections 4(b) and 5 on federalism grounds, however, the Court read the Act broadly to allow a small utility district to "bail out" from under the statute.¹⁰⁰

⁹⁵ See *id.* at 310–15.

⁹⁶ *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.")).

⁹⁷ See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that the Religious Freedom Act of 1993 exceeds Congress' power under section 5 of the Fourteenth Amendment); Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C.L. REV. 783, 784 (2002). Although Congress originally enacted the Voting Rights Act pursuant to its authority under the Fifteenth Amendment, it reauthorized various provisions of the Act under both the Fourteenth and Fifteenth Amendments over the last four decades. See *Shelby Cnty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594, 594 (U.S. Nov. 9, 2012) (No. 12–96) (granting petition for a writ of certiorari and acknowledging that the preclearance regime is based on dual sources of constitutional authority).

⁹⁸ See, e.g., *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (holding that the state was not obligated to protect a minority influence district where doing so would violate state law because minorities were less than fifty percent of the voting population in the district and therefore had no cognizable claim under the VRA); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (holding that the Department of Justice could not deny preclearance to a plan that was discriminatory but non-retrogressive because this would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts").

⁹⁹ 557 U.S. 193, 203 (2009).

¹⁰⁰ *Id.* at 206–07 (noting that "Section 4(b) of the Voting Rights Act authorizes a bailout suit by a 'State or political subdivision'" and that the Act defines political subdivision to include "'any other subdivision of a State which conducts registration for voting,'" but rejecting the argument that the plaintiff did not qualify, even though it did not conduct its own voter registration, because "specific precedent, the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision" (citing 42 U.S.C. § 1973(c) (2006))).

In 2013, the Court finally addressed the federalism issues head-on in *Shelby County v. Holder*, invalidating the coverage formula of section 4(b), which determined the jurisdictions subject to preclearance under section 5 of the Act.¹⁰¹ According to the Court, the formula impermissibly intruded on state sovereignty because Congress relied on 40-year-old data and long-eradicated practices such as literacy tests and poll taxes in selecting the states that had to ask “permission to implement laws that they would otherwise have the right to enact and execute on their own.”¹⁰² Because the formula resulted in mostly southern jurisdictions being subject to the preclearance requirement, but not northern states that have equally problematic voting rights records, the Court held that section 4(b) violated the constitutional principle that the states enjoy equal sovereignty.¹⁰³ In the Court’s view, Congress did not build a sufficient record, based on current conditions, to justify legislation that distinguished between the sovereign states.¹⁰⁴

Commentators have been critical of the *Shelby County* decision for a number of reasons.¹⁰⁵ As I have argued in prior work, “[t]he *Shelby County* Court’s focus . . . [on whether Congress developed a formula based on] current conditions, rather than the reality that voting discrimination still exists in the covered jurisdictions, is a vast departure from prior precedent that focused instead on reading the Act broad enough to effectuate the protections of the Fourteenth and Fifteenth Amendments.”¹⁰⁶ In light of Article I, however, the majority’s departure from precedent could be justified, even if the case itself is problematic for other reasons.¹⁰⁷ Arguably, *Shelby County* shifts the responsibility of enforcing voting rights back to the states, which is consistent with the structure of Article I.¹⁰⁸ Although the Reconstruction Amendments enhanced

¹⁰¹ 133 S. Ct. 2612, 2622. (2013).

¹⁰² *Id.* at 2624.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2629.

¹⁰⁵ Scholars have questioned the origins of the equal sovereignty principle, arguing that this doctrine traces back to *Scott v. Sandford*, 60 U.S. 393 (1857), which held that African-Americans could not be U.S. citizens, and does not stand as a foundational principle from the founding era. See James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote After Shelby County v. Holder*, 8 HARV. L. & POL’Y REV. 39, 39 (2014); see also Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 179–81 (2013), <http://www.yalelawjournal.org/forum/the-dignity-of-the-south>, archived at <http://perma.cc/YS7J-JR4J>.

¹⁰⁶ See Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 436 (2014) (citing *United States v. Sheffield Bd. of Comm’ns*, 435 U.S. 110, 117–18 (1978)).

¹⁰⁷ See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 484 (2014) (noting that one plausible interpretation of *Shelby County* is that it is less an indictment of the Voting Rights Act itself and more about “communicating a message to Congress about the perils of political avoidance” in its failure to amend the VRA).

¹⁰⁸ The Court makes this shift by relying on the Tenth Amendment, instead of Article I. See *Shelby Cnty.*, 133 S. Ct. at 2623. The Tenth Amendment, however, would explain only the state’s authori-

the authority of the federal government to regulate access to the ballot, these Amendments did not completely eliminate state sovereignty in this area.¹⁰⁹

From this perspective, *Shelby County* may be better framed as a case in which the Court had to make a value judgment about whether the federal government built a record of discrimination sufficient to exercise their power under the Reconstruction Amendments, thereby departing from Article I's delegation of authority to the states to "determine the conditions under which the right of suffrage may be exercised."¹¹⁰ On this view, *Katzenbach* was correctly decided because voting related discrimination was pervasive at the time, but in the eyes of the Court, the 2006 reauthorization did not build a record of discrimination that was extensive enough to justify a departure from the structure of Article I.¹¹¹ The absence of discrimination similar to that present in *Katzenbach* provides some support for the Court's conclusion that section 4(b) is overbroad because that provision suspends *all* changes to a state's electoral laws, contrary to the state-centered framework of Article I.¹¹²

Nevertheless, the Court ignores that Article I also demands consideration of the norms of participation inherent in the Voter Qualifications Clause, and by implication, the manner in which the Reconstruction Amendments changed the states' authority over elections.¹¹³ The Court's exclusive focus on state sovereignty and its parsimonious treatment of the Reconstruction Amendments' goal of preventing voting-based discrimination precluded any meaningful analysis of whether issues of racial exclusion were still pervasive enough to justify the preclearance regime.¹¹⁴ Arguably, Article I would require such an analysis in order to justify the shift from state to federal oversight of voting

ty over its own elections and not its power to regulate federal elections. See *supra* note 92 and accompanying text.

¹⁰⁹ See U.S. CONST. amend. XIII; *id.* amend. XIV; *id.* amend. XV; see also Tolson, *Reinventing Sovereignty*, *supra* note 92, at 1200.

¹¹⁰ See *Shelby Cnty.*, 133 S. Ct. at 2623 (citing *Carrington v. Rash*, 380 U.S. 89, 91 (1965)).

¹¹¹ See *id.* at 2629.

¹¹² It is unclear whether Congress, in reauthorizing the preclearance regime, was required to create a legislative record that mimics its 1965 counterpart or else risk exceeding the scope of their enforcement authority under the Reconstruction Amendments. Compare *id.* ("Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."), with *id.* at 2651 (Ginsburg, J., dissenting) ("Congress could determine from the record whether the jurisdictions captured by the coverage formula still belonged under the preclearance regime. If they did, there was no need to alter the formula.").

¹¹³ See *infra* notes 149–260 and accompanying text.

¹¹⁴ Tolson, *supra* note 106, at 437 (noting that the equal sovereignty principle "strains credulity" because "[t]o say that Congress cannot pass legislation singling out the worst offenders, a circumstance that should justify a departure from this equality principle, would mean that Congress is constitutionally obligated to pass legislation that is overbroad so as to maintain this principle of state equality").

rights permitted by the Reconstruction Amendments.¹¹⁵ Like the reapportionment cases before it, *Shelby County* errs in prioritizing “the fundamental principle of equal sovereignty” over compelling evidence that the Constitution protects a conception of the right to vote that includes broad rights of participation. These rights expanded quickly in most states from the founding onward; were enshrined in Article I, Section 2 of the Constitution; and were later reinforced by the Reconstruction Amendments.¹¹⁶ *Shelby County* rightly recognizes that the Constitution makes the states, and not the federal government, the gatekeepers of the electoral process, but overlooks that Article I and the Reconstruction Amendments work in tandem. These provisions embrace a norm of broad participation that requires states to justify regulations that overly burden the right to vote, and also could legitimize federal oversight of state electoral processes.

II. JUSTIFYING INCREASED SCRUTINY OF STATE ELECTION LAWS: THE HISTORY OF THE VOTER QUALIFICATIONS CLAUSE OF ARTICLE I

The Constitutional Convention and ratification debates further illustrate that there are limitations on the states’ authority over voter qualifications under Article I that the Supreme Court has not accounted for in structuring its review of state electoral regulations—namely, the state constitutions. During these debates, proponents of the new Constitution relied on the Voter Qualifications Clause and the Guarantee Clause of Article IV to refute arguments that the Constitution would disenfranchise voters, pointing out that Article I’s reliance on state law prevented the federal government from disenfranchising anyone.¹¹⁷ Implicit in this defense of Article I was an assumption that the states

¹¹⁵ See *South Carolina v. Katzenbach*, 383 U.S. 301, 326, 327 (1966) (rejecting the argument that “Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms” and recognizing that Congress “has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting”); see also Tolson, *supra* note 106, at 384–86 (arguing that sections 2 and 5 of the Fourteenth Amendment together allow Congress to intervene in state electoral processes outside of reducing a state’s delegation in the House of Representatives).

¹¹⁶ *Shelby Cnty.*, 133 S. Ct. at 2623 (internal citation omitted); Derek Muller, *The Play in the Joints of the Elections Clauses*, 13 ELECTION L.J. 310, 321 (2014) (suggesting that the outcomes in the *Shelby County* and *Arizona Inter Tribal* decisions resulted from the Court’s “renewed interest in protecting states from federal encroachment”).

¹¹⁷ See U.S. CONST. art. IV, § 4, (“The United States shall guarantee to every State in this Union a Republican Form of Government.”). For further exploration of the Guarantee Clause foundations of the right to vote, see Franita Tolson, *The Living Constitution(al) Right(s) to Vote* (June 25, 2014) (unpublished manuscript) (on file with author). For Antifederalist arguments that the proposed Constitution would disenfranchise voters, see Letter from John Williams to His Constituents, ALBANY FEDERAL HERALD, Feb. 25, 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 119 (criticizing the new Constitution on the grounds that “[t]he elections may be so altered as to destroy the liberty of the people”); “Agrippa” (James Winthrop), *Amend the Articles of Confederation or Amend the Constitution? Fourteen Conditions for Accepting the Constitution*, MASSACHUSETTS GAZETTE, Feb. 5, 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 159 (“Nothing

would pose less of a threat to voting rights than the federal government. As James Madison argued in *The Federalist No. 52*:

The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the Convention therefore to define and establish this right, in the Constitution. To have left it open for the occasional regulation of Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason To have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the Convention [Article I, Section 2] appears, therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself. It will be safe to the United States; because, being fixed by the State Constitutions, it is not alterable by the State Governments¹¹⁸

This passage presents persuasive evidence of the meaning of the right to vote as protected by Article I, Section 2, suggesting that: (1) the right to vote in state and federal elections must exist because it is the hallmark of a republican form of government; (2) there is no uniform right of suffrage at the federal level, and the right varies by state; and (3) the state and federal constitutions limit the ability of state governments to alter the right to vote through ordinary legislative processes.¹¹⁹

From *The Federalist No. 52*, it is evident that Madison believed that it was important to preserve voting rights upon ratification, a view that is bolstered by the debate in the constitutional convention over whether the qualifications of federal electors should be enumerated in the Constitution.¹²⁰ This proposal was rejected because, according to James Wilson, “[i]t was difficult to form any uniform rule of qualifications for all the States.”¹²¹ Wilson further

in this constitution shall deprive a citizen of any state of the benefit of the bill of rights established by the constitution of the state in which he shall reside”).

¹¹⁸ THE FEDERALIST NO. 52 (James Madison), *reprinted* in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 182–83.

¹¹⁹ *See id.*

¹²⁰ *See id.*; JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 351 (Gaillard Hunt & James Brown Scott eds., 2007) (debate over whether qualifications of federal electors should be included in the Constitution).

¹²¹ MADISON, *supra* note 120, at 351 (comments of James Wilson). *But see id.* at 352 (comments of John Dickenson) (arguing that freeholders are “the best guardians of liberty”).

observed that, "it would be very hard [and] disagreeable for the same persons at the same time, to vote for representatives in the State Legislature and to be excluded from a vote for those in the Nat[ional] Legislature."¹²² Other delegates emphasized concerns about disqualifying voters who would otherwise be eligible to vote under state law, with some opining that this development could lead the people to ultimately reject the proposed constitution.¹²³ As Oliver Ellsworth noted, "[t]he people will not readily subscribe to the Nat[ional] Constitution if it should subject them to be disenfranchised. The States are the best Judges of the circumstances [and] temper of their own people."¹²⁴ George Mason similarly worried, "what will the people there say, if they should be disenfranchised. A power to alter the qualifications would be a dangerous power in the hands of the [Federal] Legislature."¹²⁵

Some delegates were against state control over voter qualifications because they were distrustful of the states' ability to regulate federal elections.¹²⁶ Gouverneur Morris argued that federal and state voter qualifications need not be identical because "[t]he people are accustomed to [disparate qualification standards] and not dissatisfied with it, in the several of the States" because in "some the qualifications are different for the choice of the Gov[ernor]r [and] Representatives; In others for different Houses of the Legislature."¹²⁷ Indeed, Morris was more uncomfortable with a proposal that would "make[] the qualifications of the Nat[ional] Legislature depend on the will of the States" than the potential lack of uniformity among federal and state qualifications.¹²⁸

Yet few of these delegates could dispute that the right to vote was already strongly protected by state constitutions, making any proposal that would alter

¹²² *Id.* at 351.

¹²³ *See id.* at 354. Benjamin Franklin argued that he did not think "the elected had any right in any case to narrow the privileges of electors" because the elected often used subterfuge to circumscribe the right to vote. As James Madison described in his notes:

He [Franklin] quoted as arbitrary the British Statute setting forth the danger of tumultuous meetings, and under that pretext narrowing the right of suffrage to persons having freeholds of a certain value; observing that this Statute was soon followed by another under the succeeding Parliam[en]t subjecting the people who had no votes to peculiar labors & hardships. He was persuaded also that such a restriction as was proposed would give great uneasiness in the populous States. The sons of a substantial farmer, not being themselves freeholders, would not be pleased at being disenfranchised, and there are a great many persons of that description.

Id.

¹²⁴ *Id.* at 351 (comments of Oliver Ellsworth).

¹²⁵ *Id.* (comments of George Mason).

¹²⁶ *See* MADISON, *supra* note 120, at 351 (comments of Gouverneur Morris).

¹²⁷ *Id.*

¹²⁸ *Id.*

this situation controversial.¹²⁹ For example, some delegates proposed freehold requirements for federal electors, but others believed that imposing a property restriction could derail ratification.¹³⁰ Freehold requirements were not a prerequisite to voting in all states.¹³¹ Moreover, critics of this approach argued that limiting the right to vote to property holders was too “British,” and the people would rebel against creating a system that mimicked the one that they had repudiated.¹³² Others worried less about adopting overtly British standards, and were more concerned about the possibility of corruption and bribery should the right to vote be extended to the masses.¹³³ Ultimately, a majority of the delegates decided to let states determine voter qualifications for federal elections because outlining federal criteria would explicitly disenfranchise vot-

¹²⁹ *Id.* (comments of Oliver Ellsworth) (arguing that “[t]he right of suffrage was a tender point, and strongly guarded by most of the State Constitutions”); *see, e.g.*, GA. CONST. art. 12 (1777) (“Every person absenting himself from an election, and shall neglect to give in his or their ballot . . . shall be subject to a penalty not exceeding five pounds.”); MD. CONST., Declaration of Rights, § 5 (1776) (“[E]lections ought to be free and frequent, and every man, having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage.”). Other states also had provisions for “free and fair elections.” *See, e.g.*, MASS. CONST. Declaration of Rights, art. 9 (1780); N.H. CONST. art. I, § 11 (1784).

¹³⁰ *See* MADISON, *supra* note 120, at 352 (comments of Oliver Ellsworth). Oliver Ellsworth stated:

How shall the freehold be defined? Ought not every man who pays a tax, to vote for the representative who is to levy & dispose of his money? Shall the wealthy merchants & manufacturers, who will bear a full share of the public burdens be not allowed a voice in the imposition of them—taxation and representation ought to go together.

Id.

¹³¹ *See, e.g.*, DEL. CONST. art. 4 (1776) (incorporating by reference 7 Geo. II, § 2 (1733)) (requiring that electors “be a freeholder” or “be otherwise worth Forty Pounds of lawful money”); N.Y. CONST. art. VII (1777) (requiring electors to either be a freeholder or “have rented a tenement therein of the yearly value of forty shillings”); FUNDAMENTAL ORDERS OF CONN. (1639) (providing that “choice shall be made by all that are admitted freemen”).

¹³² MADISON, *supra* note 120, at 353 (comments of George Mason). George Mason stated:

We all feel too strongly the remains of antient prejudices, and view things too much through a British medium. A Freehold is the qualification in England, and hence it is imagined to be the only proper one. The true idea in his opinion was that every man having evidence of attachment to & permanent common interest with the Society ought to share in all its rights & privileges.

Id.; *see also* VA. CONST. Bill of Rights, § 5 (1776) (requiring only that men have “sufficient evidence of permanent common interest . . . with the community”).

¹³³ *See* MADISON, *supra* note 120, at 353–54 (comments of James Madison) (arguing that “[a] very small proportion of the Representatives [in England] are chosen by freeholders. The greatest part are chosen by the Cities and boroughs, in many of which the qualification of suffrage is as low as it is in any one of the U.S.,” but noting that “it was in the boroughs and Cities . . . that bribery most prevailed”). *But see id.* at 355 (comments of Nathaniel Ghorum) (disputing that the “[c]ities & large towns are . . . the seat of Crown influence & corruption” and arguing that the “[t]he elections in Philadelphia, New York & Boston where the Merchants, & Mechanics vote are at least as good as those made by freeholders only”).

ers otherwise qualified to vote under state law, thereby undermining passage of the new Constitution.¹³⁴

The ratification debates further corroborate that the purpose of the Voter Qualification Clause of Article I was to avoid disenfranchising eligible voters. During the debates, opponents criticized various provisions of the proposed Constitution (such as a lack of annual elections for any federal offices) that, although not explicitly restricting the right to vote, could have had the effect of abridging state-granted voting rights.¹³⁵ Many viewed the rejection of annual elections to be a subversion of the people's right to vote, equivalent to a freehold requirement or outright vote denial.¹³⁶ A letter appeared in the *Independent Gazetteer* in November 1787, arguing that, under the proposed Constitution, "[a]nnual Elections are abolished, and the people are not to re-assume their rights until the expiration of *two, four and six years*."¹³⁷ Supporters of the Constitution conceded that "the doctrine of frequent elections has been sanctified by antiquity," but maintained that longer terms of office are necessary at the federal level because "[i]t is not by riding post to and from Congress, that a man can acquire a just knowledge of the true interests of the union."¹³⁸ Noah Webster similarly rejected the argument that biennial elections undermined the

¹³⁴ *Id.* at 354 (comments of John Rutledge) (arguing that "restraining the right of suffrage to the freeholders a very unadvised [idea]" because it "would create division among the people and make enemies of all those who should be excluded"); *see also id.* at 351 (comments of George Mason) (noting that "[e]ight or nine States have extended the right of suffrage beyond the freeholders").

¹³⁵ *See, e.g., "Cato," Can an American Be a Tyrant? On the Great Powers of the Presidency, the Vagueness of the Constitution, and the Dangers of Congress*, N.Y. J., Nov. 22, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 13, at 401 [hereinafter *Cato, Can an American Be a Tyrant?*]; *Reply to Wilson's Speech, an Officer of the Late Continental Army* (William Findley?), INDEPENDENT GAZETTEER, Nov. 6, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 13, at 100.

¹³⁶ *See Cato, Can an American be a Tyrant?*, *supra* note 135, at 401 ("The most general objections to the first article [which comprises the election of the house of representatives and the senate], are that biennial elections for representatives are a departure from the safe democratic principles of annual ones.").

¹³⁷ *See Reply to Wilson's Speech, an Officer of the Late Continental Army* (William Findley?), INDEPENDENT GAZETTEER, Nov. 6, 1787, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 13, at 100.

¹³⁸ *Fisher Ames on Biennial Elections and on the Volcano of Democracy*, Jan. 15, 1788, *reprinted in* 1 DEBATE ON THE CONSTITUTION, *supra* note 13, at 891–95 (arguing that "Biennial elections [are] . . . an essential security to liberty" because it allows time for "reflection and information" so as to discourage people from "nourish[ing] factions in their bosom"); *see* THE FEDERALIST NO. 53 (James Madison), *reprinted in* 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 189 ("No man can be a competent legislator who does not add . . . a certain degree of knowledge of the subjects on which he is to legislate . . . part [of which] can only be attained . . . by actual experience in the station which requires the use of it."); *see also* THE FEDERALIST NO. 52 (James Madison), *supra* note 118, at 184–85 (drawing on the history of British elections, where election frequency went from every seven years to every three; Irish elections, which "were regulated entirely by the discretion of the crown"; and elections in the colonies, which "varied for one to seven years," in order to show that "biennial elections under the federal system, cannot possibly be dangerous to the requisite dependence of the house of representatives on their constituents").

right to vote, arguing that the proposed timing of federal elections do not disturb the underlying rights of the people because the “only barrier against tyranny . . . is the *election of Legislators* by the yeomanry of the State. Preserve *that*, and every privilege is safe.”¹³⁹

The Elections Clause was another point of contention during the ratification debates, with critics arguing that this provision gave Congress too much authority over House and Senate elections.¹⁴⁰ Brutus, a well-known opponent of the Constitution, criticized the Clause for usurping the people’s authority:

Had the power of regulating elections been left under the direction of the state legislatures, where the people are not only nominally but substantially represented, it would have been secure; but if it was taken out of their hands, it surely ought to have been fixed on such a basis as to have put it out of the power of the federal legislature to deprive the people of it by law.¹⁴¹

Similarly, William Findley contended that the Clause was proof of a conspiracy to consolidate the states, “for there cannot be two powers employed at the same time in regulating the same elections.”¹⁴² The authority given to Congress under the Elections Clause, combined with the lack of annual elections, convinced many opponents of the Constitution that the states and their citizens no longer had control over the electoral process.¹⁴³

¹³⁹ “America” (Noah Webster), *Reply to the Pennsylvania Minority*, Dec. 31, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 13, at 554–55 (arguing that “the right of election is above [Congress’s] control: it *must* remain in the people, and be exercised once in two, four or six years”).

¹⁴⁰ See “Agrippa” (James Winthrop), *Amend the Articles of Confederation or Amend the Constitution? Fourteen Conditions for Accepting the Constitution*, MASS. GAZETTE, Feb. 5, 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 158 (“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 . . .”); Letter of John Spencer to James Madison, Enclosing John Leland’s Objections, Feb. 28, 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 268 (“The time place & Manner of chusing the Members of the Lower house is intirely at the Mercy of Congress, if they Appoint Pepin or Japan, or their ten Miles Square for the place, no man can help it.”); see also *Resolution of Virginia*, June 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 564 (“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.”); *Resolution of New York*, July 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 541 (same); *Resolution of North Carolina*, Aug. 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 571 (same).

¹⁴¹ Brutus, *Fair Representation Is the Great Desideratum in Politics*, N.Y. JOURNAL, Nov. 29, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 13, at 428–29 (arguing that through the “clause the right of election itself, is, in a great measure, transferred from the people to their rulers”).

¹⁴² William Findley *on the Constitution as a Plan for National Consolidation*, Dec. 1, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 13, at 818–19.

¹⁴³ See, e.g., Robert Whitehall’s *Amendments and the Final Vote*, Dec. 12, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 13, at 873 (circulating a petition of proposed constitu-

In response to these critiques, some people pointed out that the right to vote in House elections would remain a creature of state law post-ratification to illustrate that the federal government would be dependent upon the continued existence of the states.¹⁴⁴ In *The Federalist No. 45*, for example, James Madison observed that “[e]ven the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State Legislature.”¹⁴⁵ Similarly, a supporter of the Constitution calling himself “A Landholder” wrote a spirited defense in *The Connecticut Courant*, noting that, among the advantages of the new government:

The federal representatives are to be chosen by the votes of the people. Every freeman is an elector. The same qualifications which enable you to vote for state representatives, give you a federal voice. It is a right you cannot lose, unless you first annihilate the state legislature, and declare yourselves incapable of electing, which is a degree of infatuation improbable as a second deluge to drown the world.¹⁴⁶

As this Part illustrates, Article I, Section 2 incorporated the substantive versions of the right to vote enshrined in state constitutions to avoid widespread disenfranchisement, to spur ratification, and most importantly, to give the states a role in the composition of the new government.¹⁴⁷ It is this understanding of the right to vote, derived almost entirely from state law, that should drive the current judicial interpretation of the states’ authority over elections.¹⁴⁸

III. THE EVOLUTION OF THE “ALTER OR ABOLISH” POWER AND THE RISE OF THE RIGHT TO VOTE

Although the scope of voting rights varies by state, one of the key assumptions underlying the Voter Qualifications Clause was that making federal voting rights dependent upon state law would result in more, not less, political

tional amendments, including one providing that “elections shall remain free . . . and that the several states shall have power to regulate the elections for senators and representatives, without being controuled [sic] either directly or indirectly by any interference on the part of Congress, and that elections of representatives be annual”); A Columbian Patriot [Mercy Otis Warren], *Observations on the Constitution*, Feb. 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 290 (criticizing the lack of annual elections).

¹⁴⁴ See *supra* notes 116–143 and accompanying text.

¹⁴⁵ THE FEDERALIST NO. 45 (James Madison), reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 103–04.

¹⁴⁶ “A Landholder” (Oliver Ellsworth), *Reply to Elbridge Gerry*, CONN. COURANT, Nov. 26, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 13, at 236–37 (arguing that “State representation and government is the very basis of the congressional power proposed”).

¹⁴⁷ 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, 548–50 (1954).

¹⁴⁸ See *supra* notes 91–116 and accompanying text.

participation. The original understanding of the text was that federal voting rights would be defined by state substantive law, but as this Part shows, the framers also assumed that voter participation in House elections would be consistent with the political norms present in the states.¹⁴⁹ As James Madison noted in *The Federalist No. 39*, “[t]he house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State.”¹⁵⁰ Arguably, the “alter or abolish” power is one of the best indications of what citizen political participation and state political norms looked like at the founding, given that this authority was the primary mechanism that the people used to express their sovereignty until well into the nineteenth century.¹⁵¹ The people used the “alter or abolish” power to displace state laws with which they disagreed;¹⁵² to hold constitutional conventions independent of the legislature;¹⁵³ to revise their state constitutions without official ratification;¹⁵⁴ and to form new states.¹⁵⁵

¹⁴⁹ Wayne Logan has made a similar argument in the criminal law context. See, e.g., Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 146 (2009) (arguing that the Fourth Amendment right to be free of illegal search and seizure often turns on state norms despite the Supreme Court’s treatment of the right as national in character); Wayne A. Logan, *A House Divided: When State and Lower Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. (forthcoming 2014) (pushing back on the Supreme Court’s assumption that federal rights are uniform).

¹⁵⁰ THE FEDERALIST NO. 39 (James Madison), reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 13, at 30.

¹⁵¹ See Fritz, *supra* note 17, at 262. As Fritz observed:

State constitutionalism springs from our colonial inheritance, but underwent a uniquely American shift from a belief in a right of revolution based in natural law to the notion of a central role of ‘the people’ as the ultimate sovereign. The people’s role found expression in written constitutions and took shape in the constitutional transformation from the conventional right of revolution to the right of the people to alter or abolish the constitutional order under which they chose to be governed.

Id.

¹⁵² See generally Larry D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

¹⁵³ Richard L. Mumford, *Constitutional Development in the State of Delaware, 1776–1897*, at 108–09 (1968) (unpublished Ph.D. dissertation, Univ. of Delaware) (on file with author) (noting that Delaware’s 1776 Constitution “did not include any mode of calling a convention [but] [i]t was called on the assumption that the people retained an inherent right to change their frame of government”).

¹⁵⁴ See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside of Article V*, 55 U. CHI. L. REV. 1043, 1051–52 (1988) (arguing that Massachusetts, Pennsylvania, and Maryland legally ratified the U.S. Constitution—even though its adoption effectuated a change to their existing state constitutions by a procedure not explicitly mentioned in those documents—because the natural right to alter or abolish government gave “a bare majority of the People . . . a legal right to amend their constitution” outside of its formal strictures); Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 RUTGERS L.J. 1327, 1352 (2004) (“Studies have long documented numerous instances—if not a tendency toward—constitutional revision bypassing established constitutional procedures.”).

Although there is an ongoing debate over whether the U.S. Constitution rejected the “alter or abolish” authority that served as the legal basis for the colonists’ split with Great Britain,¹⁵⁶ this right remained vibrant in the states during the post-Revolutionary War era.¹⁵⁷ The mechanisms through which the people, as collective sovereign, could express their will varied in the states, ranging from the formal use of procedural mechanisms; the informal use of the “alter or abolish” authority; or some variation of both.¹⁵⁸ For example, the federal government and some state governments required that their constitutions be amended only by way of formal procedures.¹⁵⁹ Other state governments were not as formalistic, delegating significant authority to the people to revise

¹⁵⁵ See JAMES QUAYLE DEALEY, *GROWTH OF AMERICAN STATE CONSTITUTIONS: FROM 1776 TO THE END OF THE YEAR 1914*, at 50 (1915) (noting that, in eight of the states that entered the union between 1831 and 1860, “the inhabitants, in their eagerness for statehood, called a convention on their own account and then petitioned congress for admission”); Fritz, *supra* note 154, at 1352 (“[O]nly one of the seven constitutions that formed states out of the Northwest Territory between 1801 and 1830 was [submitted to a constitutional convention and] ratified by the people” and “of the 119 constitutions created between 1776 and 1900, 45 constitutions (roughly 38%) were adopted without [constitutional convention and] popular ratification . . .”).

¹⁵⁶ See Amar, *supra* note 154, at 1050–51 (arguing that Article V is a nonexclusive means of amending the Constitution because the people still retain their right to alter or abolish the government); see also CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 135 (2009) (“The federal Framers did not include alter or abolish language in the federal Constitution. Moreover, they rejected the assumption that the sovereign source creating the constitution retained an inherent right of revision. The Framers’ position dramatically departed from an expansive view of the people’s sovereignty.”); *supra* note 135–136 and accompanying text. But see Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 130 (1996) (criticizing Amar for overlooking “the democracy restraining nature of the Constitution” in trying to draw parallels between Article V and the traditional understanding of the alter or abolish power).

¹⁵⁷ See *supra* note 16 and accompanying text.

¹⁵⁸ Compare GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 1789–1815*, at 31 (2009) (“In addition to correcting the deficiencies of the Articles of Confederation, the Constitution was intended to restrain the excesses of democracy and protect minority rights from overbearing majorities in the state legislatures.”), with Fritz, *supra* note 154, at 1359:

[W]e assume from Wood’s description of the rise of a more constrained proceduralism [through the adoption of Article V] that the constitutionalism of the early revolutionary period has been dead for over two centuries. But the . . . records of nearly a hundred constitutional conventions after 1787 belie the assumption that non-procedural constitutionalism died with the birth of the Federal Constitution. . . . In the years following the Constitution’s adoption, Americans continued to dispute, both at the federal and state level, whether constitutional procedures could limit the powers of the sovereign—the people—who created those constitutions.

Fritz, *supra* note 154, at 1359.

¹⁵⁹ See Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 178 (1997) (“Article V can be seen as the Constitution writ small [because] [i]t affirms the right of the people to alter or abolish their government . . . [but] the institutional procedures and supermajority requirements help guarantee that reason and not passion guide the sovereign people.”).

their state constitutions at will.¹⁶⁰ Five of the eleven states that drafted constitutions during the Revolutionary War included “alter or abolish” provisions,¹⁶¹ and many states adopted these provisions upon entry into the union post-ratification.

However, missing from this narrative is a discussion of how, over the course of the nineteenth century, expanded access to the franchise helped bridge the gap between the nonprocedural lawmaking of the people’s “alter or abolish” authority and formal amendment procedures like Article V. As this Part shows, Reconstruction-era disputes over voting rights and the legal status of the former confederate states ultimately led to the domestication of state “alter or abolish” provisions, a process that provided an opening for the right to vote to become the medium for expressing the people’s sovereign authority outside of the strictures of formal constitutional amendment.¹⁶²

Unlike the “alter or abolish” authority, voting minimized the risk of political disruption, mob action, and violent regime overthrow while preserving the people’s ability to influence lawmaking and governance.¹⁶³ Through elections, the people could remove elected officials, vote on referendum and ballot initiatives, and call for state constitutional conventions. Because the Voter Qualifications Clause links federal voting rights to participation in state elections, this provision also incorporates these state level norms about the nature of the right to vote as the successor to the “alter or abolish” power and, as such, an expression of popular sovereignty.

A. The Influence of Political Rights on the “Alter or Abolish” Authority During the Founding and Antebellum Eras

The structure of the federal government as described by the U.S. Constitution is not populist in the same way as state governments. In particular, the

¹⁶⁰ State constitutions at the founding constantly evolved because drafters looked to the constitutions of sister states in writing, revising, and creating their own constitutions. See Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 207–08 (2000) (“Compilations [of existing state constitutions] facilitated the first wave of constitution-making after the Revolution and produced an enduring trait of American constitution-making: a clear instinct for comparison, modeling, and borrowing. Newspapers regularly published the texts of state constitutions, which were subjected to close analysis and scrutiny by revolutionary constitution-makers.”); see also JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 3 (2006) (“[T]he drafters of the federal Constitution established a rigid amendment and revision process, [but] state convention delegates have almost uniformly rejected this approach and adopted relatively flexible procedures for constitutional change . . .”).

¹⁶¹ FRITZ, *supra* note 156, at 24.

¹⁶² For a similar analogy, see Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 351 (2010) (arguing that presidential impeachment is the “domestication of assassination” because “[t]he Constitution’s impeachment procedures make the removal of the chief magistrate less violent, less disruptive, and less error-prone than assassination”).

¹⁶³ See Amar, *supra* note 17, at 463.

text limits the direct involvement of the people to selecting members of the House of Representatives (and later, the Senate).¹⁶⁴ The Constitution's division of power among the federal government, the states, and the people reflects the selective use of popular sovereignty to validate the new powers of the national government while preserving majoritarianism at the state level.¹⁶⁵ Given the Constitution's structure, it is unsurprising that there is no mechanism for direct democracy at the federal level nor does the Constitution contain an "alter or abolish" provision similar to those that existed in state constitutions during the founding.

Nevertheless, the people's right to "alter or abolish" their government persisted in the states.¹⁶⁶ For example, the state that later became Vermont, relying on the "alter or abolish" authority, attempted to break away from New York in 1777, but leaders from the Continental Congress rejected this attempt as "untenable."¹⁶⁷ Many state leaders agreed that this authority could be dangerous, but did not believe they had the authority to eliminate the "alter or abolish" power outright because of its connection to the "right of revolution"

¹⁶⁴ See U.S. CONST. art. I, § 2 (stating that the House of Representatives shall be composed of members chosen "by the People of the several States," but delegating to states the responsibility of choosing the qualifications of the electors); *id.* art. I, § 5, cl. 1 (constraining the people's authority over elections by delegating to each house of Congress the power to be the "Judge of the Elections, Returns, and Qualifications of its own Members"); see also A. JAMES REICHLEY, *THE LIFE OF THE PARTIES* 29, 34 (1992) (describing how the electors, not voters, select the President of the United States, which was a compromise between election by popular vote and selection by Congress).

¹⁶⁵ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1436 (1987) ("[A]s sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers So long as the People at all times retained the ability to revoke or modify their delegations, such agency relationships were in no sense a surrender or division of ultimate sovereignty."); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 21 (1993) ("[The framers] attempted to carry forward the classical republican belief in virtue . . . but to do so in a way that responded realistically, not romantically, to likely difficulties in the real world of political life We might understand the Constitution as a complex set of precommitment strategies, through which the citizenry creates institutional arrangements to protect against political self-interest, factionalism, failures in representation, myopia, and other predictable problems in democratic governance").

¹⁶⁶ See Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J.L. & POL. 189, 238 (2014).

¹⁶⁷ FRITZ, *supra* note 156, at 55 (noting that "Americans could 'alter or abolish' their governments but congressional leaders faced a quandary" because "maintaining the status quo of newly established American governments was a more pressing concern than extending the logic of the Revolution's principles that might challenge those governments"). Shay's Rebellion, an armed uprising in Massachusetts in 1786 over the post-Revolutionary War economic depression, also raised concerns about the citizens' authority to alter or abolish government, leading revolutionary leaders to take a different view regarding the scope of this authority. See Knapp, *supra* note 166, at 238 ("In the decade after Independence, the intellectual tides increasingly turned against the more radical articulations of popular power that had debuted in the heady days of revolution—a trend that began as early as 1778 and which culminated in an oft-expressed fear of anarchy in the wake of Shay's Rebellion.").

in the Declaration of Independence.¹⁶⁸ Instead, some post-1776 state constitutions circumscribed this authority by adding mechanisms by which state constitutions could be formally amended.¹⁶⁹

The adoption of the Guarantee Clause in 1787 necessitated further changes to the natural right to “alter or abolish” state government. The requirement of republicanism for state governments, although ill-defined during the founding era, arguably was a repudiation of the violence that had accompanied traditional exercises of this power.¹⁷⁰ Republicanism, in the view of some framers, required citizen political participation and eschewed violent overthrow of the government, further validating the turn away from an “alter or abolish” power centered in violence to one premised on political rights.¹⁷¹ As Roger Sherman argued during the ratification debates, a republican government is one that has three branches of government, including legislative and executive branches determined “by periodical elections, agreeable to an established constitution; and that what especially denominates it a republic is its dependence on the public or the people at large, without hereditary powers,” a view that appeared to be fairly common during this period.¹⁷²

¹⁶⁸ See Amar, *supra* note 154, at 1050 (describing the people’s alter or abolish authority as an “inalienable legal right—that is, a right that [the people] were incapable of waiving, even if they tried”).

¹⁶⁹ FRITZ, *supra* note 156, at 242 (“With one exception, every state between 1820 and 1842 holding a constitutional convention inserted a provision for amendment if one did not already exist in its constitution.”).

¹⁷⁰ According to William Wiecek, there was very little consensus about what the Guarantee Clause of Article IV actually required in order for a government to be “republican.” WIECEK, *supra* note 13, at 13. Wiecek noted:

If the word [Republican] did have a definable meaning it probably had several, and they may have been vague, ambiguous, multifarious, or conflicting A republic might have been the antithesis of a monarchy or an aristocracy, yet [John] Adams and others found no difficulty in imagining monarchic or aristocratic republics. Some of the framers and their contemporaries expected the concept of republican government to change over time, hopefully perfecting the experiment begun by the Revolution.

Id.; see also MADISON, *supra* note 120, at 353 (comments of James Madison) (describing the right to vote as “one of the fundamental articles of republican Government”).

¹⁷¹ See MADISON, *supra* note 120, at 280 (comments of James Wilson) (arguing that the Guarantee Clause “secure[d] the States ag[ain]st dangerous commotions, insurrections and rebellions”). Countless law review articles have been written on what constitutes a republican form of government, and many scholars agree that republicanism requires that states extend political rights to their citizens. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 122–23 (1980) (noting that the Guarantee Clause could be the source of the Court’s voting rights jurisprudence); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (arguing that republican government requires that “the structure of day-to-day government—the Constitution—be derived from ‘the People’ and be legally alterable by a ‘majority’ of them”).

¹⁷² Letter from Roger Sherman to John Adams, July 20, 1789, in 4 *THE WORKS OF JOHN ADAMS* 437 (C. Adams ed., 1856); see *THE FEDERALIST* NO. 39 (James Madison), *supra* note 150, at 27 (defining a republican government as “a government which derives all of its powers directly or indirectly

The rejection of a violent “alter or abolish” power, though a firmly entrenched natural right, also corresponded to discussions in the eighteenth and nineteenth centuries about whether voting was a natural right.¹⁷³ Increased ballot access and more expansive voting rights in the states predictably influenced eighteenth and nineteenth century debates over the validity of the people’s “alter or abolish” authority.¹⁷⁴ The framers’ decision to link voter qualifications for state and federal elections made it inevitable that the democratic tide in most states would bleed over into the federal realm, and as discussed in Part II, many of the delegates actually expected and welcomed this outcome.¹⁷⁵ As Alexander Keyssar argued in his seminal study of the right to vote, “The idea that voting was a right, even a natural right, had become increasingly widespread in the eighteenth century (its ancestry dated to antiquity) and was embraced by many small farmers and artisans, as well as by the most radical leaders of the revolution such as Franklin, Thomas Young of Pennsylvania, and Ethan Allen of Vermont.”¹⁷⁶

Although the concept of voting as a natural right did not become the dominant view,¹⁷⁷ these discussions introduced the idea that the act of voting is an expression of popular sovereignty. Indeed, these debates about who should have access to the ballot significantly influenced the political landscape post-ratification.¹⁷⁸ Notably, states expanded voting rights in the first half of the nineteenth century despite the lack of firm support in natural rights theory.¹⁷⁹

from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior”); see also WIECEK, *supra* note 13, at 17 (“The negative senses of ‘republican’ that is nonmonarchical and nonaristocratic commanded the assent of most Americans in 1787. Beyond this it is unsafe to generalize about the precise meaning of the term.”).

¹⁷³ KEYSSAR, *supra* note 21, at 12.

¹⁷⁴ See KRAMER, *supra* note 152, at 109 (noting that citizen demands to “control the course of government” was reflected in “expanded suffrage and higher voter turnout”).

¹⁷⁵ See *supra* notes 120–128 and accompanying text.

¹⁷⁶ KEYSSAR, *supra* note 21, at 12; see also MADISON, *supra* note 120, at 354 (comments of Benjamin Franklin) (arguing that “the elected [did not have] any right in any case to narrow the privileges of electors”).

¹⁷⁷ See KEYSSAR, *supra* note 21, at 12 (discussing how the notion of voting as a natural right had gained a foothold in post-revolutionary America because “it meshed well with the Lockean political theory popular in eighteenth-century America, it had a clear antimonarchical thrust, and it had the virtue of simplicity,” but such arguments never became dominant because “there was no way to argue that voting was a . . . natural right without opening Pandora’s box”). The Supreme Court implicitly rejected the natural right argument in *Luther v. Borden*, which is famous for holding that the power to determine whether a state government has been lawfully established is a political question. See 48 U.S. 1, 42 (1849). The case also involved a challenge to the voting provisions of the Rhode Island Constitution because, according to the petitioners, the property requirements excluded half the state’s population of white males from voting.

¹⁷⁸ See *infra* notes 179–201 and accompanying text.

¹⁷⁹ See CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760–1860*, at vii, 42 (1960).

This change was prompted by the shrinking electorate,¹⁸⁰ but the expansion of the voter base was also a foreseeable consequence of granting the people broad authority to choose which candidates would be on the ballot.¹⁸¹ Although many states retained freehold requirements for voters in the early decades of the nineteenth century,¹⁸² state officials were quite liberal in allowing almost anyone to run for office in both state and federal elections.¹⁸³ For example, New Jersey law provided that “it shall . . . be lawful for every Inhabitant of this State, who is or shall be qualified to vote for Members of the State Legislature, to nominate four Candidates to the Choice of the People, as Representatives in the said Congress of the United States, by writing on one Ticket or Piece of Paper the Names of four Persons . . . at least thirty Days previous to the Day of Election”¹⁸⁴ Thus, New Jersey limited who could vote, but not who could be a candidate so long as the individual met the age, residency, and citizenship requirements of the U.S. Constitution.¹⁸⁵ Notably, the New Jersey Constitution of 1776 required its legislators to be freeholders, but its 1787 election law, adopted to implement the newly ratified Constitution, did not impose this requirement on House and Senate candidates.¹⁸⁶

Similarly, New York’s election law divided the state into six districts and gave the people in each district the authority to elect one representative without articulating any constraints on who could be nominated outside of those criteria specifically mentioned in the U.S. Constitution.¹⁸⁷ Connecticut likewise provided that “each [Freeman shall] give his Votes or Suffrages for a number not exceeding twelve Persons whom he Judges Qualified to stand in nomination for Representatives of the People of this State to the Congress of

¹⁸⁰ *Id.* at 260 (discussing the increasing number of adult males who could not meet the property qualifications that were a prerequisite to voting in many states).

¹⁸¹ Numerous scholars have noted the connection between who can be on the ballot and who can participate in the election. See Issacharoff & Pildes, *supra* note 35, at 715. However, the practical reality is that it is difficult for the state to allow anyone to be a candidate while circumscribing that candidate’s support amongst the electorate through restrictive voter registration requirements.

¹⁸² See 3 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790, at 365 (Gordon Den Boer et al. eds., 1986) [hereinafter THE FIRST FEDERAL ELECTIONS] (quoting freehold requirements in the 1787 New York Constitution).

¹⁸³ It was not clear in the nineteenth century that states were barred from adding to the qualifications outlined in the Constitution for House and Senate candidates. Compare *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (holding that states do not have this authority), with Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. PITT. L. REV. 97, 101 (1991) (arguing that “the states’ power under Article I, Section Two, to set qualifications for the House of Representatives implies a power to set qualifications for federal representatives as well”).

¹⁸⁴ 3 THE FIRST FEDERAL ELECTIONS, *supra* note 182, at 16.

¹⁸⁵ See U.S. CONST. art. I, § 2, cl. 2.

¹⁸⁶ N.J. CONST. § 3 (1776); 3 THE FIRST FEDERAL ELECTIONS, *supra* note 182, at 16–18.

¹⁸⁷ 3 THE FIRST FEDERAL ELECTIONS, *supra* note 182, at 361–62 (listing the same qualifications as Article I, Section 2 of the U.S. Constitution).

the United States.”¹⁸⁸ Delaware also placed few constraints on who can be nominated for Congress, allowing voters to name “two persons” for the one congressional seat, subject only to the limitation that “one of whom at least shall not be an Inhabitant of the same County with themselves.”¹⁸⁹ Virginia, by contrast, was one of the more restrictive states and allowed voters to name one person for the office so long as that person was “a freeholder and . . . a bona fide resident for twelve months.”¹⁹⁰

This virtually unfettered ability to nominate candidates “of the people,” once conceived as an aspect of the people’s sovereign authority,¹⁹¹ made the slide toward liberal access to the ballot inevitable. The change was gradual at first, with Delaware eliminating its property qualification for voting in 1792 and Maryland right after the turn of the century.¹⁹² Then, Massachusetts and New York allowed broader access to the ballot in the 1820s, with Virginia and North Carolina doing the same in the 1850s.¹⁹³ Between 1830 and 1855, six states abolished the poll tax,¹⁹⁴ and “none of the new states admitted to the union after 1790 adopted mandatory property requirements in their original constitutions.”¹⁹⁵ In turn, state legislatures compelled municipalities to adopt more liberal voting regulations for local elections, leading to a convergence between state and local regulations that governed voter qualifications by the 1850s.¹⁹⁶

The expansion of the franchise coincided with the rise of mass political parties in the 1820s, and organized politics made it more likely that political rights could facilitate the people’s sovereign authority.¹⁹⁷ The competition between the political parties led to additional voting reforms, which had become a partisan political issue during this time.¹⁹⁸ These reforms led to the election

¹⁸⁸ 2 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788–1790, at 24 (Gordon Den Boer et al. eds., 1984) [hereinafter THE FIRST FEDERAL ELECTIONS].

¹⁸⁹ *Id.* at 71.

¹⁹⁰ *Id.* at 294.

¹⁹¹ See Letter from Samuel Adams to John Adams, Nov. 20, 1790, in 4 THE WORKS OF JOHN ADAMS 420–21 (C. Adams ed., 1856) (arguing that the people exert their sovereignty when “they delegate the exercise of the powers of government to particular persons, who, after short intervals, resign their powers to the people, and they will reelect them, or appoint others, as they see fit”); see also Hills, *supra* note 183, at 123 (defending the ability of state citizens to add qualifications for federal legislators as an aspect of popular sovereignty).

¹⁹² KEYSSAR, *supra* note 21, at 29.

¹⁹³ *Id.* at 31.

¹⁹⁴ *Id.*; see also KRAMER, *supra* note 152, at 191–92 (“Wealth restrictions on voting by white men were abandoned in many states even before the 1820s, and other majority-restrictive devices were similarly replaced during these years. By the time of Andrew Jackson’s first election in 1828, significant property or tax-paying requirements for voting existed in no more than two or three states, and only in South Carolina were presidential electors not popularly chosen.”).

¹⁹⁵ KEYSSAR, *supra* note 21, at 29.

¹⁹⁶ *Id.*

¹⁹⁷ DINAN, *supra* note 160, at 144 (noting that “[c]onstitution makers during this period came under pressure to eliminate any distinctions grounded in property holdings”).

¹⁹⁸ KEYSSAR, *supra* note 21, at 39–42.

of more populous candidates such as Andrew Jackson, who ended the reign of the founding-era aristocracy.¹⁹⁹ Voting's evolution from a tool of the landed gentry to one dominated by the masses provided an answer to the perplexing question of "how could the people act as one, like a traditional sovereign" without violence.²⁰⁰ Over the next several decades, the right of the people to alter or abolish their governments "became domesticated and legalized" in each of the colonies, where "[b]allots would replace bullets."²⁰¹

B. Cementing a New Understanding of "Alter or Abolish": The Civil War and Reconstruction-Era State Constitutions

The people's authority to "alter or abolish" their state governments was officially relegated to the political processes during the Reconstruction era, creating an enduring link between this authority and the right to vote.²⁰² The Civil War forced elected officials to confront the constitutionality of state "alter or abolish" provisions because the confederate states relied on this authority as one of the main legal arguments justifying secession.²⁰³ The confederacy asserted that the U.S. Constitution was a compact that the federal government breached due to its failure to allow slavery in more of the territories acquired

¹⁹⁹ WILLIAMSON, *supra* note 179, at 223 (noting that upon Jackson's 1829 inauguration, "only two of the states comprising that section of the country where he had been born required a freehold qualification for voting in any elections, North Carolina and Virginia"); *see also* FLA. CONST. art. I, § 4 (1838) ("That all elections shall be free and equal, and that no property qualification for eligibility to office, or for the right of suffrage, shall ever be required in this State."); MISS. CONST., art. I, § 20 (1832) ("No property qualification for eligibility to office, or for the right of suffrage, shall ever be required by law in this State.").

²⁰⁰ Fritz, *supra* note 17, at 268; *see also* KRAMER, *supra* note 152, at 24–25 (arguing that voting, along with the rights of assembly, speech, and petition, are expressions of popular sovereignty); John Adams, *Adams' Diary Notes on the Right of Juries*, Feb. 12, 1771, in LEGAL PAPERS OF JOHN ADAMS 228–29 (L. Kinvon Wroth et al. eds., 1965) (describing voting as "the Part which the People are by the Constitution appointed to take, in the passing and Execution of the Laws").

²⁰¹ *See* Amar, *supra* note 17, at 463.

²⁰² *See id.* at 458 (arguing that "popular sovereignty principles in America [had] evolved beyond the Lockean core of the Declaration and established the legal right of the polity to alter or abolish their government at any time and for any reason, by a peaceful and simple majoritarian process"); *see also* FRITZ, *supra* note 156, at 124–26 (discussing debates in 1787 about whether the alter or abolish provision in the Maryland Constitution, which described all government officials "as 'the trustees of the public'" included a corresponding right of the people to instruct their representatives to the Senate).

²⁰³ States that explicitly relied on the alter or abolish authority as a basis for secession are South Carolina, Mississippi, Georgia and Texas. *See* ORDINANCES OF SECESSION, available at http://www.constitution.org/csa/ordinances_secession.htm, archived at <http://perma.cc/47B7-GSZ6>; *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union* (Dec. 24, 1860) [hereinafter *Declaration of the Immediate Causes-South Carolina*], available at http://avalon.law.yale.edu/19th_century/csa_scarec.asp, archived at <http://perma.cc/8Y2C-WMEP>; *see also* G. Edward White, *Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 480–81 (2011).

in the first half of the nineteenth century,²⁰⁴ and that the non-slave holding states breached due to their refusal to return fugitive slaves.²⁰⁵

The argument that the states could secede based on contract theory often was followed by the claim that all states have an inherent, natural right to overthrow the federal government.²⁰⁶ An explicit right of the people to “alter or abolish” the government appeared in six of the eleven confederate state constitutions prior to the Civil War, as well as in the constitutions of the contested border states of Missouri and Kentucky.²⁰⁷ Jefferson Davis framed secession as not only natural, but at least partially derived from the Declaration of Independence:

Our present political position has been achieved in a manner unprecedented in the history of nations. It illustrates the American idea that governments rest on the consent of the governed, and that it is the right of the people to alter or abolish them at will whenever they become destructive of the ends for which they were established. . . . In this [the confederate states] merely asserted the right which the Declaration of Independence of July 4, 1776, defined to be “inalienable.”²⁰⁸

It was this argument, along with the pressure to take a side once the war began, that pushed the last few southern states to join the confederacy.²⁰⁹ Historian William Freehling argues that the right to “alter or abolish” government was

²⁰⁴ *A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union* (Dec. 24, 1860) [hereinafter *Declaration of the Immediate Causes-Mississippi*], available at http://avalon.law.yale.edu/19th_century/csa_missec.asp, archived at <http://perma.cc/28RD-9ZH3> (“In 1819–20, [the U.S.] deprived the South of more than half the vast territory acquired from France.”).

²⁰⁵ See *Declaration of the Immediate Causes-South Carolina*, *supra* note 203. The South Carolina Declaration of the Immediate Causes stated:

Thus was established, by compact between the States, a Government with definite objects and powers, limited to the express words of the grant We hold that . . . the mode of its formation subjects it to . . . the law of compact. We maintain that in every compact between two or more parties, the obligation is mutual; that the failure of one of the contracting parties to perform a material part of the agreement, entirely releases the obligation of the other; and that where no arbiter is provided, each party is remitted to his own judgment to determine the fact of failure, with all its consequences.

Id.; see also Georgia Secession Declaration (Jan. 29, 1861), available at http://avalon.law.yale.edu/19th_century/csa_geosec.asp, archived at <http://perma.cc/J9LT-ET5J> (same).

²⁰⁶ See Jefferson Davis, Inaugural Address of the President of the Provisional Government (Feb. 18, 1861), available at http://avalon.law.yale.edu/19th_century/csa_csainau.asp, archived at <http://perma.cc/UZA5-EF9P>.

²⁰⁷ ALA. CONST. art. I, § 2 (1819); ARK. CONST. art. II, § 2 (1836); FLA. CONST. art. I, § 2 (1838); KY. CONST., art. 13, § 4; MISS. CONST. art. I, § 2 (1832); MO. CONST. art. 8, § 2 (1820); TENN. CONST. art. I, § 1 (1835); TEX. CONST. art. I, § 1 (1845).

²⁰⁸ Davis, *supra* note 206.

²⁰⁹ See WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: VOLUME II: SECESSIONISTS TRIUMPHANT, 1854–1861*, at 527–28 (2007).

absolutely essential in convincing Virginia and the rest of the somewhat reluctant southern states that they too had to secede once the war began:

Virginia and the whole Upper South needed to be shoved . . . Only when Lincoln called up the troops, to destroy the people of a state's alleged right to withdraw their consent, did disunion consume Virginia. William Rives, for example, led the Central Confederacy movement. But after Lincoln summoned the troops, Rives became a Southern Confederate partisan. "Our justification now," soared Rives, lies "in the principles of the Declaration of American Independence"—in the right to throw off a "government, which no longer stands upon the only legitimate foundation, the consent of the governed, but seeks to rule by the sword." . . . [T]he majority of Southerners . . . rejected Lower South Separatists' case for ripping apart the nation over Lincoln's menace to slavery. But Lincoln's trampling down white men's right to consent was another matter.²¹⁰

Thus, this argument, rooted in the Declaration of Independence, convinced some moderately pro-slavery states to support secession even though they were not otherwise swayed by claims of breach of contract or protecting the property rights of slave-owners as justification for outright rebellion.²¹¹ As the Mississippi declaration of secession put it, "[f]or far less cause . . . our fathers separated from the Crown of England."²¹²

Given this, Republicans in Congress focused their legislative efforts in the immediate aftermath of the war on mitigating the natural right to "alter or abolish" government and ensuring that southern states granted African-Americans the right to vote to prevent ex-confederates from overthrowing the new southern regimes.²¹³ Congress used its authority under the Guarantee Clause to suspend southern governments that deprived African-Americans of civil and political rights as non-republican in form.²¹⁴ Constitutional conventions, spear-

²¹⁰ *Id.*

²¹¹ *See id.*

²¹² *A Declaration of the Immediate Causes-Mississippi*, *supra* note 204.

²¹³ John Bingham, the primary drafter of section 1 of the Fourteenth Amendment, linked the right to vote to the protections of the Guarantee Clause:

The second section [of the Fourteenth Amendment] excludes the conclusion that by the first section suffrage is subjected to congressional laws; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people.

CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

²¹⁴ *See* Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428, 429.

headed by Republicans, amended “alter or abolish” provisions in state constitutions and barred ex-confederates from assuming elected office.²¹⁵ As a result, states that had “alter or abolish” clauses prior to the war, such as Arkansas, Alabama, Texas, and Florida, instituted provisions that were less far reaching than their predecessors of the 1830s while increasing political protections in the post-war constitutions.²¹⁶ African-American suffrage was the most important issue at the time,²¹⁷ and voting became a natural replacement for the more robust “alter or abolish” provisions that had once existed. While this change was not a repudiation of the principle that sovereignty lies with the people, it embraced the view that the vehicle for expressing this sovereignty had to be tempered by values of republicanism, including expansive voting rights and the supremacy of federal law.

During Reconstruction, only two of the state constitutions adopted in the former confederacy added “alter or abolish” provisions, and all of these provisions—both the newly added and the preexisting clauses—were qualified in favor of federal power and extensive protection of individual rights.²¹⁸ Some states did not have traditional “alter or abolish” provisions at the time of the war, but Congress nonetheless rejected their constitutions because the docu-

²¹⁵ See ALA. CONST. art. VII, § 3 (1868) (“[T]he following classes of persons shall not be permitted to register, vote or hold office: 1st, Those, who, during the later rebellion, inflicted, or caused to be inflicted, any cruel or usual punishment upon any soldier . . . of the United States, or who, in any other way, violated the rules of civilized warfare. 2d, Those who may be disqualified from holding office by the proposed amendment to the Constitution of the United States, known as ‘Article XIV’”); *infra* notes 218–260 and accompanying text; see also U.S. CONST. amend XIV, § 3.

²¹⁶ See *infra* notes 218–260 and accompanying text.

²¹⁷ See generally ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877 (1988) (discussing the challenges faced by the ex-slaves in gaining political and civil rights during Reconstruction).

²¹⁸ Those states that added alter or abolish provisions constrained this power by referencing federal law and disavowing a right of secession. See VA. CONST. art. I, § 5 (1870) (adding an alter or abolish provision); VA. CONST. art. I, § 2 (stating that “all attempts, from whatever source or upon whatever pretext, to dissolve said Union or to sever said nation, are unauthorized”); *id.* art. I, § 3 (“That the Constitution of the United States, and the laws of Congress passed in pursuance thereof, constitute the supreme law of the land, to which paramount allegiance and obedience are due from every citizen, anything in the Constitution, ordinances or laws of any State to the contrary notwithstanding.”); see also N.C. CONST. art. I, § 3 (1868) (adding an alter or abolish provision); *id.* art. I, § 4 (“That this State shall ever remain a member of the American Union; that the people thereof are part of the American nation; that there is no right on the part of this State to secede, and that all attempts from whatever source or upon whatever pretext, to dissolve said Union, or to sever said nation, ought to be resisted with the whole power of the State.”). Notably, Georgia did not have an alter or abolish provision prior to the Civil War, and adopted language in its 1861 Constitution that would limit the ability of the people to alter or change government. See GA. CONST. art. I, § 2 (1861) (“God has ordained that men shall live under government; but as the forms and administration of civil government are in human, and therefore, fallible hands, they may be altered, or modified whenever the safety or happiness of the governed requires it. No government should be changed for light or transient causes; nor unless upon reasonable assurance that a better will be established.”).

ments did not adequately protect the voting rights of the emancipated slaves.²¹⁹ For example, Congress vetoed South Carolina's 1865 constitution on these grounds, but approved a revised constitution three years later that was much more conciliatory towards voting rights.²²⁰ Unlike the 1865 constitution, the 1868 constitution gave the people the right to "at all times . . . modify their form of government,"²²¹ but subject to the caveat that "[n]o power, civil or military, shall at any time interfere to prevent the free exercise of the right of voting in this State."²²²

Like South Carolina, the Alabama constitution of 1868 gave its citizens the right to "change," but not abolish the government.²²³ Under its 1819 constitution, the people had retained "a right to alter, reform, or abolish their form of government, in such manner as they may think expedient."²²⁴ This document similarly provided that "[e]very white male person of the age of twenty one years, or upwards, who shall be a citizen of the United States, and shall have resided in this State one year next proceeding an election, and the last three months within the county, city, or town in which he offers to vote, shall be deemed a qualified elector."²²⁵ The 1868 constitution changed these requirements by eliminating the race restriction, reducing the residency requirement to six months instead of a year,²²⁶ and adding a requirement that all electors, prior to registering to vote, take an oath to "support and maintain the Constitution and laws of the United States"; "never countenance or aid in the secession of this State from the United States"; and "accept the civil and political equality of all men."²²⁷

²¹⁹ See W. Lewis Burke, *Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina After the Civil War*, 57 S.C. L. REV. 859, 861–62 (2006).

²²⁰ South Carolina did not have an "alter or abolish" provision in its constitution at the time of the Civil War, although political power was said to derive from the people. Specifically, the constitution stated: "All power is originally vested in the people; and all free governments are founded on their authority, and are instituted for their peace, safety, and happiness." S.C. CONST. art. 9, § 1 (1790). This provision remained essentially unchanged in the constitutions of 1861 and 1865. S.C. CONST. art. 9, § 1 (1861); S.C. CONST. art. 9, § 1 (1865).

²²¹ Compare S.C. CONST. art. I, § 3 (1868) ("All political power is vested in and derived from the people only; therefore, they have the right, at all times, to modify their form of government"), with S.C. CONST. art. 9, § 1 (1790) (1861) (1865) ("All power is originally vested in the people; and all free governments are founded on their authority, and are instituted for their peace, safety, and happiness.").

²²² S.C. CONST. art. II, § 2 (1868).

²²³ ALA. CONST. art. I, § 3 (1868) ("That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have, at all times, an inherent right to change their form of government, in such manner as they may deem expedient."); see also ALA. CONST. art. I, § 2 (1901) (same); ALA. CONST. art. I, § 3 (1875) (same).

²²⁴ ALA. CONST. art. I, § 2 (1819).

²²⁵ *Id.* art. III, § 5.

²²⁶ ALA. CONST. art. VII, § 2 (1868).

²²⁷ *Id.* art. VII, § 4.

Arkansas's 1868 constitution contained a provision that allowed citizens to alter or reform government, but it limited their ability to dissolve their connection with or rebel against the federal government.²²⁸ In contrast, its 1836 and 1864 constitutions gave the people an unqualified right to "alter or abolish" government at will.²²⁹ Arkansas's 1836 constitution also provided "[t]hat all elections shall be free and equal,"²³⁰ and granted voting rights to "[e]very free white male citizen . . . who shall have attained the age of twenty-one years, and who shall have been a citizen of this State six months."²³¹ Like Alabama, these criteria were expanded in 1868 to eliminate the race requirement and exclude former confederates from voting and holding office.²³²

Texas's 1836 constitution likewise granted the right to vote to every citizen, defined as "all free white persons,"²³³ "who has attained the age of twenty-one years and shall have resided six month within the district or county where the election is held."²³⁴ However, the right to vote described in its 1869 constitution was more expansive than its predecessor:

Every male citizen of the United States, of the age of twenty-one years and upwards, not laboring under the disabilities named in this Constitution, without distinction of race, color or former condition, who shall be a resident of this State at the time of the adoption of this Constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote sixty days next preceding any election, shall be entitled to vote for all officers that are now, or hereafter may be elected by the people, and upon all questions submitted to the electors at any election²³⁵

This section is markedly different than the suffrage provision of the 1866 Texas constitution rejected by Congress, which limited voting to "[e]very free male person" rather than "[e]very male citizen."²³⁶ The 1866 Texas constitution also did not disenfranchise former confederates,²³⁷ and it retained the same broad

²²⁸ ARK. CONST. art. I, § 1 (1868).

²²⁹ ARK. CONST. art. II, § 2 (1864) ("That all power is inherent in the people; and all free governments are founded on their authority For the advancement of these ends, they have, at all times, an unqualified right to alter, reform or abolish their government, in such manner as they may think proper."); ARK. CONST. art. II, § 2 (1836) (same).

²³⁰ ARK. CONST. art. II, § 5. (1836).

²³¹ *Id.* art. IV, § 2.

²³² ARK. CONST. art. VIII, §§ 2–5 (1868).

²³³ TEX. CONST. art. VI, General Provisions, § 6 (1836).

²³⁴ *Id.* art. 6, § 11.

²³⁵ TEX. CONST. art. 6, § 1 (1869).

²³⁶ *See id.*; TEX. CONST. art. 3, § 1 (1866).

²³⁷ TEX. CONST. art. 3, § 1 (1866).

“alter or abolish” language as its 1836 counterpart.²³⁸ In addition to more expansive voting rights and penalties for former confederates, the 1869 constitution eliminated the “alter or abolish” provision, adding a preamble to the bill of rights that stated, “That the heresies of nullification and secession, which brought the country to grief, may be eliminated from future political discussion.”²³⁹

Florida also had an “alter or abolish” provision in its constitution at the time of secession,²⁴⁰ but it amended this provision in 1868 to subordinate the people’s “alter or abolish” power to “the paramount allegiance of every citizen” to the federal government, and circumscribe the ability of the people “to dissolve their connection therewith.”²⁴¹ Like Arkansas, the 1838 Florida constitution provided for “free and equal” elections, extending the vote to every “[e]very free white male person of the age of twenty-one years and upwards” who was a U.S. citizen, but subject to a longer residency requirement of “two years next preceding the election at which he shall offer to vote.”²⁴² Florida attempted to retain the “alter or abolish” language from its 1838 constitution in the document submitted to Congress in 1865 as a condition of readmission, but Congress rejected it.²⁴³ Notably, the rejected 1865 constitution retained its predecessor’s voting qualifications, limiting suffrage to free white males.²⁴⁴ The 1868 constitution was significantly more inclusive, extending voting rights to “[e]very male person of the age of twenty-one years . . . of whatever race, color, nationality, or previous condition, who shall . . . be a citizen,” and it reduced the residency requirement from two years to one year.²⁴⁵

Some states reintroduced “alter or abolish” provisions in the 1870s, but these provisions were qualified by an expectation that the people would use political power, rather than violence, to change government.²⁴⁶ For example, Texas amended its constitution in 1876, reinstating its “alter or abolish” provision, but subject to “the preservation of a republican form of government” rather than the inalienable “right to alter, reform, or abolish their government” that had existed under the 1836 constitution.²⁴⁷ Similarly,

²³⁸ *Id.* art. I, § 1 (“All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times the unalienable right to alter, reform or abolish their form of government, in such manner as they may think expedient.”)

²³⁹ TEX. CONST. art. I (1869).

²⁴⁰ FLA. CONST. art. I, § 2 (1838).

²⁴¹ FLA. CONST. Declaration of Rights, § 2 (1885); FLA. CONST. Declaration of Rights, § 2 (1868).

²⁴² FLA. CONST. art. I, § 4 (1838); *Id.* art. VI, § 1.

²⁴³ Compare FLA. CONST. art. I, § 2 (1868) (removes alter or abolish language), with FLA. CONST. art. I, § 2 (1865) (includes alter or abolish language).

²⁴⁴ *Id.* art. VI, § 1 (1865).

²⁴⁵ FLA. CONST. art. XIV, § 1 (1868).

²⁴⁶ See *infra* notes 247–248.

²⁴⁷ TEX. CONST. art. I, § 2 (1876).

Tennessee kept its “alter or abolish” provision in both its 1835 and 1870 constitutions, but its 1870 constitution specifically limited the circumstances in which this power could be exercised to majoritarian political processes:

The Legislature shall have the right, at any time by law, to submit to the people the question of calling a Convention to alter, reform or abolish this Constitution, and when upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the Convention shall assemble in such mode and manner as shall be prescribed.²⁴⁸

The constitutional provisions guaranteeing free and fair elections also became significantly more elaborate in the post-Civil War era, further signaling a qualification of the “alter or abolish” authority.²⁴⁹ In 1874, Arkansas reinstituted the “alter or abolish” provision that existed in its 1836 and 1864 constitutions, giving citizens the right to “alter, reform or abolish . . . [government] in such manner as they may think proper,”²⁵⁰ yet this right was qualified by an expansive requirement of free elections:

Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted, whereby the right to vote at any election shall be made to depend upon any previous registration of the elector’s name; or whereby such right shall be impaired or forfeited, except for the commission of a felony at common law, upon lawful conviction thereof.²⁵¹

Even the “alter or abolish” provisions adopted in the late nineteenth and early twentieth century were shadows of the provisions that had existed prior to the Civil War.²⁵² Mississippi, for example, removed its “alter or abolish”

²⁴⁸ TENN. CONST. art. XI, § 3 (1870). The 1835 constitution, although it contained an alter or abolish provision similar to the 1870 version, did not provide a vehicle for abolishing the constitution through official means. *See* TENN. CONST. art. XI, § 3 (1835) (including a process for amending, but not abolishing, the constitution).

²⁴⁹ *See* S.C. CONST. art. II, § 2 (1868); *see also* Douglas, *supra* note 14, at 103 (“Although the terms ‘free and equal’ or ‘free and open’ might seem amorphous, several state courts have construed this language as guaranteeing all eligible voters access to the ballot.”).

²⁵⁰ ARK. CONST. art. II, § 1 (1874); ARK. CONST. art. II, § 2 (1864); ARK. CONST. art. II, § 2 (1836).

²⁵¹ ARK. CONST. art. III, § 2 (1874).

²⁵² For example, the Oklahoma constitution of 1907 provided that people have a right to “alter or reform” (not to abolish) their governments, and further, “such change shall not be repugnant to the Constitution of the United States.” OKLA. CONST. art. II, § 1 (1907). The 1865 Missouri constitution also kept the alter or abolish provision from its 1820 constitution, but it added that “every such right should be exercised in pursuance of law, and consistently with the Constitution of the United States,”

provision after the Civil War.²⁵³ It was reinserted in the 1890 constitution, and is still a part of the state constitution today; however, like Florida and Texas, Mississippi's citizens can only exercise the "alter or abolish" power if such action does not violate the U.S. Constitution.²⁵⁴

More recently, voters have relied on their "alter or abolish" authority to support various iterations of direct democracy.²⁵⁵ In 1945, the Georgia Supreme Court held that the people could directly approve a new constitution submitted to them by the General Assembly even if the document was not created in accordance with the formal procedures in the constitution.²⁵⁶ The court held that the state constitution gave the people the "inherent, sole and exclusive right to regulate their internal government and the policy thereof, and of altering and abolishing their Constitution whenever it may be necessary to their safety and happiness," a power that could not be superseded by those sections of the constitution requiring formal amendment through a constitutional

MO. CONST. art. I, § 5. (1865), and it included very specific processes by which the constitution could be amended or altered by majoritarian processes. *Id.* art. XII, § 3.

²⁵³ The Mississippi constitution of 1832, in effect at the time of secession, read:

That all political power is inherent in the people, and all free governments are founded on their authority, and established for their benefit, and, therefore they have at all times an unalienable and indefeasible right to alter or abolish their form of government, in such manner as they may think expedient.

MISS. CONST. art. I, § 2 (1832). After the Civil War, that provision was removed and another provision was added, specifically declaring the state would never secede from the union:

The right to withdraw from the Federal Union on account of any real or supposed grievances shall never be assumed by this State, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this State to the Government of the United States.

MISS. CONST. art. I, § 20 (1868).

²⁵⁴ The Mississippi constitution in effect today, the Constitution of 1890, has an "alter or abolish" provision. The power to abolish, however, is conditioned on such an action being allowed by the U.S. Constitution:

The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; provided, such change be not repugnant to the constitution of the United States.

MISS. CONST. art. III, § 6 (1890). In addition, the anti-withdrawal clause remains:

The right to withdraw from the Federal Union on account of any real or supposed grievance, shall never be assumed by this State, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this State to the government of the United States.

MISS. CONST. art. III, § 7 (1890).

²⁵⁵ See *Wheeler v. Bd. of Trs. of Fargo Consol. Sch. Dist.*, 37 S.E.2d 322, 329–30 (Ga. 1946); *Gatewood v. Matthews*, 403 S.W.2d 716, 719 (Ky. Ct. App. 1966).

²⁵⁶ *Wheeler*, 37 S.E.2d at 329–30 (holding that the formal amendment procedures in the state constitution were not exclusive because this interpretation would subvert the rights of the people).

convention.²⁵⁷ Because the new constitution was adopted by popular vote, the court treated it as “a valid and legal expression of the will of the people.”²⁵⁸ Similarly, in 1966, Kentucky voters also relied on their constitutional authority to “alter or abolish” their government as a legal basis for changing the state constitution through direct democracy, rather than through the formal amendment procedures established in their state constitution.²⁵⁹ This use of the power as a basis for democratic action, rather than violence, signaled its complete evolution from its Revolutionary War origins.²⁶⁰

IV. THE VOTER QUALIFICATIONS CLAUSE IN ACTION: ASSESSING THE CONSTITUTIONALITY OF STATE ELECTION LAWS

By defining the substantive content of federal voting rights by reference to state constitutional law and the democratic norms that existed therein, voting has become a vehicle for expressing popular sovereignty like the right to “alter or abolish” government before it. For this reason, one could argue that Article I’s incorporation of the substantive law and political norms of the states, virtually all of which treat the right to vote in state elections as a fundamental right, makes the right to vote in federal elections fundamental by transitive property. However, this Article stops short of advancing that claim because, regardless if one thinks that federal political participation is fundamental, its dependency on state law requires that courts be more attentive to state rules of participation.²⁶¹

²⁵⁷ *Id.* at 329.

²⁵⁸ *Id.*

²⁵⁹ *Gatewood*, 403 S.W.2d at 719.

²⁶⁰ *See, e.g.,* FRITZ, *supra* note 156, at 246–76 (discussing the debates over the people’s authority to change the state constitution outside of existing law in the context of the rebellion in Rhode Island in the 1840s). In *Luther v. Borden*, the Supreme Court conceded the existence of the “alter or abolish” power, but did not definitely resolve whether this authority legitimately can be exercised through violence. *See* 48 U.S. 1, 45–47 (1849) (finding that the actions taken by Rhode Island officials under martial law were justified).

²⁶¹ Assuming that the Court is right and Article I, Section 2 of the U.S. Constitution encompasses a fundamental right to vote in federal elections, then this provision can also stand as a source of the right to vote in state elections because of the link between state and federal voter qualifications. Nevertheless, even if the right to vote is not fundamental under Article I, the connection between the right to vote in federal elections and state political participation limits the states’ ability to retract the right to vote. Moreover, the connection between voting and the state alter or abolish provisions further limits the states’ authority to circumscribe the right. To the extent that the Equal Protection Clause remains the provision that the Supreme Court looks to as the “source” of the right to vote in state elections, the Court has to account for the other constitutional provisions, including the Voter Qualifications Clause of Article I, that bear on the question of what is the appropriate level of scrutiny that courts should use to assess state regulations of the right to vote. *See* Tolson, *supra* note 117 (arguing that the right to vote in state elections has several different sources, including the Ninth and Tenth Amendments and the Guarantee Clause, which reflects that, over time, the nature of the right has changed depending on the historical circumstances).

At the very least, the analysis herein suggests that the Supreme Court's balancing test has to be reformulated to allow courts to weigh the interests of both the voters and the state from the baseline assumption that these interests have similar grounding in the constitutional text and history. Under this approach, electoral changes instituted through constitutional amendment would enjoy a rebuttable presumption of constitutionality, but regulations adopted through ordinary legislation would be subject to heightened scrutiny.²⁶² Nevertheless, the shortcomings of the balancing approach do not necessarily validate a strict scrutiny approach in all contexts.²⁶³ Across the board application of strict scrutiny could obscure the considerable authority that states retain over elections, but this Article shows that a higher standard of review is more appropriate than the extreme deference that the Court currently gives to the states in assessing voter qualification standards.²⁶⁴

Voter qualification requirements predate the union, and have much to tell us about the states' authority over elections under Article I, Section 2. For example, the 1843 Rhode Island constitution had extensive requirements for those seeking to vote in its elections, including criteria based on age, residency, property ownership, and proper registration.²⁶⁵ Other states' constitutions, including those written during the Revolution and revised in the early decades of the founding, were less specific, declaring only that all elections "be free" and that all men be able to participate so long as they have a sufficient interest in

²⁶² See *supra* notes 117–148 and accompanying text (discussing *The Federalist No. 52*, in which Madison argued that Article I limits the ability of states and the federal government to alter voter qualifications through ordinary legal processes because state constitutional law is the source of the right to vote); see also Joshua Douglas, (*Mis*)*Trusting the States to Run Elections*, 92 WASH. U. L. REV. (forthcoming 2015) (conceding the power that states have to choose the qualifications of electors because of Article I, Section 2, but arguing that this power is not "limitless" because "various other provisions of the U.S. Constitution cabin this state power to dictate the qualifications of voters").

²⁶³ Cf. Douglas, *supra* note 262 (arguing that "the Court should adopt a test akin to strict scrutiny for restrictions on the right to vote and should require both Congress and states to justify its laws with specific, particularized rationales for what the law is trying to achieve"). While I agree with Professor Douglas's assessment of what strict scrutiny should look like—where the Court requires actual evidence to support a particular state interest—the reality is that strict scrutiny, as it has developed in the Court's caselaw, has tended to lead to the automatic invalidation of the challenged provision. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as "'strict' in theory and fatal in fact"). There has been a recent discussion in the academic literature about whether strict scrutiny is softening, but generally speaking, cases sustaining a state law under strict scrutiny are rare. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755 n.61 (2011) (arguing that cases applying strict scrutiny and upholding the challenged law "remain the exceptions that prove the rule of general invalidation").

²⁶⁴ See Tolson, *supra* note 106, at 394 (arguing that the Court's congruent and proportional analysis, used to assess congressional legislation passed under section 5 of the Fourteenth Amendment, has to account for both the sovereignty that states retain over elections and the considerable authority that Congress has under section 2 of the Fourteenth Amendment to regulate voting rights).

²⁶⁵ See R.I. CONST., art. 2 §§ 1–2 (1842).

the community.²⁶⁶ Like Rhode Island, however, it was common for some state constitutions to include restrictions based on age, residency, citizenship and property ownership.²⁶⁷ As Part III shows, these requirements have loosened considerably over the past two centuries, with most states eliminating freehold requirements in the nineteenth century, and court decisions and constitutional amendments eradicating others by the 1960s. However, many voter qualification requirements remain, and are assumed to be constitutional under current precedent.²⁶⁸ While this Article does not challenge the general validity of voter qualification requirements, this Part focuses on two standards in particular—voter identification laws and proof of citizenship requirements—in order to illustrate what “heightened scrutiny” requires, consistent with the Voter Qualifications Clause of Article I.²⁶⁹

A. Reassessing the Validity of Voter Identification Laws Under Heightened Scrutiny

Given the states’ broad authority to impose voter qualifications, most litigation strategies challenging voter identification laws on constitutional grounds initially focused on equating voter identification to other disfavored qualification methods—namely, the poll tax—rather than assessing their validity standing alone.²⁷⁰ In *Crawford v. Marion County*, the Supreme Court rejected the poll tax

²⁶⁶ See, e.g., N.C. CONST. Declaration of Rights, § VI (1776); PA. CONST. (1776).

²⁶⁷ See, e.g., N.Y. CONST. art. VII (1777). The New York Constitution of 1777 provided:

That every male inhabitant of full age, who shall have personally resided within one of the counties of this State for six months immediately preceding the day of election, shall, at such election, be entitled to vote for representatives of the said county in assembly; if, during the time aforesaid, he shall have been a freeholder, possessing a freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to this State.

Id.

²⁶⁸ See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69–70 (1978) (rejecting the plaintiffs’ claim that they had a right to vote in municipal elections since they lived outside of the city boundaries and therefore were not bona fide residents); *Chasan v. Vill. Dist. of Eastman*, 523 A.2d 16, 24–25 (N.H. 1986) (same); see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622 (1969) (challenging the requirements that residents had to own or lease taxable property in the district or be parents of children enrolled in public school in order to vote in school district elections, but not the age, citizenship, or residency requirements); *Gaunt v. Brown*, 341 F. Supp. 1187, 1189 (S.D. Ohio 1972), *aff’d*, 409 U.S. 809 (holding that seventeen year olds who would turn eighteen by the election had no right to vote in primary elections); *Chesser v. Buchanan*, 568 P.2d 39, 41 (Colo. 1977) (concluding that the right to vote for district commissioners could be restricted to property tax-payers under Colorado law).

²⁶⁹ See *infra* notes 270–306 and accompanying text.

²⁷⁰ None of this analysis precludes a successful challenge of a voter identification law on state constitutional grounds. See, e.g., *Applewhite v. Commonwealth*, 54 A.3d 1, 5 (Pa. 2012) (remanding

analogy, upholding Indiana's voter identification law on the grounds that the plaintiffs had not shown that the law is a severe burden on the right to vote.²⁷¹ To the extent that the law unduly impacts some voters, the Court noted that this burden is mitigated by the fact that individuals can cast provisional ballots and obtain free identification.²⁷²

While validating the use of voter identification laws, *Crawford* did not resolve the issue of whether some variations of these laws can pose a more severe burden on the right to vote than others.²⁷³ In the years since the decision, states have become more restrictive in the types of identification that are acceptable for use at the polls,²⁷⁴ a factor that might not raise concerns if assessed under equal protection, *Burdick/Crawford*-style balancing, but would raise concerns under heightened scrutiny. Heightened scrutiny would require that the state come forward with nonpartisan, empirical or evidentiary support for the law as opposed to mere assertions of the state interest at stake.²⁷⁵

Functionally, what this means is that even if a state does not have a voter identification law, it is not prohibited from adopting one if the law is designed to address a specific, documented problem. For example, voter fraud was a promi-

the case to the lower court for further consideration of whether alternate identification was sufficiently available to avoid massive disenfranchisement during the 2012 election in violation of the Pennsylvania constitution); *Pulaski Cnty. Election Comm'n v. Ark. State Bd. of Election Comm'rs*, 60CV-14-1019, 2014 WL 2925806, at *1 (Ark. Cir. Ct. Apr. 24, 2014), *aff'd in part, vacated in part*, 437 S.W.3d 80 (Ark. 2014) (invalidating Arkansas's voter identification requirement because the law adds additional qualifications for voting that are not contained in the Arkansas Constitution). Consistent with Article I, state law should also drive analysis of federal constitutional claims. *See supra* notes 117–148 and accompanying text.

²⁷¹ 553 U.S. 181, 202 (2008).

²⁷² *Id.* at 199. In addition to accepting various federal and state issued identifications for voter registration, Indiana's law offered voters the option of obtaining state issued identification free of charge. Voters who could not obtain the identification could cast a provisional ballot and had ten days to bring a valid photo identification to the local election office. IND. CODE § 3-11.7-5-2.5(b). Individuals can also sign an affidavit if they cannot afford identification or have a religious objection to being photographed. *Id.*

²⁷³ Arguably, the Court did not have to resolve this issue because Indiana's voter identification law was one of the most stringent in the nation at the time. *See* Michael J. Pitts & Matthew D. Neumann, *Documenting Disenfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329, 332 (2009).

²⁷⁴ *See* N.C. GEN. STAT. §§ 163–166.11 (2013); *South Carolina v. United States*, 898 F. Supp. 2d 30, 43–44 (D.D.C. 2012).

²⁷⁵ This assessment must be made even if the new law is a constitutional amendment enacted pursuant to voter initiative rather than ordinary legislation enacted by the legislature. *Compare* *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam) (vacating the decision of the Ninth Circuit enjoining a ballot initiative that required voters to show proof of citizenship in registering to vote and photo identification when voting), *with* *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736–37 (1964) (invalidating a redistricting plan on equal protection grounds, despite its adoption by popular referendum, because “[a] citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be”). Less evidence would be required to defend state constitutional amendments under this approach because these laws enjoy a presumption of constitutionality that ordinary legislation does not.

nent feature of the 2004 gubernatorial election in Washington state, where the election was decided by a 133-vote margin and the superior court determined that felons, unregistered, and deceased voters cast 1678 illegal ballots.²⁷⁶ Washington would be well within its authority to adopt a voter identification law in light of its documented history of voter fraud. In contrast, Wisconsin's voter identification law, recently invalidated by a federal judge, was difficult to justify given that there had not been any voter impersonation in recent Wisconsin elections.²⁷⁷ The Wisconsin law did not further the state's interest in election integrity because the risk of fraud was speculative rather than actual.

However, if the state asserts an interest in combating the perception of, rather than actual, fraud (which the Supreme Court has endorsed as legitimate), the state can further this interest with a limited voter identification law that avoids unduly burdening voting rights.²⁷⁸ In this situation, the law must have a minimal effect on the electorate's composition relative to the psychic benefits that the state hopes to derive from the law.²⁷⁹

For example, South Carolina enacted a more stringent voter identification law than its predecessor in 2011, Act R54 ("R54"), in order to "deter voter fraud and enhance public confidence in the electoral system," despite the fact that the record contained no evidence of actual fraud.²⁸⁰ Nevertheless, the district court upheld the law because, as compared to other states, "South Carolina's [voter identification law] would fall on the less stringent end."²⁸¹ Notably, R54 contains

²⁷⁶ H.R. REP. NO. 109-666, at 7 & n.16 (2006) (citing Transcript of Oral Decision, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. June 6, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/oraldecision.pdf>, archived at <http://perma.cc/H7V7-L9NN>).

²⁷⁷ The Seventh Circuit later reversed the district court decision. See *Frank v. Walker*, No. 11-CV-01128, 2014 WL 1775432, at *10–17 (E.D. Wis. Apr. 29, 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014) (invalidating Wisconsin's voter identification law under the U.S. Constitution and the Voting Rights Act). But see *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 851 N.W.2d 302 (Wis. 2014) (upholding Wisconsin's voter identification law on the grounds that the time and inconvenience associated with obtaining identification were not severe burdens on the right to vote).

²⁷⁸ See *Miller v. Treadwell*, 245 P.3d 867, 876 (Alaska 2010) (noting that Alaska's voter identification requirement can be waived if "the voter is known to the official"). Scholars have criticized the Court's reliance on "appearance of fraud" as an interest that must be balanced against the interests of disenfranchised voters. See Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 5 (2007).

²⁷⁹ See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 634 (2007) ("While a small amount of voter fraud hypothetically could determine a close election, the exclusion of twenty million Americans who lack photo identification could erroneously skew a larger number of elections."); see also *Frank*, 2014 WL 1775432, at *9 (requiring the defendants to produce empirical support for their contention that the voter identification law protects the public's confidence in the integrity of elections).

²⁸⁰ *South Carolina v. United States*, 898 F. Supp. 2d 30, 43–44 (D.D.C. 2012) ("South Carolina's goals of preventing voter fraud and increasing electoral confidence are legitimate and cannot be deemed pretextual merely because of an absence of recorded incidents of in-person voter fraud in South Carolina.").

²⁸¹ *Id.* at 46.

a “reasonable impediment provision” that is more protective of the right to vote than the usual affidavit and provisional ballot option, and is a holdover from South Carolina’s prior voter identification law that was enacted in 1988.²⁸² The reasonable impediment provision requires election officials to count the ballots of voters who present a previously acceptable non-photo form of identification and sign affidavits stating their reason for not having acceptable identification.²⁸³ When the district court considered whether R54 should be pre-cleared under section 5 of the Voting Rights Act in October of 2012, the three-judge panel found that the reasonable impediment provision made R54 flexible enough that it was nonretrogressive and did not abridge minority voting rights.²⁸⁴ While the court erroneously credited the state’s interests without requiring evidentiary support of their validity (consistent with Supreme Court precedent), the court rightly recognized that states can advance these purported interests through more flexible and less stringent voter identification laws in order to avoid abridging the right to vote (consistent with heightened scrutiny).²⁸⁵

In contrast, North Carolina’s voter identification law is an amalgamation of all of the issues that would not survive heightened scrutiny: voters can present only limited forms of identification; provisional voting is burdensome; the law was passed for partisan reasons; and the law is significantly less democratic than the prior regulations.²⁸⁶ Prior to the adoption of its omnibus election bill, House Bill 589, North Carolina required voters to state their name and address, and then sign a poll book.²⁸⁷ The new law is significantly more stringent than the prior rule.²⁸⁸ House Bill 589 provides that North Carolina voters must present an unexpired form of acceptable photo identification such as a passport or identification issued by the US military or Department of Veterans Affairs, a federally—or North Carolina—recognized tribe, or another state if

²⁸² *Id.* at 33, 35.

²⁸³ *Id.* at 41 (“The reasonable impediment provision thus operates similarly to a requirement that the voter without photo ID simply sign an affidavit stating that the voter is who he or she says.”).

²⁸⁴ *Id.* at 39.

²⁸⁵ *Id.* at 48 (“[O]ur comparison of South Carolina’s Act R54 to some other States’ voter ID laws—as well as to the Carter-Baker Report’s proposed voter ID reforms—strongly buttresses the conclusion that . . . South Carolina’s new voter ID law is significantly more friendly to voters without qualifying photo IDs than several other contemporary state laws that have passed legal muster.”); *see also id.* at 39 (noting that “as compared to pre-existing South Carolina law, Act R54 *expands* the list of photo IDs that will qualify for voting”).

²⁸⁶ While North Carolina’s voter identification law does not go into effect until 2016, House Bill 589 does not count provisional ballots filed by individuals who vote at the wrong precinct starting in 2014. N.C. GEN. STAT. §§ 163–166.11 (2013). Under the prior law, North Carolina voters could mail, fax, or deliver the required identification in person in order to have their provisional ballot counted. *See, e.g., Provisional Voting*, CNTY. OF MOORE, N.C., available at <http://www.moorecountync.gov/index.php/en/election-day-information/provisional-voting>, archived at <http://perma.cc/GVP3-9Y6X> (last visited Dec. 29, 2014).

²⁸⁷ N.C. GEN. STAT. §§ 163–166.7 (2012).

²⁸⁸ *See* N.C. GEN. STAT. §§ 163–166.7 (2013).

the voter's registration falls within 90 days of the election.²⁸⁹ If a voter does not possess proper identification on Election Day, he or she may vote provisionally and return with acceptable identification before canvassing to have his or her provisional ballot counted.²⁹⁰ It is unlikely that North Carolina's voter identification law would survive heightened scrutiny because the burdens on the electorate are not sufficiently justified by any legitimate, nonpartisan state interests, particularly in light of the flexibility of the prior law. Recently, a federal district court denied the plaintiffs' motion for a preliminary injunction to bar House Bill 589 from going into effect.²⁹¹ The court applied the *Burdick/Crawford* balancing test and found that the law would not impose a severe burden on the right to vote.²⁹² Had the court applied heightened scrutiny, it would have closely critiqued the legislature's reasons for imposing the election changes, an assessment that has been missing from most of the caselaw for over twenty years.²⁹³

B. Article I and the Legitimacy of Dual Voter Registration Systems

The debate over voter identification laws has revealed that states can impose different types of voter qualification requirements, consistent with Article I, so long as there is evidence supporting the state's regulatory interests. However, state laws that require individuals to produce documentary proof of citizenship prior to voting have raised a novel issue of whether states can run parallel voter registration systems for state and federal elections if this qualification is prohibited by federal law. The Supreme Court recently confronted a related issue in *Arizona v. Inter Tribal Council of Arizona*, where it held that the National Voter Registration Act ("NVRA") preempted Arizona's proof of citizenship requirement that was a prerequisite for voter registration in all elections.²⁹⁴ The NVRA, which Congress enacted pursuant to its authority under the Elections Clause, provides that all states must "accept and use" a uniform federal form to register individuals to vote in federal elections.²⁹⁵ Contrary to

²⁸⁹ See *id.*

²⁹⁰ See Amended Complaint, *Currie v. North Carolina*, No. 13-CV-001419 (Super. Ct. Oct. 8, 2013), available at <http://moritzlaw.osu.edu/electionlaw/litigation/CurrieV.NC.php>, archived at <http://perma.cc/3KJC-EXMF>. The *Currie* plaintiffs also challenge the reduction of early voting days, arguing that the North Carolina legislature passed the law with discriminatory purpose. The plaintiffs seek to enjoin HB 589 from going into effect in 2016 and are asking the court to bail North Carolina into preclearance under section 3(c) of the VRA.

²⁹¹ *N.C. State Conference of NAACP v. McCrory*, 997 F. Supp. 2d 322, 384 (M.D.N.C. 2014) *aff'd in part, rev'd in part and remanded*, *League of Women Voters of N.C. v. North Carolina*, No. 14-1845, 2014 WL 4852113 (4th Cir. Oct. 1, 2014).

²⁹² *Id.* at 362–65, 369–70, 381.

²⁹³ For a recent exception, see *Frank*, 2014 WL 1775432, at *34.

²⁹⁴ 133 S. Ct. 2247, 2260 (2013).

²⁹⁵ National Voter Registration Act of 1993 (NVRA), Pub. L. No. 103–31 § 6, 107 Stat. 77 (1993).

the Arizona law, the NVRA requires that individuals attest to U.S. citizenship but does not demand documentary proof of citizenship.²⁹⁶

On the surface, the Court's decision is a vindication of federal authority by recognizing that Congress has broad power to regulate federal elections under the Elections Clause; in reality, the decision represents a significant limitation on Congress's ability to regulate voter qualifications. The Court rejected Arizona's argument that the federal form would not allow the state to collect the information necessary to assess citizenship status, but the Court did so while agreeing with Arizona that the states, and not Congress, have plenary authority to prescribe voter qualifications.²⁹⁷ According to the Court, the Elections Clause is limited to setting the "Times, Places, and Manner of holding elections," and confers no authority on Congress "to make or alter" voter qualifications.²⁹⁸ Instead, these qualifications are linked to the state franchise by various provisions of the Constitution, including Article I, Section 2 and the Seventeenth Amendment.²⁹⁹

In the wake of the decision, Arizona and Kansas moved forward with imposing dual voter registration systems, requiring proof of citizenship for state, but not federal, elections.³⁰⁰ In *Arizona Inter Tribal*, the Court read Article I to delegate exclusive control over voter qualifications to the states, and in the majority's view, the NVRA can preempt additional requirements for voter registration only so long as the statute does not frustrate the states' ability to exercise their authority over voter qualifications.³⁰¹ Nevertheless, Article I likely prohibits states from divorcing state and federal voter qualifications in order to impose more onerous requirements on those seeking to participate in state elections.³⁰² As Parts II and III show, federal voting rights derive their meaning

²⁹⁶ *Arizona Inter Tribal*, 133 S. Ct. at 2263.

²⁹⁷ *Id.*

²⁹⁸ U.S. CONST. art. I, § 4, cl. 1; *Arizona Inter Tribal*, 133 S. Ct. at 2258.

²⁹⁹ U.S. CONST. art. I § 2, cl. 2; *Id.* amend. XVII.

³⁰⁰ *Kobach v. U.S. Election Assistance Comm'n*, 6 F. Supp. 3d 1252, 1271 (D. Kan. 2014), *rev'd*, 772 F.3d 1183 (10th Cir. 2014).

³⁰¹ *Arizona Inter Tribal*, 133 S. Ct. at 2265.

³⁰² Proof of citizenship requirements for voter registration also could have a disparate impact on the voting rights of certain minority groups, implicating the prohibitions on racial discrimination in voting encompassed by the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments. See Franita Tolson, *What About the Voters? Requiring Proof of Citizenship to Register to Vote in Federal Elections*, HUFFINGTON POST, Mar. 24, 2014, http://www.huffingtonpost.com/franita-tolson/what-about-the-voters-req_b_5021393.html, *archived at* <http://perma.cc/59T4-NQWJ>. Similarly, as I argue in a recent article, Congress has used its authority under Article I, Section 5 of the Constitution "to judge the elections, returns, and qualifications of its own members" to overturn elections for the House of Representatives where states have impermissibly disenfranchised segments of their populations. See Tolson, *Congressional Authority*, *supra* note 92, at 328. In some instances, Congress has exercised this authority without showing that the contested state law was adopted for a discriminatory purpose, arguably bringing proof of citizenship requirements, which are ostensibly facially neutral, within its reach.

from participation in state elections, making it difficult to constitutionally justify any regime that creates federal electors independent of state voter qualifications.³⁰³

Before the dual voter registration system could be challenged in court, a federal district court held that the U.S. Election Assistance Commission (“EAC”) could not prevent Kansas and Arizona from requesting documentary proof of citizenship as a prerequisite for registering to vote in federal elections.³⁰⁴ Relying on Article I, the district court found that Arizona and Kansas could not properly exercise their authority over voter qualifications using the federal form alone.³⁰⁵ Notably, the court relied on the very existence of these state proof of citizenship laws—one of which the Supreme Court determined was preempted—as sufficient in and of themselves to establish that the states’ authority over voter qualifications was frustrated by the EAC’s refusal to allow them to require documentary proof of citizenship.³⁰⁶

Like many election law cases, the district court opinion credited the states’ interest in preventing voter fraud even though, on the facts before the court, there was no significant evidence of noncitizen voting in any elections held in either state. Had the court applied heightened scrutiny, it would have required that the states come forward with this evidence to illustrate that federal law thwarted its regulatory authority over voter qualifications.

CONCLUSION

The Voter Qualifications Clause of Article I, Section 2, Clause 1 makes the electors for the federal House of Representatives the same as the electors of the most numerous branch of the state legislature. This provision makes federal voting rights parasitic upon participation in state elections, and given that state elections are, and have been, highly democratic, congressional elections must also be highly democratic. The democratic structure of the states, best illustrated by the

³⁰³ In enacting Article I, delegates to the constitutional convention were concerned about disenfranchising federal electors who would otherwise be entitled to vote under state law; arguably, this is why they linked state and federal voter qualifications. *See supra* notes 120–125 and accompanying text. There is a similar concern with disenfranchising state voters who would otherwise be entitled to vote under federal law.

³⁰⁴ *Kobach*, 6 F. Supp. 3d at 1271.

³⁰⁵ *Id.* at 1259–60.

³⁰⁶ *Id.* at 1271. The court stated:

[T]he Arizona and Kansas legislatures have decided that a mere oath is not sufficient to effectuate their citizenship requirements and that concrete proof of citizenship is required to register to vote. Because the Constitution gives the states exclusive authority to set voter qualifications under the Qualifications Clause, and because no clear congressional enactment attempts to preempt this authority, the Court finds that the states’ determination that a mere oath is not sufficient is all the states are required to establish.

“alter or abolish” provisions that existed in state constitutions during the founding era, was integral to efforts in the nineteenth century to define the contours of the right to vote, and should influence the scope of authority that states have to regulate their elections today. During this period, the “alter or abolish” authority was the vehicle through which the people expressed their sovereign authority. After the Civil War, the Reconstruction-era Congress domesticized this authority by rejecting the violence inherent in the right due to its role in southern secession, and states transitioned to more peaceful expressions of the people’s sovereign power by implementing expansive voting rights in state constitutions. This history indicates that the state-friendly balancing test that the Supreme Court applies to electoral regulations does not reflect the Constitution’s structural pathologies, which are premised on the assumption that making federal voting rights dependent upon state rules would result in more, not less, political participation. Consistent with Article I, courts must assess state regulations under heightened scrutiny in order to protect the right to vote in federal elections.

