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## ARTICLES

### THE SPECTRUM OF CONGRESSIONAL AUTHORITY OVER ELECTIONS

FRANITA TOLSON\*

#### ABSTRACT

*Congress routinely fails to articulate the source of authority pursuant to which it enacts federal statutes. This oversight forces the Supreme Court to sustain the constitutionality of these regulations based on powers that find no mention in the legislative record. The shortcomings of the record have not prevented the Court from interpreting congressional power quite broadly when a federal statute can be sustained as a lawful exercise of authority pursuant to more than one substantive constitutional provision. In the context of elections, however, the Court has been decidedly more opportunistic about whether it will examine the constitutionality of federal law within the broader spectrum of congressional authority.*

*In *Shelby County v. Holder*, for example, the Court held that section 4(b) of the Voting Rights Act of 1965 violated the equal sovereignty principle by forcing certain states to seek federal approval before implementing laws that they are otherwise constitutionally authorized to enact. Sections 4(b) and 5 suspended all changes to state election laws in covered jurisdictions, including nondiscriminatory voter qualification standards and procedural regulations that govern state elections. In prioritizing federalism over all other equally valid considerations, the Court ignored whether the Voting Rights Act was valid because congressional power could be derived, in part, from the Elections Clause. The Elections Clause gives Congress final policymaking authority over setting the times, places, and manner of federal elections. Unlike the Fourteenth*

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\* Professor of Law, University of Southern California Gould School of Law. Thanks to Rebecca Brown, David Cruz, Josh Douglas, Chris Elmendorf, Ned Foley, Adam Hirsch, Jake Linford, Michael Morley, Derek Muller, Lori Ringhand, Daria Roithmayr, Mark Seidenfeld, and Lisa Tucker for useful feedback and comments on earlier drafts. Thanks also to participants in workshops at the University of Chicago Law School, Florida State University College of Law, University of Georgia School of Law, and University of Southern California Gould School of Law for their invaluable insights about this project. I owe a great debt to Matletha Fuller and Mina Saffarian as well as the librarians at Florida State University College of Law and the University of Southern California Gould School of Law for excellent research assistance. Thanks also to the wonderful editors of the *Boston University Law Review* for their excellent work on this Article.

*and Fifteenth Amendments, a context in which the Court imposes some federalism limitations on the exercise of federal power, the Clause allows Congress to legislate without regard for state sovereignty.*

*The unique nature of the Elections Clause highlights the importance of applying a theoretical framework to Congress's authority over elections that properly accounts for the presence of multiple, and sometimes conflicting, sources of federal power. Not only does the Clause allow the federal government to disregard state sovereignty, but the line between voter qualification standards, on one hand, and time, place, and manner regulations, on the other, is significantly more blurred than the caselaw indicates, resulting in the existence of hybrid regulations of uncertain constitutional mooring. This Article concludes that Congress's sovereign authority under the Elections Clause is broad enough to reach restrictive and oppressive voter qualification standards that affect federal elections, a category that the Court has held falls squarely within the province of state authority. The uncertainty surrounding the boundaries of these regulations, as well as the presence of multiple sources of constitutional authority, means that, in some limited instances, Congress can aggressively police state action under the Elections Clause to protect the fundamental right to vote.*

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## INTRODUCTION

The challenges posed by the hyper-partisan and racially charged nature of recent election cycles raise the same basic questions about the limits of state and federal authority to regulate elections that have plagued the American political system since the country's founding. Despite the pressing nature of this issue, there has been no systematic attempt to create a framework for understanding the division of authority between the two levels of government. Federal power to make or alter the times, places, and manner of federal elections, protect the right to vote, or remedy racial discrimination in voting is often in tension with the state's control over voter qualifications or over state elections more generally.

The Supreme Court has traditionally handled this tension by engaging in a very broad reading of federal power where, in their view, exigency warrants an expansive interpretation. For example, in *South Carolina v. Katzenbach*,<sup>1</sup> the Court upheld the preclearance provisions of the Voting Rights Act of 1965 (the "VRA"), which gave the federal government the power to veto discriminatory state voting laws in certain southern jurisdictions, as an appropriate exercise of Congress's enforcement authority under the Fifteenth Amendment.<sup>2</sup> Southern states had engaged in a persistent, century-long effort to undermine the voting rights of African-Americans, leading the Court to conclude that extraordinary efforts were temporarily necessary to dislodge a pattern of discrimination that had held firm despite federal efforts to bring case-by-case litigation.<sup>3</sup>

The *Katzenbach* Court highlighted that its interpretation of federal power was driven not only by text and structure, but also a deep sense of urgency stemming from the unprecedented violation of constitutional rights on a mass scale.<sup>4</sup> In recent cases, the Court has backtracked on this interpretation by searching for circumstances similar to those that initially warranted such "extraordinary" legislation. In *Shelby County v. Holder*,<sup>5</sup> the Court invalidated the coverage formula of section 4(b) of the VRA, which determined the jurisdictions subject to preclearance under section 5, effectively rendering the entire preclearance framework defunct until Congress can develop a replacement formula.<sup>6</sup>

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<sup>1</sup> 383 U.S. 301 (1966).

<sup>2</sup> *Id.* at 308.

<sup>3</sup> *Id.* at 328.

<sup>4</sup> *Id.* at 334 (describing preclearance regime as "an uncommon exercise of congressional power" but noting that "the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate").

<sup>5</sup> 133 S. Ct. 2612 (2013).

<sup>6</sup> *Id.* at 2627-30; see also Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 4-5, 120 Stat. 577, 580-81 (2006) (codified as amended in scattered sections of 52 U.S.C.).

Unsurprisingly, the Court's about-face with respect to the preclearance regime on the grounds that the exigency that justified its existence—virulent racism—no longer exists,<sup>7</sup> has created confusion about the *actual* scope of congressional power to regulate elections as a practical matter.

Using the Elections Clause as its focal point, this Article argues that the Court should interpret federal election laws, and their underlying legislative record, within the broader scope of authority that the U.S. Constitution delegates to Congress over elections.<sup>8</sup> The Elections Clause, which gives the states the power to “choose the Times, Places and Manner of . . . [federal] Elections,” is power that the states exercise freely, so long as Congress does not assert its authority to “make or alter” state regulations.<sup>9</sup> In essence, Congress has a veto power over certain state electoral practices, a veto that is present in the VRA's suspension of regulations that govern federal elections in targeted states. Thus, to interpret broadly means that the Court credits the authority that Congress has across constitutional provisions—here, the Elections Clause and the Fourteenth and Fifteenth Amendments—in assessing the legislative record underlying voting rights legislation. This multi-clause analysis shows how the Elections Clause complicates the federalism narrative that scholars and courts embrace in

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<sup>7</sup> *Shelby Cty.*, 133 S. Ct. at 2625 (citing increases in African-American voter participation to illustrate that preclearance requirements for selected states is no longer justified).

<sup>8</sup> There is no objective metric for assessing the appropriate level of deference that the Court should use in critiquing the legislative record underlying federal legislation. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 150-51 (2001) (discussing partial invalidation of Americans with Disabilities Act (“ADA”) in *Bd. of Trs. of Ala. v. Garrett*, 531 U.S. 356 (2001), and noting that “the legislative record may not have mattered much” yet “close scrutiny of the legislative record is necessary if the Justices are to maintain interpretive control, for otherwise Congress might be able to elude the Court’s effort to cabin its activities”); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 34-35 (2003) (arguing that the Court’s decisions involving Section 5 of Fourteenth Amendment are influenced by constitutional culture). Instead, the Court considers a series of factors in determining whether federal legislation is congruent and proportional. See *City of Boerne v. Flores*, 521 U.S. 507, 530-31 (1997) (comparing legislative record of VRA to Religious Freedom Restoration Act and determining latter “lacks examples of modern instances of generally applicable laws passed because of religious bigotry”).

<sup>9</sup> The Elections Clause, in its entirety, provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” U.S. CONST. art. I, § 4, cl. 1. There are probably more election-related provisions of the Constitution than any other area. See, e.g., *id.* § 2; *id.* § 4; *id.* § 5; *id.* art. II, § 1; *id.* art. IV, § 4; *id.* amend. XXII; *id.* amend. XIV, § 2; *id.* amend. XV; *id.* amend. XVII; *id.* amend. XIX; *id.* amend. XXIII; *id.* amend. XXIV; *id.* amend. XXVI.

describing our election system because federalism is not a barrier to aggressive federal action under the Elections Clause seeking to protect the fundamental right to vote.<sup>10</sup>

Despite having substantial authority over elections, Congress has had difficulty responding to voting rights abuses because the Supreme Court has ignored its earlier precedent and become unduly formalistic in interpreting federal power, especially in light of the practical realities of election administration and the overlapping (and sometimes conflicting) authority over elections that Congress shares with the states.<sup>11</sup> This ambiguity has created substantial confusion about the level of deference that the Court should accord to Congress when reviewing the legislative record. It is uncontroversial that federal power is at its highest ebb when Congress seeks to regulate federal elections and at its lowest when it seeks to regulate state elections or nondiscriminatory voter qualification standards. But much of the controversy arises in the “gray” area, where federal election regulations can derive from more than one source of constitutional authority, leaving federal power ambiguous or uncertain, and otherwise permissible state laws can have a deleterious effect on federal elections, even if such laws are nondiscriminatory.<sup>12</sup> Instead of clarifying the “gray,” the Court has simply deferred to the states on federalism grounds, even though, as this Article shows, such deference is unwarranted.<sup>13</sup>

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<sup>10</sup> See, e.g., Michael T. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, 109 NW. U. L. REV. 847, 849-51 (2015) (discussing how the Elections Clause impacts balance between state and federal control of elections); Derek T. Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310, 310-12 (2014) (examining application of election clauses authorizing federal elections and delegating authority to states); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 753 (2016) (“[F]ederal election statutes implicate an unusual number of federalism relationships through all three levels of government.”). See also Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2212 (2018) (“[B]oth the Supreme Court and legal scholars tend to discuss the Clause in federalism terms, characterizing the exercise of federal power as a rare and somewhat unwelcome intrusion on the states’ relatively broad authority to legislate with respect to federal elections.”).

<sup>11</sup> See Weinstein-Tull, *supra* note 10, at 780 (“[T]ension between the federal election statutes and . . . federalism principles may explain some of the widespread noncompliance with the statutes.”).

<sup>12</sup> See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Congress can regulate constitutional behavior in order to deter constitutional violations). But see *Shelby Cty.*, 133 S. Ct. at 2625 (criticizing Congress for regulating permissible state action in order to deter voting rights violations).

<sup>13</sup> See *Shelby Cty.*, 133 S. Ct. at 2627-30 (invalidating section 4(b) of the VRA based in part on tension between the VRA and traditional federalism principles).

From this perspective, the sin of *Shelby County* is not only the neutering of a significant provision of one of the most successful civil rights statutes in history, but also that it leaves a legacy of constitutional interpretation ignorant of the full spectrum of congressional authority in this area. The Court focused on the substantial federalism costs of the VRA, ignoring that the Act arguably could have been sustained based on some combination of the Elections Clause and the Fourteenth and Fifteenth Amendments.<sup>14</sup> The aggregate of these provisions was more than sufficient to justify the coverage formula based on the legislative record before the Court.<sup>15</sup>

Indeed, the Court's disregard of the Elections Clause was odd given that the term in which the Court decided *Shelby County* also featured a major Elections Clause case, *Arizona v. Inter Tribal Council of Arizona, Inc. (Arizona Inter Tribal)*,<sup>16</sup> which reaffirmed the broad scope of congressional power over federal elections.<sup>17</sup> By depriving states of the final policymaking authority that is the hallmark of sovereignty, the Clause is impervious to the federalism concerns that have constrained congressional action under the Reconstruction Amendments.<sup>18</sup> Unlike the Commerce Clause, there is no Eleventh Amendment

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<sup>14</sup> See, e.g., H.R. REP. NO. 89-439, at 6 (1965) ("The bill, as amended, is designed primarily to enforce the 15th amendment to the Constitution of the United States and is also designed to enforce the 14th amendment and article I, section 4.").

<sup>15</sup> See Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1197-98 (2012) ("The Elections Clause, when combined with Congress's ability to enforce the mandates of the Fourteenth and Fifteenth Amendments, provides ample constitutional justification for the VRA.").

<sup>16</sup> 133 S. Ct. 2247 (2013).

<sup>17</sup> *Id.* at 2257 ("Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that . . . statutory text [based on that power] accurately communicates the scope of Congress's pre-emptive intent.").

<sup>18</sup> See, e.g., *McConnell v. FEC*, 540 U.S. 93, 160, 187 (2003) (upholding ban on soft money as valid use of Congress's authority under Elections Clause and rejecting argument that ban interfered with states' authority to regulate their elections). Compare *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (striking down provisions of the Age Discrimination in Employment Act ("ADEA") on grounds that evidence relied on by Congress was too anecdotal and too geographically narrow to justify extension of ADEA to all of states), and *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637-40 (1999) (accepting that state infringement of patents could violate Fourteenth Amendment, but invalidating Patent Remedy Act because Congress did not show that states had been engaging in this behavior), with *Ariz. Inter Tribal*, 133 S. Ct. at 2253 ("The Clause's substantive scope is broad. 'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932))).

bar to abrogate state sovereign immunity under the Elections Clause.<sup>19</sup> Congress can also make law under the Clause, which includes the authority to legislate independent of any action on the part of the states and, arguably, to commandeer state officials in the course of administering federal elections.<sup>20</sup>

For these reasons, the VRA stands as a rare example of a law invalidated on federalism grounds that could have been sustained under multiple constitutional provisions including a source—the Elections Clause—that allows Congress to legislate independent of and without deference to state sovereignty.<sup>21</sup> Part of the challenge is that, in establishing the constitutional boundaries of federal power over elections, the Court is unclear about the interpretive significance of the fact that a statute derives from multiple sources of authority.<sup>22</sup> It has engaged this

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<sup>19</sup> See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (“[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.”). Under the Elections Clause, Congress can abrogate state sovereign immunity because the Elections Clause implicates federal rights protected by both Article I, Section 2 and the Equal Protection Clause that do not predate the existence of the Union such that the states have some preexisting claim to state sovereignty. Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) (rejecting the State’s argument that it could add congressional qualifications because the “power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States”).

<sup>20</sup> See Tolson, *supra* note 10, at 2218 (“[T]he text empowers Congress to engage in the quintessentially ‘anti-’federalism action of displacing state law and commandeering state officials toward achieving this end.”).

<sup>21</sup> The VRA has had its share of challenges over the years, but the Court has upheld the Act as a proper exercise of federal authority based on a number of rationales. And, until recently, the Act had managed to emerge relatively unscathed. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 158 (1980) (“[W]e hold that the Act’s ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment . . .”); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding section 5 of the VRA, which required certain jurisdictions to “preclear” their voting laws with federal government because of their prior records of discrimination, as valid exercise of Congress’s enforcement authority under Fifteenth Amendment). Likewise, *Oregon v. Mitchell*, 400 U.S. 112 (1970), held that Congress had exceeded the scope of its authority in lowering the voting age in local and state elections under the 1970 amendments to the VRA, but sustained the age reduction for federal elections as an appropriate use of congressional power under the Elections Clause and the Fourteenth Amendment. *Id.* at 125 (“Art. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4.”).

<sup>22</sup> A non-exhaustive list of federal laws that derive from multiple sources of constitutional authority includes: Digital Millennium Copyright Act, Pub. L. 105-304, 122 Stat. 2860 (2018) (codified as amended in scattered sections of 17 U.S.C.), enacted under Copyright Clause and

issue in other contexts, most notably when dealing with constitutional rights,<sup>23</sup> but the Court has failed to act coherently when the multi-clause issue implicates the constitutional structure.

For example, laws abrogating the immunity of the states from suit under the Commerce Clause and the Fourteenth Amendment have faced difficulties after the Court held, in *Seminole Tribe of Florida v. Florida*,<sup>24</sup> that the Commerce Clause did not give Congress this authority.<sup>25</sup> Since *Seminole Tribe*, the Court has been wildly inconsistent in its approach to determining whether Congress has created a legislative record sufficient to justify similar laws under the Fourteenth Amendment alone.<sup>26</sup> Separate from the issue of abrogation, however, the Court has ignored that a legislative record showing states engaging in

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Commerce Clause; Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (2018), enacted under Fourteenth Amendment and Commerce Clause; Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619, enacted under Fourteenth Amendment and Commerce Clause; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (2018), enacted under Fourteenth Amendment and Commerce Clause; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5, enacted under Fourteenth Amendment, Commerce and Spending Clauses.

<sup>23</sup> See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990) (allowing petitioner alleging liability based on two weak constitutional claims to prevail if one claim is based on Free Exercise Clause of the First Amendment); Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 50-51 (2012) (discussing other examples in which the Court recognized “hybrid rights” derived from multiple sources of authority). The Court has also used this type of aggregation in the due process context. See *Paul v. Davis*, 424 U.S. 693, 694 (1976) (concluding that the right to reputation standing alone is insufficient to trigger due process but could if considered in conjunction with some other injury); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (holding injury to reputation plus ban on buying alcohol sufficient to trigger Due Process). The Court has also been liberal about engaging multiple constitutional provisions to accord protection on the grounds of sexual orientation, striking down laws discriminating against same-sex couples as a violation of equal protection, substantive due process, and federalism norms. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (holding Defense of Marriage Act unconstitutional as it “violates basic due process and equal protection principles”); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 750 (2011) (arguing that *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down Texas’s sodomy law, is best understood as a product of substantive due process and equal protection).

<sup>24</sup> 517 U.S. 44 (1996).

<sup>25</sup> *Id.* at 74 (holding Eleventh Amendment bars Congress from enforcing remedial scheme against states that fail to negotiate in good faith).

<sup>26</sup> See *infra* Part I (discussing the Court’s inconsistency regarding laws based on multiple sources of constitutional authority).

patterns of discrimination, which violates the mandates of the Fourteenth Amendment and impacts interstate commerce, strengthens the inference that federal legislation is necessary. Comparatively, the Elections Clause, standing alone, may be insufficient to support the full scope of the VRA, but evidence showing that states engaged in intentional discrimination in violation of the Fourteenth and Fifteenth Amendments becomes more compelling in light of the federal interest in the health and vitality of congressional elections that the Clause protects.<sup>27</sup>

Consistent with this insight, this Article presents a more comprehensive theory of federal power to regulate elections than currently offered in the legal scholarship and proceeds in three Parts. Part I describes the Court's inconsistent treatment of statutes enacted pursuant to multiple sources of constitutional authority in order to frame the unique problem presented by the Elections Clause. While the Court has acknowledged and resolved legal challenges to statutes implicating more than one constitutional provision, *Shelby County* stands as an outlier in an important respect. The Court's prior willingness to uphold a statute if it could be justified based on any legitimate use of constitutional authority apparently does not extend to the VRA, which implicates three potential sources of authority. The Court's obfuscation stems, in part, from the absence of a narrative in the caselaw about the legal significance of interpreting federal enforcement authority in the aggregate, based on all of the provisions from which such power derives.<sup>28</sup> Part I contends that the

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<sup>27</sup> See *infra* Part II.

<sup>28</sup> Very few scholars have discussed this problem at length. For some terrific exceptions, see, for example, Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779, 780 (2018) (arguing that several of the rights-based constitutional provisions, when considered in the aggregate, establish a right to engage in recreational marijuana use); see also Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1073-74 (2016) (arguing that combination analysis can be normatively desirable across cases because it "can sometimes operate to clarify, rather than confuse, the organization of judicial doctrine"); Porat & Posner, *supra* note 23, at 9 (arguing that courts should aggregate legal claims and their underlying factual information in determining defendant's liability). In an insightful article, Professor Michael Coenen details the Court's use of what he calls "combination analysis," or a willingness to evoke multiple constitutional provisions that have some independent effect on the outcome of the case, though the Court does not do so in any systematic way. Coenen, *supra*. Professor Coenen draws examples from those circumstances in which the Court explicitly relies on two or more provisions in its decision. See *id.* at 1101-09. In contrast, this Article's reference to multiple sources of authority underlying congressional action encompasses any constitutional provision that could arguably justify the law, even if the provision is not mentioned in the Court's opinion. It explicitly focuses on how this phenomena should influence the Court's review of the legislative record. The scholarship examining how this phenomenon manifests in the election law context is virtually nonexistent.

presence of multiple sources of authority justifies increased deference towards the legislative record. This approach gives full weight to the notion that Congress can both remedy and deter constitutional violations, two aims long recognized as legitimate in the caselaw.<sup>29</sup> The presence of additional sources of authority arguably gives Congress greater leeway on the deterrence side.

Given the lack of clarity in the caselaw, *Shelby County's* ignorance of the Elections Clause is no surprise. The Court has never squarely confronted the relationship between the Clause, the Reconstruction Amendments, and the VRA in thinking about the scope of congressional enforcement authority, even while consistently expressing concerns about the impact of the VRA on the sovereignty of the states. Part II canvases the historical record to show that one plausible interpretation of the Elections Clause is that it is fundamentally about congressional sovereignty. During Reconstruction, the Court adopted a narrow interpretation of Congress's enforcement authority under the Fourteenth and Fifteenth Amendments, resisting the notion that these Amendments changed the fabric of our federal system.<sup>30</sup> But that Court expressed a surprising willingness to enforce Congress's broad authority under the Elections Clause, bucking the idea that all federal voting rights legislation enacted during this period was constrained by federalism.

The Supreme Court's broad view of federal power under the Elections Clause during Reconstruction followed an era in which Congress had been unwilling to read its authority broadly. During the Antebellum period, disputes over slavery and economic issues led Congress to abandon its conservative view of federal authority that defined the first half of the nineteenth century. Even when exercising its Elections Clause power in a limited fashion, however, Congress's deference to the states was dictated by politics, not law. Reconstruction saw a Congress willing to implement a complete code for federal elections through the Enforcement Acts in order to effectively address the racial discrimination and fraud that was pervasive in state and federal elections. Thus, the Elections Clause

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<sup>29</sup> See, e.g., *City of Rome v. United States*, 446 U.S. 156, 208 n.1 (1980) (Rehnquist, J., dissenting) (“[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive.”); *South Carolina v. Katzenbach*, 383 U.S. 301, 303 (1966) (stating Congress is free to use appropriate means to enforce constitutional amendments).

<sup>30</sup> See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 556 (1876) (“[R]ight to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.”); *United States v. Reese*, 92 U.S. 214, 221-22 (1876) (holding that the Fifteenth Amendment does not extend Congress's power to grant suffrage); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1872) (stating that the adoption of the Fourteenth and Fifteenth Amendments did not change the balance of state and federal power).

broke free from Congress's self-imposed federalism constraints in order to fulfill its broader purpose of ensuring well-functioning federal elections.

Part III discusses the normative implications of an Elections Clause jurisprudence that resolves disputes from the baseline of congressional sovereignty. This Part focuses on hybrid, or mixed, regulations that implicate the procedural aspects of election administration and constitute prerequisites to voting. For example, voter registration stands as the quintessential hybrid regulation that is both procedural and inextricably linked to voter qualification standards, but the Court, with little explanation, has held that Congress can regulate voter registration under the Elections Clause.<sup>31</sup> When regulations like voter registration, or more controversially, the VRA, implicate both voter qualifications and the manner of federal elections, the Court should be predisposed to sustain federal power under the Elections Clause so that states cannot use their power over voter qualifications to undermine the legitimacy and health of federal elections. This approach places the constitutionality of the VRA in a new light by explicitly recognizing the line drawing problem that exists between voter qualification standards and manner regulations, on one hand, and state and federal power, on the other.

Part III discusses voter identification laws, proof-of-citizenship requirements, and the exclusion of African-Americans from the Democratic Party primary, all of which, like voter registration, implicates voter qualification standards and the times, places, and manner of federal elections. This Article concludes by proposing two limited instances in which Congress can directly regulate voter qualifications under the Elections Clause: when states implement voter qualification standards that unduly circumscribe the federal electorate, or, alternatively, fail to set or "under-legislate" with respect to voter qualifications for its own elections in order to achieve the same purpose. This proposal provides a theoretical framework grounded in the Clause's text, structure, and purpose that the Court can draw on in assessing the legislative record underlying federal voting rights legislation and to explain what is already occurring in practice: Congress's pedestrian, rather than "extraordinary," use of its Elections Clause authority to impose laws other than procedural regulations that apply to federal elections.<sup>32</sup>

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<sup>31</sup> See *Arizona v. Inter Tribal Council of Ariz., Inc.* (*Ariz. Inter Tribal*), 133 S. Ct. 2247, 2253 (2013) (noting the "broad" scope of Elections Clause, which includes "regulations relating to 'registration'"); *Cook v. Gralike*, 531 U.S. 510, 527 (2001) (finding that Missouri's ballot annotation "unequivocally is not a time or place regulation," but showing less certainty as to whether it is a manner regulation).

<sup>32</sup> See Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 779 n.87 (2016) ("Although as a formal matter, the Elections Clause power involves congressional elections, as a practical matter Congress can

### I. CONGRESSIONAL ENFORCEMENT POWER AND THE PROBLEMS POSED BY MULTIPLE SOURCES OF CONSTITUTIONAL AUTHORITY

The Supreme Court's caselaw is unclear about whether the scope of congressional authority to enforce and protect constitutional rights is broader—or alternatively, increased deference to the legislative record is warranted—when Congress enacts legislation pursuant to multiple sources of constitutional authority.<sup>33</sup> Authorization based on multiple constitutional provisions has, in some cases, proven to be the difference between invalidation and constitutionality for some federal statutes.<sup>34</sup> The paradigmatic example is the Affordable Care Act, which survived a constitutional challenge because the Court found that the Act, though an unlawful exercise of the commerce power, was a valid use of the taxing power.<sup>35</sup>

The Court also has not been shy about sustaining legislation where Congress has failed to specify the source of authority pursuant to which it is acting. In *Fullilove v. Klutznick*,<sup>36</sup> for example, the Court upheld an affirmative action program requiring that ten percent of federal funds granted for local public works be allocated to minority owned firms.<sup>37</sup> The Court found that the program was a constitutional exercise of federal power under the Spending Clause and the Commerce Clause, even though Congress did not rely on either provision in

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leverage this power to cover all elections because states are loathe to run two separate elections processes.”).

<sup>33</sup> See Coenen, *supra* note 28, at 1086-88 (discussing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *The Legal Tender Cases*, 79 U.S. 457 (12 Wall.) (1870), as decisions that rest “on the combined effect of multiple enumerated powers” but noting that “[n]ot much has happened since then in the world of power/power combination analysis” because most decisions focus on one source of authority “as independently sufficient to sustain the federal enactment under review”).

<sup>34</sup> For example, Congress enacted Title VII of the Civil Rights Act of 1964 pursuant to its authority under the Commerce Clause, but in 1972, extended the reach of the statute to authorize money damages against state governments under the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976) (explaining that Congress relied on Fourteenth Amendment to amend Title VII of Civil Rights Act of 1964). After the Court's decision in *Seminole Tribe*, if Congress had relied on the Commerce Clause alone, the Amendments would have been invalidated. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (holding that Congress cannot abrogate state sovereign immunity under Commerce Clause); cf. *United States v. Morrison*, 529 U.S. 598, 613 (1995) (invalidating 42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender motivated violence, on grounds that it was not a proper exercise of power under the Commerce Clause or Section 5 of Fourteenth Amendment).

<sup>35</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563-66 (2012).

<sup>36</sup> 448 U.S. 448 (1980).

<sup>37</sup> *Id.* at 490.

enacting the law.<sup>38</sup> Similarly, in *Woods v. Cloyd W. Miller Co.*,<sup>39</sup> the Court upheld the Housing and Rent Act as a lawful exercise of the war power, inferring from “the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause.”<sup>40</sup> Even though hostilities had ceased, the Court observed that, “[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”<sup>41</sup>

Uncertainty about the actual source of federal authority was on full display in *Jones v. Alfred H. Mayer*,<sup>42</sup> where the Court upheld 42 U.S.C. § 1982, which guaranteed all citizens the right to convey real and personal property, as a valid exercise of the Thirteenth Amendment.<sup>43</sup> Section 1982 was originally part of section 1 of the Civil Rights Act of 1866, and many then in Congress believed that the Act exceeded the scope of congressional authority under the Thirteenth Amendment.<sup>44</sup> While the Act was reauthorized after the passage of the Fourteenth Amendment, which provided sufficient justification for its provisions, there has never been any suggestion that *Jones* was wrongly decided because the Court focused on the Thirteenth Amendment instead of the Fourteenth.

*Jones* and the unusual historical circumstances surrounding § 1982 might also suggest that far-reaching and potentially controversial legislation can gain substantial legitimacy from the fact that Congress can draw on multiple sources of power. A prominent example of this is section 4(e) of the VRA, which prohibits literacy tests as a precondition for voting as applied to individuals from Puerto Rico who have completed at least the sixth grade. In *Katzenback v. Morgan*,<sup>45</sup> the Court upheld section 4(e) as an appropriate exercise of Congress’s

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<sup>38</sup> See *id.* at 473-76.

<sup>39</sup> 333 U.S. 138 (1948).

<sup>40</sup> *Id.* at 144.

<sup>41</sup> *Id.*; see also *Wilson-Jones v. Caviness*, 99 F.3d 203, 208 (6th Cir. 1996) (“A source of power has been held to justify an act of Congress even if Congress did not state that it rested the act on the particular source of power.”); Ann Carey Juliano, *The More You Spend, The More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1120 (2001) (arguing that Title VII is lawful use of authority under the Spending Clause even though Congress originally enacted the provision under the Commerce Clause).

<sup>42</sup> 392 U.S. 409 (1968).

<sup>43</sup> *Id.* at 413.

<sup>44</sup> *Id.* at 455 (Harlan, J., dissenting) (presenting a comprehensive review of the legislative history suggesting that many in the Thirty-Ninth Congress believed that 1866 Civil Rights Act was unconstitutional).

<sup>45</sup> 384 U.S. 641 (1966).

authority to enforce the Fourteenth Amendment.<sup>46</sup> The Court sustained Congress's ban on literacy tests, even though an earlier court decision found these tests to be constitutional as a general matter, and Congress made no evidentiary findings that literacy tests were being used in a racially discriminatory manner.<sup>47</sup> As a practical matter, the Court might have been willing to defer to Congress because of the myriad provisions that the Court identified as potential sources of authority for section 4(e)—ranging from the treaty power to the Territorial Clause of Article III—even though Congress did not explicitly rely on any of these provisions in enacting the legislation.<sup>48</sup>

At the very least, *Katzenbach* illustrates that the presence of multiple sources of constitutional support has some relevance to the inquiry into the scope of congressional power, a position that received the Court's full-throated endorsement in the *Legal Tender Cases*<sup>49</sup> and *McCulloch v. Maryland*.<sup>50</sup> In this vein, the preclearance provisions of the Voting Rights Act of 1965 are not unique in the realm of federal laws that implicate more than one source of authority, a fact that should be a net positive in the face of any constitutional challenge. The Act was first authorized pursuant to Section 2 of the Fifteenth Amendment and later renewed and extended pursuant to Section 5 of the Fourteenth Amendment in 1970. Despite its mooring in various constitutional provisions, however, the Court has not been favorably disposed towards the VRA, and other laws similarly situated, because of federalism concerns.<sup>51</sup> The analytical framework

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<sup>46</sup> *Id.* at 655-58 (concluding that New York's english literacy requirement for voters could discriminate against New York's large Puerto Rican community, but not requiring congressional findings that prove this proposition).

<sup>47</sup> *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (holding that literacy tests are constitutional absent discriminatory intent).

<sup>48</sup> *Katzenbach*, 384 U.S. at 646 n.5 (stating that Court need not consider whether section 4(e) could be sustained under Territorial Clause).

<sup>49</sup> 79 U.S. (12 Wall.) 457, 534 (1870) (holding it is "allowable to group together any number of [enumerated powers] and infer from them all that the power claimed has been conferred").

<sup>50</sup> 17 U.S. (4 Wheat.) 316, 407-12 (1819) (finding that Congress's power to charter a bank stems from its "great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies" as supplemented by the Necessary and Proper Clause).

<sup>51</sup> For example, Congress enacted the Fair Housing Act (the "FHA") pursuant to the Commerce Clause and the Fourteenth Amendment, contexts in which the Court has imposed significant constraints on the exercise of federal power in the name of federalism. Recently, the Court held that plaintiffs could bring disparate impact claims under the FHA, over the vigorous dissent of four justices who, among other things, criticized the majority for giving a "nod" to federalism as a justification for its holding when, in the dissent's view, true adherence to federalism would leave the decision to the states of whether to establish disparate

of *City of Boerne v. Flores*,<sup>52</sup> which held that Congress can adopt only those remedies that are congruent and proportional to the harm to be addressed when acting pursuant to the Fourteenth Amendment, was intended to cabin federal power to only remedial fixes in order to protect state sovereignty.<sup>53</sup> In engaging in this analysis, the Court assessed the strength of the legislative record to determine if Congress was trying to address a pattern of unconstitutional behavior on the part of the states.<sup>54</sup> However, the Court, in later cases, has been inconsistent in deciding whether the presence of multiple sources of constitutional authorization affects the means/ends analysis required by *City of Boerne*.

For example, in *Coleman v. Court of Appeals of Maryland*,<sup>55</sup> the Court held that Congress could not abrogate state sovereign immunity under the self-care provision of the Family Medical Leave Act (“FMLA”) because Congress had not established a record of discrimination on the basis of sex with respect to illness-related job loss.<sup>56</sup> This provision requires employers, including the state, to provide unpaid leave to employees with serious medical conditions. Ignoring evidence of the “well-documented pattern of workplace discrimination against pregnant women,”<sup>57</sup> *Coleman* sought to protect state sovereignty at all costs and raised the bar with respect to the degree of discrimination that Congress must show to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment.<sup>58</sup> While the question of abrogation turns on one provision—Section 5—the presence of additional sources of authority should nonetheless assuage the Court’s concerns about federalism and, in turn, increase the deference the Court accords to the legislative record.

The *Coleman* decision stands in marked contrast to *Nevada Department of Human Resources v. Hibbs*,<sup>59</sup> a case in which the Court sustained the

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impact liability. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2550 (2015) (5–4 decision) (Alito, J., dissenting).

<sup>52</sup> 521 U.S. 507 (1997).

<sup>53</sup> *Id.* at 508 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

<sup>54</sup> *Id.* at 530–32 (searching legislative history for patterns of religious discrimination to justify federal action).

<sup>55</sup> 566 U.S. 30 (2012).

<sup>56</sup> *Id.* at 33 (holding that lawsuits against states under the FMLA “are barred by the States’ immunity as sovereigns in our federal system”).

<sup>57</sup> *Id.* at 51 (Ginsburg, J., dissenting).

<sup>58</sup> Compare *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (upholding FMLA’s family leave provision under congruence and proportionality standard), with *Coleman*, 566 U.S. at 41 (requiring Congress to establish record of discrimination with respect to individual provisions of FMLA).

<sup>59</sup> 538 U.S. 721 (2003).

constitutionality of a provision of the FMLA that entitled employees to twelve weeks of paid leave to care for a family member.<sup>60</sup> In doing so, the Court viewed the legislative record much more generously than the Court in *Coleman*, deferring to the legislative evidence of gender disparities with respect to family leave.<sup>61</sup>

The Court has also been inconsistent with respect to the Americans with Disabilities Act (“ADA”), a statute that, like the FMLA, has the dubious distinction of being struck down in part, and upheld in part, based on the exact same legislative record. In *Board of Trustees of the University of Alabama v. Garrett*,<sup>62</sup> the Court invalidated portions of the ADA as an improper use of Congress’s authority under Section 5.<sup>63</sup> Like the FMLA, the Court did not consider the significance of the Commerce Clause, presumably because it was laser focused on the issue of whether Congress had properly abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment instead of whether the presence of additional evidence of the impact of disability discrimination on interstate commerce strengthened the overall record.<sup>64</sup>

In contrast, *Tennessee v. Lane*<sup>65</sup> upheld Title II of the ADA because the Court found that Congress was able to establish a disparity with respect to how states administered services to the disabled with respect to the fundamental right to access the courts.<sup>66</sup> One notable difference between the two cases is that the *Lane*

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<sup>60</sup> *Id.* at 737.

<sup>61</sup> *Id.* at 726-27 (“In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment to enforce that Amendment’s guarantees. Congress may not abrogate the States’ sovereign immunity pursuant to its Article I power over commerce. Congress may, however, abrogate States’ sovereign immunity through a valid exercise of its § 5 power, for ‘the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.’” (footnote and citations omitted)).

<sup>62</sup> 531 U.S. 356 (2001).

<sup>63</sup> *Id.* at 374.

<sup>64</sup> *Cf.* Juliano, *supra* note 41, at 1127 n.136 (“If Congress enacted the ADEA solely pursuant to its Commerce Clause power, the Court held it would not have been a valid exercise of power as Article I powers ‘do not include the power to subject States to suit at the hands of private individuals.’ If the ADEA also was enacted pursuant to Congress’ Fourteenth Amendment power to abrogate states’ sovereign immunity, the question is whether the ADEA is appropriate legislation under the Fourteenth Amendment. The Court examined only the Fourteenth Amendment power.” (citation omitted)).

<sup>65</sup> 541 U.S. 509 (2004).

<sup>66</sup> *Id.* at 515; *see also id.* at 542 (Rehnquist, C.J., dissenting) (arguing that under *Garrett* “brief anecdotes” of discrimination do not suffice for inquiry into whether Congress has “validly abrogated Eleventh Amendment immunity”).

majority couched its discussion of the record within a framework that acknowledged “the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce,”<sup>67</sup> but it is not clear that this acknowledgment of dual sources of authority had any effect on the outcome in the case.

Instead, it is more common for the Court to use the issue of state sovereign immunity as a wedge to undermine consideration of the full legislative record, generally ignoring that the Commerce Clause is still relevant to whether the remedy is congruent and proportional even if the Clause alone does not authorize Congress to abrogate state sovereign immunity.<sup>68</sup> The presence of discriminatory behavior by any state actor, intentional or otherwise, is a consideration independent of the issue of state sovereign immunity, and counsels in favor of viewing the statutory scheme and the underlying legislative record as a cohesive whole since Congress has the power to both “remedy and deter [constitutional] violations.”<sup>69</sup>

In other words, a pattern of constitutional violations affecting interstate commerce should result in Congress having to adduce less evidence of unconstitutional discrimination than if proceeding based on the Fourteenth Amendment alone. Regardless of whether discrimination implicates the Commerce Clause or the Fourteenth Amendment, its presence across dimensions can signal the need for uniform federal action. As Justice Ginsburg argued in her *Coleman* dissent, the FMLA, by invoking Congress’s power under both the Commerce Clause and the Fourteenth Amendment, “address[ed] the basic leave needs of all employees” while “providing special protection to

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<sup>67</sup> *Id.* at 516 (majority opinion) (quoting 42 U.S.C. § 12101(b)(4) (2018)).

<sup>68</sup> *See Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 37-38 (2012) (“The self-care provision standing alone addresses sex discrimination and sex stereotyping; the provision is a necessary adjunct to the family-care provision sustained in *Hibbs*; and the provision eases the burden on single parents. But what the family-care provisions have to support them, the self-care provision lacks, namely, evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations.”). *But see id.* at 58-59 (Ginsburg, J., dissenting) (noting that Congress made findings relevant to sex discrimination in violation of both the Fourteenth Amendment and the Commerce Clause in enacting FMLA).

<sup>69</sup> *Id.* at 45 (“In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.” (citation omitted)). *But see Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-69 (2001) (ignoring evidence of discrimination by local governments in assessing the legislative record underlying the ADA because “[i]t would make no sense to consider constitutional violations on their part . . . when only the States are the beneficiaries of the Eleventh Amendment”).

women.”<sup>70</sup> There is little doubt that, but for the issue of state sovereign immunity, Congress could enact this legislation under the Commerce Clause given the implications for the national labor market. Instead, the Court has tried to reconcile cases like *Hibbs* and *Lane*, which sustained Section 5 legislation, and *Coleman* and *Garrett*, which invalidated it, by searching the legislative record for evidence that a fundamental right is implicated or for discrimination that is specific to the remedy that Congress has adopted, ignoring that discrimination and rights do not exist in a vacuum.

*Lane*, unlike *Garrett*, evoked the right to access the courts rather than sustaining the legislation as a remedy to address disability discrimination, which the Court subjects to rational basis review.<sup>71</sup> But the legislative record established that disability discrimination has a pervasive and undeniable impact on interstate commerce.<sup>72</sup> Likewise, *Coleman* looked for evidence that there was discrimination specific to the taking of self-care leave, and ignored other arguably probative evidence of gender disparities in family-care leave that had been sufficient to justify federal action in *Hibbs*.<sup>73</sup> The inability of women to take self-care leave as state employees has significant consequences for the remaining provisions of the FMLA, the broader labor market, and for gender equality more generally.<sup>74</sup> As one commentator observed, “by weakening the

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<sup>70</sup> *Coleman*, 566 U.S. at 58 (Ginsburg, J., dissenting) (quoting H.R. REP. NO. 102-135, pt. 1, at 27 (1991)).

<sup>71</sup> See *Lane*, 541 U.S. at 522, 533-34 (2004).

<sup>72</sup> *Garrett*, 531 U.S. at 377 (Breyer, J., dissenting). As Justice Breyer wrote:

Congress compiled a vast legislative record documenting “massive, society-wide discrimination” against persons with disabilities. In addition to the information presented at 13 congressional hearings, and its own prior experience gathered over 40 years during which it contemplated and enacted considerable similar legislation, Congress created a special task force to assess the need for comprehensive legislation.

*Id.* (citations omitted); see also James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 162 (2000) (defending Title I of the ADA as a constitutional use of Congress’s commerce authority because the legislative record shows “discrimination to be continuing and pervasive, with the result that the disabled occupy an economically inferior position in society and that billions of dollars are lost to their dependency and non-productivity”).

<sup>73</sup> *Coleman*, 566 U.S. at 37 (noting self-care provision “addresses sex discrimination and sex stereotyping” and that “provision is a necessary adjunct to the family-care provision sustained in *Hibbs*” but still finding self-care provision lacks supporting evidence of “pattern of state constitutional violations”).

<sup>74</sup> As Justice Ginsburg argued in her *Coleman* dissent, the self-care provision was an integral part of the FMLA regulatory regime because it helped counter stereotypes that would undermine implementation of the statute if it only provided for parental and family-care leave alone. *Id.* at 62 (Ginsburg, J., dissenting).

self-care provision, it is likely that women, who still perform the vast majority of family care, will be taking leave disproportionately and will consequently become, in the eyes of employers, less attractive employees to hire and promote, further relegating them to second-class workers.<sup>75</sup>

Thus, the Court's analysis is incomplete at best if it ignores that the underlying right or protected class, the pattern of state action in the area, and the proposed remedy have implications for interstate commerce that matter in federal attempts to address unconstitutional discrimination by the states. Ignoring the Commerce Clause imposes a significant burden on Congress when it seeks to enact legislation pursuant to Section 5, and this move makes little sense given that Congress can also use its authority under the Clause to enforce the equality norms of the Fourteenth Amendment so long as the behavior has a substantial economic effect on interstate commerce.<sup>76</sup>

As this caselaw illustrates, there is no guarantee that the Court will properly entertain arguments that it should be more deferential to the congressional record simply because the discriminatory behavior implicates more than one constitutional provision.<sup>77</sup> This remains true even though the Court has been willing to engage in a more comprehensive, multi-clause analysis of state power.<sup>78</sup> The presence of multiple sources of congressional power to justify a federal law is nonetheless germane in determining whether a remedy is appropriate under *City of Boerne*.<sup>79</sup> For its part, *City of Boerne* cited the VRA as

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<sup>75</sup> Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407, 433 (2012).

<sup>76</sup> See *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (explaining that Congress acted within its Commerce Clause power to apply "coverage of Title II [forbidding discrimination in places of public accommodation] only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce"); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964) (concluding that the Civil Rights Act of 1964 was within Congress's Commerce Clause powers).

<sup>77</sup> Even Justice Scalia, an enduring critic of expansive federal authority, suggested that federal power is broader when Congress can point to an additional source of authority to support its legislation. See *Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) ("[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.").

<sup>78</sup> See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (finding that the Constitution contains a conception of state sovereign immunity that derives not only from the Tenth and Eleventh Amendments but from the constitutional structure).

<sup>79</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997). At the very least, the presence of an additional source of power arguably expands the universe of means that Congress can employ in furthering the ends of the statute. Cf. *Gonzales*, 545 U.S. at 38 (Scalia, J., concurring) ("As the Court said in the *Shreveport Rate Cases*, the Necessary and Proper Clause does not give

an appropriate use of congressional power under the Fourteenth Amendment, but ignored that Congress had also enacted the Act pursuant to the Fifteenth.<sup>80</sup> Unlike the Fourteenth Amendment, the Fifteenth Amendment creates a right to vote free of racial discrimination and can serve as the predicate for far reaching congressional legislation designed to ferret out such discrimination. It is unclear if *City of Boerne* also applies to the Fifteenth Amendment, which has not perfectly paralleled the Fourteenth Amendment with respect to its development in the caselaw. For example, the Court initially enforced the Fifteenth Amendment against both private individuals and the states,<sup>81</sup> eschewing the federalism concerns that had limited the reach of the Fourteenth to state action. But the Court later imposed a state action requirement on the Fifteenth Amendment in 1903, decades after it had done the same for the Fourteenth Amendment in the *Civil Rights Cases*.<sup>82</sup> The nonparallel evolution of the Fourteenth and Fifteenth Amendments illustrates the difficulties that arise when multiple sources of constitutional authority are at issue in a very sharp way, even without consideration of the Elections Clause.

Ultimately, *Shelby County* accorded no weight to the fact that authority for the VRA rested on both the Fourteenth and Fifteenth Amendments.<sup>83</sup> The Court relegated its discussion of the Fourteenth Amendment to a mere footnote with little explanation in the body of the decision about how either Amendment resolved the constitutional issues present in the case.<sup>84</sup> Instead, the Court contended that section 4(b) failed both rational basis review<sup>85</sup> and the standard

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‘Congress . . . the authority to regulate the internal commerce of a State, as such,’ but it does allow Congress ‘to take all measures necessary or appropriate to’ the effective regulation of the interstate market, ‘although intrastate transactions . . . may thereby be controlled.’” (citations omitted).

<sup>80</sup> *City of Boerne*, 521 U.S. at 532-33 (discussing Congress’s enforcement power to enact VRA).

<sup>81</sup> *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884) (explaining that the Fifteenth Amendment confers a right to vote free of racial discrimination and limits the power of states).

<sup>82</sup> Compare *James v. Bowman*, 190 U.S. 127, 136-39 (1903) (explaining that the Fifteenth Amendment is similar to the Fourteenth Amendment), with *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (holding that the Fourteenth Amendment only reaches discriminatory state action).

<sup>83</sup> In its grant of certiorari, the Court acknowledged that the preclearance regime is based on dual sources of constitutional authority, but otherwise ignored the implications of this fact in assessing the regime’s constitutionality. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2629 (2013) (discussing only Fifteenth Amendment), *cert. granted*, 568 U.S. 1006 (2012) (acknowledging Fourteenth and Fifteenth Amendments in grant of certiorari).

<sup>84</sup> See *id.* at 2622 n.1.

<sup>85</sup> See *id.* at 2625 (explaining that section 4(b) was rational “in both practice and theory” when adopted, but is now irrational).

derived from *Northwest Austin Municipal Utility District Number One v. Holder*<sup>86</sup> (“*NAMUDNO*”) which “guides [its] review under both [the Fourteenth and Fifteenth] Amendments.”<sup>87</sup> *NAMUDNO*, however, did not articulate a standard of review under these provisions.<sup>88</sup> Pursuant to this (non)standard, the Court in *Shelby County* held that section 4(b) violated the Constitution’s principle of equal sovereignty, which requires that Congress build a record sufficient to justify legislation that distinguishes between the sovereign states.<sup>89</sup> In other words, it was constitutionally suspect to subject mostly southern jurisdictions, but not the northern states, to the preclearance requirement without showing a pattern of intentional discrimination by the southern states.

In putting on the standard of review, the Court also disregarded amicus briefs filed in the case that offered a full range of constitutional alternatives that could have saved the VRA. One brief, in particular, argued that the Act could be sustained as a constitutional exercise of Congress’s authority under the Fourteenth and Fifteenth Amendments as well as the Elections Clause, an argument bolstered by the Court’s broad reading of federal power under the Clause in the *Arizona Inter Tribal* case, decided eleven days earlier.<sup>90</sup>

In *Arizona Inter Tribal*, the Court held that congressional power under the Elections Clause is paramount over the times, places, and manner of federal

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<sup>86</sup> 557 U.S. 193 (2009).

<sup>87</sup> *Shelby Cty.*, 133 S. Ct. at 2622 n.1.

<sup>88</sup> See *NAMUDNO*, 557 U.S. at 204 (“The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. . . . That question has been extensively briefed in this case, but we need not resolve it. The Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test [congruent and proportional or rational basis].” (citations omitted)).

<sup>89</sup> *Shelby Cty.*, 133 S. Ct. at 2623-24 (explaining that VRA departs from “these basic principles” of equal sovereignty).

<sup>90</sup> See, e.g., Brief of Gabriel Chin et al. as Amici Curiae Supporting Respondents at 4, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) (“The Fourteenth and Fifteenth Amendments are not and have never been the *sole* source of Congress’ authority for Section 5. Section 5 concerns elections not only for state officials, but also for federal officials. The Elections Clause, U.S. Const. art I, § 4, cl. 1, provides distinct, clear authority for Congress to enact Section 5’s pre-clearance procedures for state laws concerning federal elections.”). For a detailed discussion of the federalism issues presented by the VRA, see Tolson, *supra* note 15, at 1198 (“The [VRA] represents an appropriate use of congressional power to alter or modify state electoral schemes that govern federal elections and implicate the constitutional right to vote.”). See also Michael Halberstam, *The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 927 (2010) (arguing that VRA is “not nearly as intrusive as is generally assumed” and rather its “relative sensitivity to local autonomy and to the promotion of political participation by governmental and nongovernmental actors contributed to its phenomenal success”).

elections, but instead of looking to this provision as a potential source of authority for the VRA, *Shelby County* cited the case in passing without any meaningful analysis.<sup>91</sup> In reality, *Arizona Inter Tribal* is so much more, sustaining broad federal authority even when faced with a non-frivolous argument that the National Voter Registration Act of 1993 (“NVRA”) conflicted with the State’s authority to enforce its voter qualifications.<sup>92</sup> At issue in the case was an Arizona law that required individuals to present documentary proof of citizenship in order to register to vote in state and federal elections.<sup>93</sup> The plaintiffs sued, arguing that the Arizona proof-of-citizenship requirement conflicted with the NVRA’s uniform federal form used to register voters for federal elections that only required affirmation of citizenship status, not documentary proof.<sup>94</sup> The Court held that the NVRA required states to “accept and use” the federal form as a “complete and sufficient registration application,” and preempted the Arizona law that would require additional documentation.<sup>95</sup> Notably, dissenters in the case took the position that the NVRA interfered with the State’s power to enforce its proof-of-citizenship requirement.<sup>96</sup> As Justice Thomas argued, states have the sole authority to set voter qualifications and the practical effect of preempting the Arizona law is to deprive Arizona of the ability to determine if its voter qualification standards are met.<sup>97</sup>

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<sup>91</sup> *Shelby Cty.*, 133 S. Ct. at 2224 (citing *Arizon v. Inter Tribal Council of Ariz., Inc.* (*Ariz. Inter Tribal*), 133 S. Ct. 2247, 2253-54, 2257-59 (2013), for the proposition that “the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives” but noting states possess “broad powers to determine the conditions under which the right of suffrage may be exercised” (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965))).

<sup>92</sup> *Ariz. Inter Tribal*, 133 S. Ct. at 2252.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2254, 2257 (“We conclude that the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is ‘inconsistent with’ the NVRA’s mandate . . .”).

<sup>96</sup> *Id.* at 2262 (Thomas, J., dissenting).

<sup>97</sup> *Id.* at 2262, 2264 (“[B]oth the plain text and the history of the Voter Qualifications Clause, U.S. Const., art. I, § 2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied. To avoid substantial constitutional problems created by interpreting § 1973gg-4(a)(1) to permit Congress to effectively countermand this authority, I would construe the law as only requiring Arizona to accept and use the form as part of its voter registration process, leaving the State free to request whatever additional information it determines is necessary to ensure that voters meet the qualifications it has the constitutional authority to establish. Under this interpretation, Arizona did ‘accept and use’ the federal form.”).

The *Arizona Inter Tribal* case presents a question that is both intriguing and has profound implications for the Court's approach to cases that not only implicate both state and federal power, but also squarely frames the issues presented by the multi-clause nature of Congress's authority over elections: how should the Court approach federal regulations that fall in the gray area between time, place, and manner regulations (where congressional power is paramount) and voter qualification standards (where federal power is much more limited)?<sup>98</sup> As Justice Alito argued in dissent, the majority's reading of the Elections Clause could substantially impair state control over voter qualifications, not only for federal elections, but for state and local elections, which substantially increases the federalism costs of the NVRA.<sup>99</sup>

The argument that the NVRA interferes with the states' control over voter qualifications looms because the Court has not definitively resolved the tension present in this area of concurrent regulation. The majority recognized the risks presented by Justices Thomas and Alito, but denied that the question was properly presented in the case.<sup>100</sup> Nonetheless, the question persists as to the extent to which the federalism concerns that have so limited the Reconstruction Amendments constrain the federal power under the Elections Clause. To put the question in practical terms: when can Congress aggregate its Elections Clause authority with its power under the Reconstruction Amendments to enact "hybrid" regulations that plainly interfere with the state's control over voter qualification standards? Like the *Shelby County* case, the majority and the dissent in *Arizona Inter Tribal* suggest that the answer to this question is never absent a record of intentional racial discrimination, although the justices disagree in the latter case about the extent to which the NVRA intrudes on the states. In reality, the answer to this question is significantly more complicated than either the majority or the dissenters appreciate, and lies in the tortured history of the Elections Clause and the Reconstruction Amendments.

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<sup>98</sup> *See id.* at 2263 ("Congress has no role in setting voter qualifications, or determining whether they are satisfied, aside from the powers conferred by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which are not at issue here. This power is instead expressly reposed in the States.").

<sup>99</sup> *Id.* at 2272 (Alito, J., dissenting) ("[T]he Elections Clause's default rule helps to protect the States' authority to regulate state and local elections. As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections.").

<sup>100</sup> *Id.* at 2258-59 (majority opinion) (noting that because the statute "provides another means by which Arizona may obtain information needed for enforcement" the Court does not have to "determine whether Arizona's interpretation . . . is at least a possible" reading).

## II. RETHINKING THE EVOLUTION OF ELECTIONS CLAUSE “FEDERALISM”

The Supreme Court’s perception that states retain sovereignty under the Elections Clause that must be protected from federal overreaching is a relic of a history that has been grossly misunderstood and misinterpreted. This misunderstanding is precisely why the Court has been able to ignore how the Elections Clause complicates the calculus surrounding whether Congress has established a legislative record sufficient to justify federal voting rights legislation. Since the founding, Congress has used its “make or alter” authority sparingly, leading the regulation of federal elections to become, over time, a government function traditionally left to the states. Additionally, the relatively small field of Elections Clause cases over the last century have contributed to this view that states have default sovereign authority that courts must acknowledge in the course of determining the scope of Congress’s authority under the Clause. But the Waite Court, which took the first crack at defining the Clause’s meaning and scope in a systematic way, deliberately interpreted the Clause in a manner that freed it from the federalism constraints that had come to define the Reconstruction Amendments.<sup>101</sup> This approach corroborated Congress’s view, on the eve of the Civil War, that the Elections Clause is an expansive and far-reaching source of federal authority.

This Part shows the evolution of the Clause from one in which Congress unilaterally imposed federalism constraints during the Antebellum era to a provision that vindicated the broad Reconstruction-era legislation that were clear affronts to state sovereignty. The historical record reinforces the anti-federalism, pro-federal power narrative of the Elections Clause by showing that: (1) Congress exercised its independent authority to “make law” in the pre-Civil War era, even when the assertion of this power was controversial, and (2) the Court’s jurisprudence on the Reconstruction Amendments and the Elections Clause during the late nineteenth century explicitly distanced the Clause from the federalism pathologies that had limited the reach of the Reconstruction Amendments.

### A. *Making Law: Congress’s Authority over Federal Elections in the Pre-Civil War Era*

In the Antebellum era, Congress’s commitment to a political system in which a winner is chosen from a process legitimized by clear rules and a definitive outcome generally trumped any desire to use electoral disputes as a vehicle for asserting the primacy of federal law. Even in situations in which state procedures were not ideal, Congress still deferred to state authority to promote these broader

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<sup>101</sup> See Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2389-91 (2003) (discussing Waite Court’s decision in *Ex parte Yarbrough*).

values. Early in the country's history, deference to state law, or more accurately, Congress's self-imposed "federalism" constraints, brought coherence and administrative ease to a system in which multiple states had de facto control over federal elections.<sup>102</sup> But as this Section shows, Congress had to weigh in and reassert the primacy of federal law on occasion, negating any inference that the states were truly sovereign.

Many disputes over the scope of federal authority under the Elections Clause are memorialized in the historical record because of the House's authority, under Article I, Section 5, to judge the "elections, returns and qualifications of its own members."<sup>103</sup> The contested elections presented opportunities for Congress to probe the scope of both state and federal authority in this area.<sup>104</sup> Prior to the Civil War, Congress believed that its authority under the Clause permitted, at a minimum, federal intervention if the states failed to enact legislation governing the times, places, and manner of federal elections, or if state legislation was inadequate.<sup>105</sup> Congress took a broader view of its authority under the Clause in

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<sup>102</sup> That Congress would be conservative and reserved in regulating federal elections is consistent with at least some views of federal power under the Clause at the country's founding. See Tolson, *supra* note 15, at 1224-25 (discussing proposals in Massachusetts and New Hampshire that would limit Congress's power under Elections Clause to only those situations in which states failed to call for congressional elections or where state legislation endangered rights otherwise protected by Constitution); see also RATIFICATION OF THE CONSTITUTION BY THE STATE OF NEW YORK (July 26, 1788), reprinted in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786-1870, at 197 (1894) [hereinafter DOCUMENTARY HISTORY] (stating "Congress shall not make or alter any Regulation in any State respecting the times places and manner of holding Elections for Senators or Representatives, unless the Legislature of such State shall neglect or refuse to make Laws or Regulations for the purpose, or from any circumstance be incapable of making the same; and then only until the Legislature of such State shall make provision in the premises . . ."); RATIFICATION OF THE CONSTITUTION, BY THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS (May 29, 1790), reprinted in DOCUMENTARY HISTORY, *supra*, at 315 (1894) (same).

<sup>103</sup> U.S. CONST. art. I, § 5.

<sup>104</sup> See Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 589 (2015) ("Congress can examine qualifications of its own members and probably those of presidential candidates. For states, however, their roles of evaluation would look slightly different: it would occur through the context of ballot access.").

<sup>105</sup> JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 232 (John M. Gould ed., 14th ed. 1896) ("The legislature of each State prescribes the times, places, and manner of holding elections, subject, however, to the interference and control of Congress, which is permitted them for the sake of their own preservation, and which, it is to be presumed, they will not be disposed to exercise, except when any state shall neglect or refuse to make adequate provision for the purpose."). Congress did not think that its authority under the Clause extended to calling a new election even in the face of obvious fraud or disenfranchisement by the state.

the wake of the sharp partisan conflict that emerged during the 1830s and early 1840s thanks to the development of clearly defined and organized political parties—the Democrats and the Whigs.<sup>106</sup> At the time, the American political system was dominated by disagreements over slavery and economic issues, i.e., patronage, at the state and local level.<sup>107</sup> Electoral fraud was also rampant,<sup>108</sup> and Congress deducted a number of fraudulent votes from the total ballots cast in very close races.<sup>109</sup> Nevertheless, election disputes that necessitated a strong

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*See, e.g., Featherstone v. Cate: Hearing Before H. Comm. on Elections, 51st Cong. (1889), reprinted in CHESTER A. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789-1901, at 441, 441-42 (1901) [hereinafter ROWELL, ELECTION CASES].* Congress can, however, declare a seat vacant. *See Bowen v. De Large: Hearing Before H. Comm. on Elections, 42d Cong. (1871), reprinted in ROWELL, ELECTION CASES, supra, at 282, 282 (“[I]t was impossible to determine who was elected, and the committee unanimously recommended that the seat be declared vacant.”).* Congress has exercised this extraordinary power rarely. *See infra* Section II.A.2 (explaining factors that led to Congress’s willingness to exert more federal power over state elections).

<sup>106</sup> *See* ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 43-44 (2013) (“By the election of 1840, Whig and Democrat organizations were fighting on an even basis in almost every state. By 1840, nearly 80 percent of the states had a competitive two-party system, compared to only 10 percent in 1824.”); RICHARD P. MCCORMICK, THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA 341 (1966) (“In 1840, for the first time, two parties that were truly national in scope contested for the presidency.”).

<sup>107</sup> *See* Scott C. James, *Patronage Regimes and American Party Development from ‘The Age of Jackson’ to the Progressive Era*, 36 BRIT. J. POL. SCI. 39, 42 (2006) (“Since party policies are ‘public goods’—that is, once enacted, no supporter can be excluded from enjoying their benefits—labour contributions to the party campaign should have been under-supplied. The answer of course was patronage—well-paid public jobs—a selective incentive with the power to induce participation in the otherwise profitless process of electioneering.”); Peter Levine, *State Legislative Parties in the Jacksonian Era: New Jersey, 1829-1844*, 62 J. AM. HIST. 591, 600 (1975) (“Patronage and its control were critical links between legislative parties and state party organizations.”).

<sup>108</sup> *See, e.g., Rutherford v. Morgan: Hearing Before H. Comm. on Elections, 5th Cong. (1797), reprinted in ROWELL, ELECTION CASES, supra note 105, at 48, 48 (arguing that Morgan’s election should be vacated because “money was promised by [General Morgan] or his friends for ‘meat, drink, wagon hire, and other acts of bribery and corruption,’ with the result that the freedom and purity of the election was greatly interfered with by disorder and carousals”).*

<sup>109</sup> *See, e.g., Chapman v. Ferguson: Hearing Before H. Comm. on Elections, 35th Cong. (1859), reprinted in D.W. BARTLETT, CASES OF CONTESTED ELECTIONS IN CONGRESS, FROM 1834 TO 1865, INCLUSIVE 267, 267-68, 270 (1865) [hereinafter BARTLETT, CONTESTED ELECTIONS] (adding votes cast for “Judge Ferguson” instead of “Fenner Ferguson” to contestant’s vote total and rejecting entire precinct’s vote where there were “numerous*

showing of federal power were relatively rare, and this period is best defined by Congress's deferential posture towards the states with respect to the regulation of federal elections. Even the extreme case—where Congress set aside an election in its entirety—usually occurred if the election “was conducted in an irregular manner” contrary to state law.<sup>110</sup> By the mid-nineteenth century, however, the manipulation of electoral rules for partisan gain led Congress to be more assertive in exercising its authority over federal elections, forced by circumstances to loosen, and ultimately discard, its self-imposed federalism constraints.

### 1. Federalism as a Political Constraint During the Antebellum Era

In the first Congress, Representative William Smith survived an election challenge after his opponent claimed that Smith had not been a citizen for seven years and therefore was ineligible to keep his seat. Smith, who had been abroad studying law and was later shipwrecked for a year, was able to prevail because of “the tacit recognition of Mr. Smith’s citizenship by the people and legislature of the State.”<sup>111</sup>

This case set an early precedent in the House of deferring to state law in exercising Congress’s power under Article I, Section 5 to judge its members’ “elections, returns and qualifications” as well as its concomitant authority under the Elections Clause to regulate the procedure of federal elections. For example, in *Barney v. McCreery*, a contested election arising during the tenth Congress, the contestant, Barney, argued that the sitting Maryland congressman, McCreery, did not have the qualifications necessary to be seated.<sup>112</sup> Barney contended that McCreery was not “an inhabitant of his district at the time of his election,” nor had he “resided therein twelve calendar months immediately before” in accordance with Maryland law.<sup>113</sup> McCreery moved his family to their second home in the summer months and lived in Washington, D.C. during the winter when Congress was in session.<sup>114</sup> The House Committee on Elections

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evidences of illegalities and frauds practiced”); *Howard v. Cooper: Hearing Before H. Comm. on Elections* 36th Cong. (1860), reprinted in ROWELL, ELECTION CASES, *supra* note 105, at 161, 161 (noting issue of illegal and fraudulent votes).

<sup>110</sup> See, e.g., *Taliaferro v. Hungerford: Hearing Before H. Comm. on Elections*, 13th Cong. (1813), reprinted in ROWELL, ELECTION CASES, *supra* note 105, at 63, 64 (finding election was illegal and should be set aside).

<sup>111</sup> *Ramsay v. Smith: Hearing Before H. Comm. on Elections*, 1st Cong. (1789), reprinted in ROWELL, ELECTION CASES, *supra* note 105, at 37, 37.

<sup>112</sup> *Barney v. McCreery: Hearing Before H. Comm. on Elections*, 10th Cong. (1807), reprinted in ROWELL, ELECTION CASES, *supra* note 105, at 56, 56 (noting that “seat was contested on the ground that [McCreery] was not a resident of the city”).

<sup>113</sup> 17 ANNALS OF CONG. 871 (1807).

<sup>114</sup> *Id.*

found that McCreery was entitled to his seat because the state legislature had no authority to prescribe the qualifications of Representatives.<sup>115</sup> In making this finding, however, the Committee took a very narrow view of its authority under the Elections Clause, arguing that federal intervention is warranted only when states abuse their power:

The Federal Constitution indeed provisionally delegates to the State Legislature the authority of directing the time, place, and manner of holding elections at the discretion of Congress. It is not necessary nor convenient that the time, place, and manner of holding elections should be uniform, therefore nothing but abuses or usurpations of power by the States, can ever excite or justify Congress in assuming the exercise of it, which, however, they may do at discretion.<sup>116</sup>

Similarly, in an 1804 election dispute over a Pennsylvania House seat that became vacant after the representative resigned, the House Committee on Elections noted that there was no state law to regulate how these vacancies should be filled.<sup>117</sup> Although the Committee was of the opinion that the state legislature should fill the vacancy, the House seated John Hoge, who won a special election that the Governor scheduled on very little notice.<sup>118</sup> Congress did not intervene, even though it considered Hoge's election less than ideal, because the state was able to fill the seat with a legitimate candidate quickly and with minimum disruption.<sup>119</sup> This case is an early example of Congress's willingness to defer to the states, even where there is a legislative vacuum that could be filled by federal legislation, if disputes are resolved in a reasonable and timely manner.<sup>120</sup>

These very sedate uses of Congress's power stand in marked contrast to its decision, in 1842, to implement the most intrusive piece of federal legislation up to that point. Tame by today's standards, the 1842 Apportionment Act was the

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<sup>115</sup> See *U.S. Term Limits v. Thornton*, 514 U.S. 779, 816-17 (1995) (examining President Thomas Jefferson's letter to Joseph Cabell discussing this contested election outcome with approval because, in Jefferson's words, "to add new qualifications to those of the Constitution would be as much an alteration as to detract from them").

<sup>116</sup> 17 ANNALS OF CONG. 874 (1807).

<sup>117</sup> *Hoge: Hearing Before H. Comm. on Elections*, 8th Cong. (1804), reprinted in ROWELL, ELECTION CASES, *supra* note 105, at 52, 52.

<sup>118</sup> *Id.* at 53 ("[Y]et, considering the special circumstances connected with the election of John Hoge, and particularly that the election took place on the day fixed by the State legislature for the appointment of electors for the State of Pennsylvania, the committee are of opinion that John Hoge is entitled to a seat in this House.").

<sup>119</sup> *Id.*

<sup>120</sup> See Tolson, *supra* note 10, at 2246 (arguing that the Elections Clause privileges the values of finality and ease of administration).

most controversial exercise of Congress's authority under the Elections Clause in the pre-Civil War era, and represented an effort by the Whigs to cement their congressional majority through partisan election legislation.<sup>121</sup> The 1842 Act required states to elect their congressional representatives from single member districts.<sup>122</sup> It read in pertinent part:

*And be it further enacted*, That in every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts, composed of contiguous territory, equal in number to the number of Representatives to which said State may be entitled; no one district electing more than one Representative.<sup>123</sup>

The 1842 Act preempted the laws of those states that elected their representatives at-large, which was ten out of the then-existing twenty-six states.<sup>124</sup> Even though most states elected their representatives from districts, the federal law mandating such elections triggered significant outrage and allegations of federal overreaching.<sup>125</sup> As Professor Erik Engstrom observed:

By outlawing the general ticket, Whigs were trying to pick up extra seats—or, at the least—minimize the potential loss of seats that the new apportionment promised. In addition, Whigs had the opportunity to make such a change. For the only time in their brief history, Whigs had control of both Congress and the presidency.<sup>126</sup>

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<sup>121</sup> See ENGSTROM, *supra* note 106, at 51 (“Whigs saw districting as a way to stave off complete electoral disaster.”).

<sup>122</sup> Apportionment Act of 1842, ch. 47, 5 Stat. 491 (1842).

<sup>123</sup> CONG. GLOBE, 27th Cong., 2d Sess. 348 (1842).

<sup>124</sup> ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE* 129 (1987) (discussing the effect of 1842 Act on at-large states); see also Nicolas Flores, *A History of One-Winner Districts for Congress* (unpublished thesis, Stanford University) (on file with author).

<sup>125</sup> CONG. GLOBE, 27th Cong., 2d Sess. 348 (1842) (statement of Rep. Clifford) (suggesting that Congress can only exercise its power pursuant to Article I, Section 4 if states “by design or accident” fail to elect representatives). To understand the outrage, consider that in 1800, Representative John Nicholas introduced a *constitutional amendment* to require that representatives be elected from districts, but this proposal was rejected. 6 ANNALS OF CONG. 785 (1800) (proposing each state be divided into representative districts). The Whigs then imposed a single member district requirement through a federal statute.

<sup>126</sup> ENGSTROM, *supra* note 106, at 43-44; see also ZAGARRI, *supra* note 124, at 126-27 (“As a direct result of the electoral procedure used, small states sent more politically unified delegations to Congress than did large states. . . . With few exceptions, the large-state congressional delegations [utilizing the district system] tended to be more politically divided. . . . When [small states] did vote as a bloc, they exercised an influence disproportionate to their numbers in the lower house.”).

Besides the obvious partisan gamesmanship, the 1842 Act generated controversy because it not only mandated a particular electoral scheme for congressional elections, but it also reduced the number of representatives in the House.<sup>127</sup> Thus, the ratio selected by Congress for apportioning seats could mean the difference between an open seat and two incumbents facing off in the same district.

Congress's decision to institute single member districts for congressional elections in 1842, and not during prior eras in which the party in power could have cemented electoral gains, may reflect either the political boldness of the Whigs, or a more substantial shift in the political landscape.<sup>128</sup> While many representatives, including some Whigs, believed that federal authority did not extend to intervening in state electoral processes in this manner,<sup>129</sup> over the course of the next decade, it would become clear that it was politics and custom—not the Constitution itself—that dictated this limited view of federal power.<sup>130</sup>

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<sup>127</sup> See H.R. REP. NO. 12, at 3 (1911) (discussing the 1842 reapportionment, which reduced house membership by seventeen, as an exception to general rule that apportionment increases House membership).

<sup>128</sup> Compare ENGSTROM, *supra* note 106, at 48 (arguing that the Whigs, which was the party in power at the time, tended to fare better under single member districting schemes), with ZAGARRI, *supra* note 124, at 130 (“What differentiated the 1842 conflict from previous debates was that several small states that still elected by general ticket came to support the districting measure.”).

<sup>129</sup> CONG. GLOBE, 27th Cong., 2d Sess. 436 (1842) (statement of Sen. McRoberts) (arguing that the Framers “would hardly think it possible that this could be the same General Government which [they] assisted to frame fifty-three years ago. . . . Congress assumes to dictate to the Legislatures of the States what they *shall* do in regard to their election laws”); see also *Davison v. Gilbert: Hearing Before H. Comm. on Elections*, 56th Cong. (1901), reprinted in ROWELL, ELECTION CASES, *supra* note 105, at 603, 604 (noting “[t]he best opinion seems to be that the Constitution does not mean that under all circumstances Congress shall have power to divide the States into districts” but only when “the State itself, for some reason, has failed or refused to make such provision itself”).

<sup>130</sup> *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884) (arguing that Congress's broad authority under Elections Clause is being challenged “only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted”). Early in the country's history, some elected officials argued that at-large elections were constitutionally mandated, but this view was never universally adopted given that others argued the Constitution delegated to the states the authority to decide the method by which congressional representatives are elected. See ZAGARRI, *supra* note 124, at 109-11 (discussing constitutional debate between proponents of at-large and district elections). The use of at-large and district elections varied by state until 1842 when the principle of district elections became firmly ensconced in our political system. See *id.* at 131 (“Although the 1842 act expired within ten

Notably, during the twenty-eighth Congress, the House had to determine whether representatives from the four states that held at-large elections in violation of the 1842 Act could still take their seats.<sup>131</sup> This controversy brought the issue of whether states had complete constitutional freedom to choose the manner of congressional redistricting front and center.<sup>132</sup> As the majority report from the House Committee on Elections described the dispute, “There is not only a conflict of law [between the state laws and the 1842 Act], but a conflict of right, of power, of sovereignty, between the Federal Government and four of the independent States of this Union.”<sup>133</sup> Framing the 1842 Act as implicating issues of federalism as opposed to a naked partisan grab by the ruling party was likely deliberate. Despite the redistricting, the Whigs suffered massive losses in the 1844 elections.<sup>134</sup> Democrats, now back in power, did not want to relinquish the new authority that Congress had gained from the partisan move by congressional Whigs. The Committee, now composed primarily of Democrats, reaffirmed that federal authority over redistricting is paramount and provided a detailed blueprint for congressional intervention that had been absent from these disputes:

Under the Constitution the State legislatures are *required* to prescribe the times, places, and manner of holding elections for Senators and Representatives, but Congress is *permitted* at any time to “make or alter such regulations.” The State legislatures have an imperative duty in this matter, but they are intrusted with an unlimited discretion in the manner of its performance. But—[t]he privilege allowed Congress of altering State regulations or of making new ones, if not in terms is certainly in spirit and design dependent and contingent. If the legislatures of the States fail or refuse to act in the premises or act in such a manner as will be subversive of the rights of the people and the principles of the Constitution, then this conservative power interposes, and, upon the principle of self-preservation,

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years, the principle of district elections had been firmly established. The legal tradition for the method had won approval. Districting laws were passed in 1862, 1872, and throughout the early years of the twentieth century.”).

<sup>131</sup> See *Members Elected by General Ticket: Hearing Before H. Comm. on Elections*, 28th Cong. (1843), reprinted in ROWELL, *ELECTION CASES*, *supra* note 105, at 117, 117-20 (debating whether representatives from Georgia, Mississippi, Missouri, and New Hampshire could take their seats).

<sup>132</sup> See *id.* at 118 (noting that the issue was whether the federal government or the states have freedom in determining the manner of elections).

<sup>133</sup> *Id.* at 117.

<sup>134</sup> ENGSTROM, *supra* note 106, at 54 (noting House representation of Whigs “plummeted from 59 percent to 36 percent”).

authorizes Congress to do that which the State legislatures ought to have done.<sup>135</sup>

While the Committee's approach was certainly less deferential than that of past Congresses, the Committee rejected the broader conceptions of its Elections Clause power that would eventually become commonplace. The Committee argued that not only is Congress precluded from commandeering state officials and state law under the Elections Clause,<sup>136</sup> but "its legislation must be complete to that extent, so as to execute itself without the intervention of the State legislatures, and the residue must be left to the States to be exercised according to their discretion under the Constitution."<sup>137</sup>

The Committee's view of federal power under the Elections Clause can be summed up as: a strong anti-commandeering stance, combined with a very narrow conception of the congressional role ("If the legislatures of the States fail or refuse to act . . ."), but an inexplicably broad view of federal power once action is warranted, i.e., federal law must completely displace state election regulations. Arguably, the Democrats wanted to impose principled limitations on the exercise of federal power to protect the slaveholding states, which had been concerned about *any* broad interpretation of federal power,<sup>138</sup> while simultaneously taking advantage of their majority status by reaffirming the more expansive interpretation of federal authority embraced by the Whigs through the 1842 Act.

The cognitive dissonance of this position led to a somewhat confused and ultimately untenable interpretation of the Elections Clause. When faced with the decision in 1844 of whether to seat representatives elected in violation of federal law or to exclude them (and by implication subordinate state power to federal authority), Congress adopted a compromise position. The Committee concluded that the provision of the 1842 Act mandating single member districts was invalid because it "[did] not provide the districts in which the election [was] to be held or furnish any of the necessary regulations."<sup>139</sup> In other words, when Congress seeks to intervene, it must implement broader legislation than the 1842 Act by providing a complete code for federal elections, which, in this case, would have included drawing the congressional districts for those states that adhered to at-

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<sup>135</sup> *Members Elected by General Ticket*, *supra* note 131, at 117, 118.

<sup>136</sup> *Id.* (noting that "the Constitution gives to Congress no power to command the States").

<sup>137</sup> *Id.* at 119.

<sup>138</sup> ROBERT PIERCE FORBES, *THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA* 21 (2007) ("If the Constitution empowered Congress to build roads and canals, warned one [Republican], it could 'with more propriety' be invoked to 'free all the slaves in the U.S.'").

<sup>139</sup> *Members Elected by General Ticket*, *supra* note 131, at 117, 118.

large elections. The full House agreed with the Committee's report and seated the representatives elected at-large in violation of federal law.<sup>140</sup>

The compromise position endorsed by the twenty-eighth Congress conflicted with the views of earlier Committees, which denied that Congress had the power under the Elections Clause to determine "[w]hether the subdivision of representative power within any State, if there be a subdivision, be equal or unequal, or fairly or unfairly made" because "Congress can not know and has no authority to inquire."<sup>141</sup> The twenty-eighth Congress's view of federal power was arguably more intrusive of state sovereignty than simply mandating single member districts because it eliminated any role for the states in the regulation of federal elections. Because that particular Congress was dominated by pro-slavery Democrats, this was likely unintentional and a product of political opportunism.

While Congress's all-or-nothing approach embraced a broader reading of federal power in some respects, it did not completely displace the self-imposed federalism limits at odds with the text and purpose of the Clause.<sup>142</sup> First, the

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<sup>140</sup> See *Phelps and Cavanaugh: Hearing Before H. Comm. on Elections*, 35th Cong. (1857), reprinted in ROWELL, ELECTION CASES, *supra* note 105, at 154, 155 ("The fact that the election was by general ticket did not invalidate it, as the second section of the apportionment act of 1842 only applied to that apportionment, and even where it applied the House had refused to recognize or enforce it.").

<sup>141</sup> *Davison v. Gilbert*, *supra* note 129, at 603, 605. Compare the temerity of the 1842 Act with the aggression of the Apportionment Act of 1872, where Congress not only consolidated the timing of congressional and presidential elections and, in the process, overturned the laws of twenty states that held these elections at separate times, see Erik J. Engstrom & Samuel Kernell, *Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840-1940*, 49 AM. J. POL. SCI. 531, 535 (2005), but Congress also threatened to implement Section 2 of the Fourteenth Amendment, which would reduce a state's delegation in the House for abridging the right to vote. See George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 114-16 (1961) (noting that Section 2 of Fourteenth Amendment received considerable discussion during debates over the 1872 Act).

<sup>142</sup> *Members Elected by General Ticket*, 28th Cong. (1843), in ROWELL, ELECTION CASES, *supra* note 105, at 117, 120 ("The Constitution itself, from which the legislatures derive their authority, commands them to enact regulations; and if Congress so exercises its authority to alter State regulations as to render further legislation necessary before the laws as altered can form a complete and practicable system, the command for the enactment of such legislation comes not from Congress, but from the Constitution. The law, then, not being contrary to the Constitution, is valid and binding in all the States . . ."). This is contrary to how Congress's authority was viewed in the post-Civil War era. See *Ex parte Siebold*, 100 U.S. 371, 383 (1879) ("If Congress does not interfere [with state election regulations], of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words [of the

Committee's argument that Congress must provide a full regulatory scheme for federal elections, capable of being executed without further state legislation, was arguably a procedural hurdle designed to protect the regulatory authority of the states.<sup>143</sup> This requirement was in tension with Congress's authority, under the Clause, to "alter" state regulations.<sup>144</sup> As the minority report recognized:

Congress has power to *alter* State regulations, and it is upon this power that the validity of the second section of the apportionment act rests. No State can prevent or circumscribe the action of Congress in this respect. Congress may alter the State regulations to any extent it chooses, leaving those parts not altered still in force.<sup>145</sup>

The minority view would play a central role in validating the scope of Reconstruction era voting rights legislation.<sup>146</sup>

Second, the Committee failed to appreciate that the affected states also recognized the supremacy of federal law in this context, and was relying solely on political capital to resist the requirement of single member districts.<sup>147</sup> Three of the outlier states—Mississippi, Missouri, and New Hampshire—switched to single member districts in 1846 while under Democratic control.<sup>148</sup> Erik Engstrom has argued that these switches occurred because the "Democrats in the holdout states likely discerned that national political tides had turned against them and, fearing that their delegations would not be seated, preemptively

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Constitution] to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them." And it is also contrary to how the Court views federal power today. *See* United States v. Windsor, 133 S. Ct. 2675, 2689-91 (2013) (noting the "general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of mechanisms and means to adopt").

<sup>143</sup> *See* sources cited *supra* note 129.

<sup>144</sup> *Members Elected by General Ticket*, *supra* note 131, at 117, 119 (arguing in the minority report that "the constitutionality of this Congressional alteration would not depend on the fact that the other portions of the State regulations were so constructed that with this alteration a complete system, capable of being executed without further legislation, would remain. A law is constitutional if it is not contrary to the Constitution, and the constitutionality of a law of Congress can not depend on the forms of State laws.").

<sup>145</sup> *Id.*

<sup>146</sup> *See, e.g., Ex parte Yarbrough*, 110 U.S. 651, 660-61 (1884) (discussing favorably Congress's various exercises of authority under Elections Clause including the enactment of the 1842 Act).

<sup>147</sup> ENGSTROM, *supra* note 106, at 55 (noting that Democrats adopted single-member districts when they viewed them as politically advantageous).

<sup>148</sup> *Id.*

switched to districts.”<sup>149</sup> The single member district requirement arguably breached the political norms of the day, hence most of the objections to the 1842 Act, but it is not clear that the states, even those that resisted the change from at-large to single member districts, seriously questioned Congress’s constitutional authority to institute this mandate.<sup>150</sup> By 1846, only four years after the Act was implemented, the minority report challenging those representatives elected at-large had, for all practical purposes, attained majority status.

The Committee’s diminished and somewhat misleading conception of congressional power was not all in vain, however. The decade before the Civil War would bear out an important aspect of the Committee’s theory about federal power surrounding the enactment of the 1842 Act. Notably, the Committee’s assertion that Congress could intervene in federal elections where states “act in such a manner as will be subversive to the rights of the people and the principles of the Constitution” was especially path breaking because it left the door open for the broad and significantly less formalistic approach to interpreting Congress’s power under the Clause that became dominant by 1860.<sup>151</sup>

## 2. A Broader Interpretation of Congressional Authority: The Need for a Stronger Central Government on the Eve of the Civil War

Congress’s state protective stance with respect to the regulation of federal elections did not last, and conflicts over slavery, the Kansas-Nebraska Act, and later, the Supreme Court’s decision in *Dred Scott v. Sandford*,<sup>152</sup> all pushed Congress towards a broader reading of its authority than in the preceding decades. The Kansas-Nebraska Act was especially important in this regard, as it allowed the people in those territories to decide whether they wanted to be slave or free states, and this decision had a consequential effect on the balance of power in Congress.<sup>153</sup>

A series of violent confrontations over slavery in the State of Kansas and neighboring Missouri in 1854 required Congress to weigh in on the legitimacy

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<sup>149</sup> *Id.* (discussing why districting took hold under Democrats despite their success under general-ticket elections).

<sup>150</sup> Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 884.

<sup>151</sup> *Members Elected by General Ticket*, *supra* note 131, at 118.

<sup>152</sup> 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>153</sup> See John B. Gates, *Partisan Realignment, Unconstitutional State Policies, and the U.S. Supreme Court, 1837-1964*, 31 AM. J. POL. SCI. 259, 264-65 (1987) (discussing how the Kansas-Nebraska Act and *Dred Scott* decision resulted in a restructuring of the political parties); Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 403 (2012) (“The Kansas-Nebraska Act . . . allowed the residents of Kansas and Nebraska to vote on whether or not they wanted slavery[.]”).

of delegates elected to Congress from Kansas. Slave state Missouri, already surrounded on two sides by free states, had a vested interest in ensuring that Kansas entered the union as a slave state in order to prevent Missouri slaves from having another free state into which they could escape. Missouri slaveowners, led by U.S. Senator “Bourbon” Dave Atchinson, decided to challenge the entire notion of popular sovereignty underlying the Kansas-Nebraska Act by capturing the political apparatus in Kansas and pushing a pro-slavery agenda.<sup>154</sup> As historian William W. Freehling observed:

In the first Kansas election, called to select a nonvoting delegate to the U.S. Congress in late November 1854, Bourbon Dave taught Missourians how to preclude any antislavery threat. Campaigning in western Missouri rather than in eastern Kansas, he told his constituents that “when you reside within one day’s journey of the territory, and when your peace, your quiet, and your property depend upon your action, you can, without exertion,” spend a day in Kansas and “vote in favor of your institutions.” Atchinson asked for 500 one-day Kansans.

He received more than three times that number. On voting day, some 1700 one-day Kansans cast ballots, as opposed to only 1100 permanent Kansans.<sup>155</sup>

The next Kansas election selected territorial legislators, and Missouri voters once again overwhelmed the balloting. Kansas, which at the time only had 2,905 eligible voters who were permanent residents, had 4,968 one-day Kansans (from Missouri) and 1,210 permanent Kansans participate in the election.<sup>156</sup> Violence between anti-slavery and pro-slavery forces would follow for the next two years. The political fallout of “bleeding Kansas” would lead Democrats, who had retaken control of the House in 1856, to assert their authority in much the same way as the Whigs had in 1842—by using Congress’s authority under both Article I, Section 5 and the Elections Clause to strengthen federal oversight of House elections, a reflection of the party’s sharp divide over the slavery issue.<sup>157</sup>

A special congressional committee investigated the Kansas congressional election in the wake of the violence and determined that “[n]o law exists in Kansas for the election of a delegate to Congress . . . and no territorial law for such an election can be enacted, for the plain reason that the law-making power

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<sup>154</sup> WILLIAM W. FREEHLING, *THE ROAD TO DISUNION, VOLUME II: SECESSIONISTS TRIUMPH, 1854-1861*, at 80-81 (2007).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 82-83 (discussing plague of one-day Kansas in 1855 election).

<sup>157</sup> See DAVID M. POTTER, *THE IMPENDING CRISIS: 1848-1861*, at 238-40 (1976) (discussing Democrats’ retaking of House in 1846 and continued division on issue of slavery).

of that Territory has been subverted by usurpation.”<sup>158</sup> The committee observed that “[i]t is undoubtedly competent for the Congress of the United States to enact a law under which a legal election of a delegate from Kansas could be effected.”<sup>159</sup> Alternatively, if Congress refused to enact this law, it could accept the candidate who received the most votes, and disregard that the election was governed by laws enacted by a legislature that was an “illegally constituted body, [that] had no power to pass valid laws, and their enactments are, therefore, null and void.”<sup>160</sup> However, the full Committee on Elections decided that the election, as conducted under rules adopted by the state legislature, could not stand because “[t]o admit the legality of the so-called territorial legislature of Kansas would be to sanction fraud, violence, and perjury . . . .”<sup>161</sup>

Congress’s willingness to both set aside the election and call into question the constitutional legitimacy of the state government represented a more expansive view of federal power than, for example, that embraced by the eighth Congress, which deferred to a state legislature that filled a vacancy through a procedurally problematic special election, or the twenty-second Congress, which denied that it could weigh in on whether the representative power of a state is “fairly or unfairly made.”<sup>162</sup> Perhaps emboldened (or disheartened) by the dispute over the seating of the Kansas delegation, the House began to more assertively frame its authority to “alter” regulations pursuant to the Elections Clause as a failsafe triggered when states have clearly overstepped their constitutional authority and subverted the rights of the people. And this approach, contrary to the twenty-eighth Congress’s assertion that federal power was limited to providing a full regulatory alternative to state law, represented the broadest presentation of federal power under the Clause to date: that Congress could expressly and explicitly invalidate contrary state pronouncements without any requirement that it replace the state’s regulatory framework in its entirety.<sup>163</sup>

For example, Lyman Trumbull, who would go on to become a prominent conservative Republican during Reconstruction, was the subject of an election challenge in 1856 after he won the seat in the eighth congressional district of

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<sup>158</sup> *Reeder v. Whitfield: Hearing Before H. Comm. on Elections*, 34th Cong. (1856), reprinted in BARTLETT, *CONTESTED ELECTIONS*, *supra* note 109, at 185, 203.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 202.

<sup>161</sup> *Reeder v. Whitfield: Hearing Before H. Comm. on Elections*, 34th Cong. (1856), reprinted in BARTLETT, *CONTESTED ELECTIONS*, *supra* note 109, at 215, 216.

<sup>162</sup> See *supra* notes 117-19, 141 and accompanying text.

<sup>163</sup> Cf. *Barney v. McCreery*, *supra* note 112, at 56, 56-57 (invalidating state election law without dictating replacement provisions).

Illinois.<sup>164</sup> His opponent claimed that Trumbull, then a state supreme court judge, violated an Illinois law that provided that “[t]he judges of the supreme and circuit courts shall not be eligible to any other office of public trust or profit in this State, or the United States, during the term for which they are elected, nor for one year thereafter.”<sup>165</sup>

In rejecting this challenge, the House Committee on Elections treated the Illinois law as an impermissible attempt to add to the list of congressional qualifications:

[I]t is equally clear that a State of the Union has not the power to superadd qualifications to those prescribed by the Constitution for representatives, to take away from “*the people of the several States*” the right given to them by the Constitution to choose, “*every second year,*” as their representative in Congress, ANY PERSON who has the required age, citizenship, and residence.<sup>166</sup>

In finding that Trumbull was entitled to his seat, the Committee viewed the Illinois law as an affront not only to the people’s authority under Article I, Section 2, but also to congressional power under the Elections Clause:

By the plain letter of the Constitution Congress may prescribe the *time, place, and manner* of holding elections for representatives; and at such *time and place*, and in the *manner* thus prescribed, every second year, the people of each State may choose as representative in Congress *any person* having the qualifications enumerated in that Constitution. The power attempted to be asserted by the State of Illinois in the cases before us is in direct contravention of the letter, as also of the spirit, true intent, and meaning of these provisions of the federal Constitution, and absolutely subversive of the rights of the people under that Constitution.<sup>167</sup>

Similar to its refusal to seat the Kansas delegation, Congress was willing to use its authority under the Elections Clause to invalidate state law outright. Disputes over slavery forced Congress to be aggressive in using its authority under both Article I, Section 5 and the Elections Clause to intervene in state electoral processes, and the pattern of intervention that emerged in the 1850s was predictive of the centralization of federal power that would occur over the

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<sup>164</sup> See *Fouke v. Trumbull: Hearing Before H. Comm. on Elections*, 34th Cong. (1856), reprinted in BARTLETT, *CONTESTED ELECTIONS*, *supra* note 109, at 167, 167.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 168.

<sup>167</sup> *Id.* at 169 (finding that votes given to Trumbull not void “because they were given by electors having the qualifications prescribed by the Constitution of the United States, and at the time and place and in the manner prescribed by law”). Article I, Section 2 of the Constitution provides that the qualifications for federal electors should be the same as the electors for the most numerous branch of the state legislature. See U.S. CONST. art. I, § 2.

next two decades. During this unprecedented period of federal lawmaking, Congress would reconceptualize its authority under the Clause and challenge the dominance of state power over federal elections.<sup>168</sup>

B. *Protecting the Primacy of Federal Law: The Reconstruction Amendments and the Rise of Congressional Sovereignty*

The Civil War and Reconstruction brought Congress's new, more expansive approach to the Elections Clause full circle. Emancipation necessitated oversight of both state and federal elections in order to incorporate a new category of citizens—African-Americans—into the American political system. Reconstruction represented a complete reworking of both American democracy and preexisting conceptions of individual rights, and as such, presents a prime opportunity to contrast the non-federalism of the Elections Clause with constitutional provisions that were concerned with preserving some aspects of state sovereignty over elections, namely, the Fourteenth and Fifteenth Amendments.<sup>169</sup> Under the Supreme Court's nascent and emerging jurisprudence on the Fourteenth and Fifteenth Amendments, the Court limited Congress's power to intervene in state electoral processes to situations in which the state failed in their duty to protect civil rights, or there was discrimination based on race.<sup>170</sup> This Section, which draws on the Enforcement Acts of 1870 and 1871, shows that the Elections Clause was not similarly constrained.

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<sup>168</sup> During the Civil War and Reconstruction, there was also a greater willingness by presidents to staff the civil service with party loyalists than in the Antebellum period, further proof that Congress—with its “electorally vulnerable” Republican majority—utilized both patronage and long dormant constitutional provisions to cement its authority. See James, *supra* note 107, at 47 (“[I]t seems reasonable to conclude that the deepening civil service reform pressures of the post-Civil War Era placed few practical constraints on presidents seeking to replace opposition appointees with party loyalists.”).

<sup>169</sup> See, e.g., *Shelby Cty. v. Lynch*, 799 F.3d 1173, 1181 (D.C. Cir. 2015) (punting on question of whether defendant properly read Reconstruction Amendments as “reflect[ing] guarantees to individuals and states alike: to individuals, to be free from discrimination; and to states, to be free from unwarranted regulation”). *But see id.* at 1189 (Tatel, J., concurring) (“That Congress may enforce the Amendments only by ‘appropriate’ legislation, the County insists, means that the enforcement provisions guarantee ‘the constitutional right of sovereign States . . . to regulate state and local elections as they see fit.’ But this claim finds no support in the constitutional text.” (citations omitted)).

<sup>170</sup> See, e.g., *United States v. Reese*, 92 U.S. 214, 218 (1876) (“It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere . . .”).

1. Congress's View of its Authority in the Post-Civil War Era: Sovereign, Not Autonomous, Power

The scholarly literature generally does not treat the Reconstruction era as a high point for sustained and meaningful voting rights enforcement.<sup>171</sup> Instead, much of the literature focuses on the Supreme Court's very narrow interpretations of the Fourteenth and Fifteenth Amendments, ignoring Congress's reliance on the Elections Clause as an alternative source of authority to justify the breadth of its Reconstruction era legislation. In enacting the Enforcement Acts of 1870 and 1871, Congress relied on the Reconstruction Amendments and the Elections Clause to defend this legislation.<sup>172</sup> The congressional debates surrounding the Acts confirm: (1) that Congress legislated under the Elections Clause in a piecemeal fashion, contrary to its earlier position that it was limited to enacting a full regulatory regime for federal elections, and (2) that Congress used this power to significantly circumscribe state authority over federal elections.

On Monday, February 21, 1870, less than three weeks after the ratification of the Fifteenth Amendment, Representative John Bingham introduced House Bill 1293 to "enforce the right of citizens of the United States to vote in the several States of this Union who have hitherto been denied that right, on account of race, color, or previous condition of servitude."<sup>173</sup> Although framed as an effort to enforce the mandates of the Fifteenth Amendment, it was clear from the scope of the bill, the debates over its language, and the law's final form that the Enforcement Act of 1870 went beyond prohibiting abridgments or denials of the right to vote on the basis of race.<sup>174</sup>

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<sup>171</sup> See, e.g., Katz, *supra* note 101, at 2350-51 (2003) (discussing *Reese* and *Cruikshank*, but not *Clark* and *Siebold*, to argue how Reconstruction-era Court cases "indisputably hindered ongoing federal efforts to enforce the newly ratified Fourteenth and Fifteenth Amendments"). For a recent exception, see PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 88 (2011) (asserting that "[f]ederal rights enforcement remained alive after *Cruikshank*").

<sup>172</sup> Compare Apportionment Act of 1842, ch. 47, 5 Stat. 491 (requiring single-member districts), with Enforcement Act of 1870, ch. 114, 16 Stat. 140 (instituting regime of federal oversight for congressional elections), and Enforcement Act of 1871, ch. 99, 16 Stat. 433 (same).

<sup>173</sup> CONG. GLOBE, 41st Cong., 2d Sess. 1458-59 (1870).

<sup>174</sup> See, e.g., Richard M. Valelly, *Partisan Entrepreneurship and Policy Windows*, in *FORMATIVE ACTS* 126, 130 (Steven Skowronek ed., 2007) (describing the Enforcement Acts of 1870 and 1871 and the Immigration and Naturalization Act of 1870 as a reaction to "the largest fraud ever devised in American electoral history—the production by Tammany Hall of sixty thousand naturalization papers a month before the 1868 elections in New York state, which tainted 16 percent of the state's presidential vote").

The Senate version, which Congress ultimately enacted, was more expansive than its counterpart in the House, and sought to enforce provisions of the Fourteenth and the Fifteenth Amendments as well as the Elections Clause.<sup>175</sup> Section 19 stated that “if at any election for representative or delegate in the Congress of the United States any person shall knowingly personate and vote, or attempt to vote, in the name of any person, whether living, dead, or fictitious . . . such person shall be deemed guilty of a crime . . .”<sup>176</sup> Section 20 extended these protections to “any registration of voters for an election for representative or delegate in the Congress of the United States” and provides criminal penalties if “any person shall knowingly personate and register, or attempt to register, in the name of any person . . .”<sup>177</sup> Section 21 likewise provided that the ballot itself can be used as *prima facie* evidence that a person voted unlawfully in violation of the Act so long as representatives for Congress are present on the ballot.<sup>178</sup> These provisions policed voter fraud in federal elections and fell well outside the province of the Fifteenth Amendment.

The Enforcement Act of 1871 similarly provided for federal oversight of congressional elections, and was arguably more far-reaching, and intrusive of state sovereignty than any prior federal election legislation. Not only does the 1871 Act reiterate the criminal penalties in the 1870 Act for those who commit voter fraud,<sup>179</sup> the 1871 Act also instituted a system of federal oversight for congressional elections. For example, section 2 of the 1871 Act allowed federal judges to appoint two election supervisors, one from each of the major political parties, to oversee congressional elections in areas with a population of at least twenty thousand people.<sup>180</sup> Section 4 required that the supervisors be present “at

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<sup>175</sup> CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870) (statement of Rep. Bingham) (“[T]he Senate amendment contained various provisions for the enforcement of certain sections of the fourteenth article of the amendments to the Constitution. It contained also a provision authorizing the President of the United States to employ the [military] at his discretion, in elections. . . . And it contained further, a provision giving jurisdiction to the district and circuit courts of the United States, concurrently with the State courts, in all contested elections, save elections of members of Congress and elections of members of the State Legislatures.”).

<sup>176</sup> Enforcement Act of 1870, ch. 114, § 19, 16 Stat. 140, 144.

<sup>177</sup> *Id.* § 20.

<sup>178</sup> *Id.* § 21. Many in Congress argued that federal legislation to enfranchise African-Americans had to be enacted concurrently with legislation to eliminate fraud in federal elections, otherwise all of this effort would be for naught. The Elections Clause allowed Congress to supplement its efforts under the Fourteenth and Fifteenth Amendment to ensure broad enfranchisement in federal elections. *See infra* Section II.B.2.

<sup>179</sup> Enforcement Act of 1871, ch. 99, § 10, 16 Stat. 433, 436.

<sup>180</sup> *Id.* § 2 (“[W]henever in any city or town having upward of twenty thousand inhabitants, there shall be two citizens . . . of different political parties . . . who shall be designated as supervisors of election.”).

all times and places fixed for the registration of voters”<sup>181</sup> in order to comply with section 13, which allowed federal judges to “require of the supervisors of election, where necessary, lists of the persons who may register and vote . . . and to cause the names of those upon any such list whose right to register or vote shall be honestly doubted to be verified by proper inquiry and examination . . . .”<sup>182</sup> Appointment of these new federal supervisors, overseeing the election process from registration to certification of the winner, was unlike anything previously enacted by Congress, and the intrusion on state sovereignty was deliberate and intentional.<sup>183</sup>

The breadth of the Acts illustrated that fraud had become inextricably intertwined with disenfranchising African-Americans and suppressing support for the Republican Party.<sup>184</sup> And it was not clear that the Fourteenth and Fifteenth Amendments, as then interpreted, were broad enough to address this problem. Opponents argued, for example, that the bill was unconstitutional because regulations such as voter registration and poll taxes do not fall within the scope of the Fifteenth Amendment since these requirements are “applicable alike to citizens of all colors, races, and conditions . . . .”<sup>185</sup> Other representatives did not limit themselves to attacking the 1870 Act as beyond the terms of the Fifteenth Amendment, arguing that it exceeded the scope of other constitutional provisions upon which its constitutionality could be based.<sup>186</sup> What sounded the alarm loudest among Democrats was that the Enforcement Acts reflected a structural shift over the regulation of federal elections from the states to the federal government, grounded in constitutional provisions that predated the Civil War but long had been a source of underutilized federal power.

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<sup>181</sup> *Id.* § 4.

<sup>182</sup> *Id.* § 13.

<sup>183</sup> See Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 463 (2015) (discussing fraud in northern states).

<sup>184</sup> XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910*, at 68 (1997) (“Although the primary object of the Enforcement Act of May 31, 1870, was to protect southern black voters from Klan terrorism, several sections of the act also dealt with fraudulent practices in northern elections. True, the Fifteenth Amendment neither addressed election fraud nor specifically authorized Congress to provide legislation to correct it. But the reality that northern fraud could hurt the party as much as southern black disenfranchisement, and eventually hurt the whole system of congressional elections, alarmed Republicans.”).

<sup>185</sup> CONG. GLOBE, 41st Cong., 2d Sess. 3872 (1870) (statement of Rep. Kerr).

<sup>186</sup> *Id.* at 3876 (comments of Rep. Potter) (“Many of [the Enforcement Act of 1870’s] provisions relate neither to the time, place, nor manner of holding elections, in respect of which Congress is entitled to legislate by the fourth section of the Constitution, nor to the denial or abridgment of suffrage on account of race, color, or previous condition of servitude as to which legislation is authorized by the fifteenth amendment . . .”).

Representative John Bingham, in defending the substitution of the House bill with the more expansive Senate version, argued:

[No] thoughtful man of this House, fully advised of the nature of the provisions, can doubt for one moment their necessity and constitutionality.

While the general power of the States to “regulate,” in the language of the Constitution, the election of Representatives to Congress is conceded by all who have ever read that instrument, it must at the same time be admitted that by the very same clause the power is conferred upon Congress to make regulations for the election of members of Congress, or to alter the regulations which have been or may hereafter be made in that behalf by the States. The amendments proposed to prevent fraudulent registration or fraudulent voting, in so far as I am advised, do not alter any of the existing regulations of the States touching registration; they are but a simple exercise of the power expressly conferred on the Congress of the United States to regulate elections of members and Delegates to Congress.<sup>187</sup>

Bingham’s statements represented the position of many in Congress that state action was not a prerequisite before Congress could act pursuant to the Elections Clause, a requirement that could potentially undermine the success of African-American enfranchisement and the political fortunes of the Republican Party.

But the Supreme Court expressed overt hostility to much of the civil rights legislation that explicitly relied on the Fifteenth Amendment as predicate authority. The Court ignored that many in Congress sought to justify these laws through sources, other than the Reconstruction Amendments, that allowed Congress to legislate with little regard for state sovereignty. For example, in *United States v. Reese*,<sup>188</sup> the Court invalidated section 4 of the Enforcement Act of 1870, finding that the statute exceeded the scope of the Fifteenth Amendment because it criminalized the actions of state officials for any discriminatory denial of the ballot, rather than just race-based denials.<sup>189</sup> Similarly, in *United States v. Cruikshank*,<sup>190</sup> the Court dismissed an indictment against the defendant election inspectors because “the intent of the defendants was [not] to prevent these parties from exercising their right to vote on account of their race . . . .”<sup>191</sup> This conclusion assumed that Congress is limited to preventing denials of the ballot

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<sup>187</sup> *Id.* at 3871-72 (comments of Rep. Bingham).

<sup>188</sup> 92 U.S. 214 (1876).

<sup>189</sup> *Id.* at 221 (holding that section 4 was general in its terms and could not be construed as limited to race-based discrimination).

<sup>190</sup> 92 U.S. 542 (1876).

<sup>191</sup> *Id.* at 556 (“The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been.”).

only on this ground in order to avoid unduly intruding on the states' authority over voter qualifications. But, as the next Section shows, the Court surprisingly agreed with Congress that its authority under the Elections Clause, unlike the Fourteenth and Fifteenth Amendments, is broad and unencumbered by federalism concerns.

## 2. Loosening the Constraints of Federalism During Reconstruction and Redemption

Prior to Reconstruction, there was not much mention of the Elections Clause in the Supreme Court's jurisprudence, much less any thorough analysis of the meaning of its terms.<sup>192</sup> The absence of substantial precedent meant that there was a risk that the Court would interpret the Clause's provisions narrowly, especially since Congress had declined to read the Clause broadly until right before the Civil War.<sup>193</sup> In addition, the Court had resisted any notion that the Reconstruction Amendments changed the balance of power between the states and the federal government, and could have easily applied this same reasoning to the Elections Clause.<sup>194</sup> In the *Slaughter-House Cases*<sup>195</sup> and the *Civil Rights Cases*,<sup>196</sup> the Court denied that the Fourteenth Amendment fundamentally altered our system of federalism by shifting the responsibility of protecting civil rights from the states to the federal government.<sup>197</sup> These cases did not deal with

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<sup>192</sup> See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 614 (1857) (Curtis, J., dissenting) (referencing the Elections Clause in brief discussion of the meaning of "regulate"), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 586 (1842) (making passing reference to Elections Clause). Indeed, adding the Elections Clause to this analysis complicates the overly simplistic view of the Reconstruction-era Court as state friendly, or alternatively, overtly hostile to congressional power. See BRANDWEIN, *supra* note 171, at 53 (noting failure of most legal literature to recognize the Reconstruction-era Court's stated willingness to hold states accountable for failing to satisfy constitutional requirements under the Reconstruction Amendments); Gates, *supra* note 153, at 264 ("From 1837 to 1860 the Court struck down 17 state policies, or less than one statute a year. On the other hand, between 1860 and 1878 the Court declared 58 state policies unconstitutional, or more than three each year.").

<sup>193</sup> See *supra* Section II.A.

<sup>194</sup> Cf. *Reese*, 92 U.S. at 214 (making no mention of Elections Clause in analysis).

<sup>195</sup> 83 U.S. (16 Wall.) 36 (1872).

<sup>196</sup> 109 U.S. 3 (1883).

<sup>197</sup> See *id.* at 24 ("[H]is redress is to be sought under the laws of the State; or, if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment."); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77 (declaring it was not "purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge

elections—the *Slaughter-House Cases* interpreted the scope of the Privileges and Immunities Clause of the Fourteenth Amendment and the *Civil Rights Cases* resolved the constitutionality of the Civil Rights Act of 1875, which prohibited discrimination in places of public accommodation. But when read in light of the Fifteenth Amendment's limitation to race-based voting denials, these cases, holding that there must be state action or state neglect in protecting civil rights before Congress could legislate pursuant to the Fourteenth Amendment, were also a threat to broad voting rights enforcement efforts.<sup>198</sup>

Despite this jurisprudence, a reality in which the Elections Clause would be narrowly interpreted never materialized. Since the Elections Clause was a part of the original Constitution and explicitly delegated to Congress substantial authority over federal elections, cases litigated under the Clause provide a nice counterpoint to those decided under the Reconstruction Acts, which did not contain such explicit language and consequently were not viewed as liberally.

Two cases, in particular, are especially instructive here. In *Ex parte Clarke*,<sup>199</sup> an election judge violated state law by opening a previously sealed poll book before turning it over to the county clerk.<sup>200</sup> The defendant in *Ex parte Siebold*<sup>201</sup> was also an election judge, but he was prosecuted under state law for stuffing the ballot box.<sup>202</sup> Other defendants were also indicted, and had committed a range of violations from ballot box stuffing to turning away voters at the polls.<sup>203</sup> The issue before the Court in both cases was whether Congress had the authority to make the violation of a state election statute a federal offense since the violations occurred in the context of a federal election.<sup>204</sup>

the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government”).

<sup>198</sup> See *The Civil Rights Cases*, 109 U.S. at 24; *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 77.

<sup>199</sup> 100 U.S. 399 (1879).

<sup>200</sup> State law provided:

That, after canvassing the votes in the manner aforesaid, the judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the Court of Common Pleas of the county wherein the return is to be made; and the poll-book, thus sealed and directed, shall be conveyed by one of the judges (to be determined by lot if they cannot agree otherwise) to the clerk of the Court of Common Pleas of the county, at his office, within two days from the day of the election . . .

*Id.* at 401-02.

<sup>201</sup> 100 U.S. 371 (1879).

<sup>202</sup> *Id.* at 379.

<sup>203</sup> *Id.* at 377-79 (enumerating charges against other various defendants).

<sup>204</sup> *Id.* at 382 (addressing the contention that Congress has “no constitutional power to make partial regulations intended to be carried out in conjunction with regulations made by the States”).

Section 5515 of the revised statutes, which was originally section 22 of the Enforcement Act of 1870, did not define the substantive offenses that violated its terms, instead incorporating state law and other federal laws by reference.<sup>205</sup> In defending this regime of concurrent state and federal regulation over congressional elections, the Court noted that Congress could act pursuant to the Elections Clause without invoking the usual concerns about state sovereignty present in other contexts.<sup>206</sup> Like in *Arizona Inter Tribal* over a century later, the Court in *Ex parte Siebold* recognized that Congress can make its own regulations pursuant to the Clause, and where its regulations conflict with state law, federal law “necessarily supersedes” state law because “the power of Congress over the subject is paramount.”<sup>207</sup> The Court further observed that Congress could choose not to act, leading to regulations that are “made wholly by the State . . . .”<sup>208</sup> But Congress’s “make or alter” authority does not prohibit state and federal law from co-existing, and while this might require a certain level of cooperation on the part of the two governments, the Court was clear that this cooperation occurs at the prerogative of Congress.<sup>209</sup>

As the Court noted, no deference to state sovereignty is ever warranted under the Elections Clause because “[n]o clashing [of jurisdictions and conflict of rules] can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature.”<sup>210</sup> In other words, federal law is always paramount. The Court’s disregard of state sovereignty, unusual given the controversy over the Reconstruction Amendments, was tied to the explicit language of the Elections Clause (“make or alter”) that contemplated a concurrent regime of election regulation where, unlike the Fourteenth Amendment, Congress’s authority to

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<sup>205</sup> U.S. REV. STAT. § 5515 (2d ed. 1878); Enforcement Act of 1870, ch. 114, § 22, 16 Stat. 140, 145 (punishing election officers who violate, “neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof”).

<sup>206</sup> *Siebold*, 100 U.S. at 392 (“[W]e think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State.”).

<sup>207</sup> *Id.* at 384.

<sup>208</sup> *Id.* at 383.

<sup>209</sup> *Id.* at 386 (“The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.”).

<sup>210</sup> *Id.* at 384.

enact “appropriate” legislation is significantly less ambiguous.<sup>211</sup> Under the Clause, Congress can act at any time in supplementing or displacing state law, can incorporate state law by reference, and has both civil and criminal authority.<sup>212</sup>

In contrast, the dissenters in *Ex parte Siebold* and *Ex parte Clarke* applied the same federalism restrictions to the Clause that had stymied enforcement of the Fourteenth Amendment. In dissent, Justice Field denied that there could be federal incorporation of state law offenses because such incorporation would extend both the power of Congress and the jurisdiction of the courts and, by implication, intrude on the sovereignty of the states.<sup>213</sup> This critique misunderstood Congress’s authority to “make or alter” state regulations, which arguably includes the ability to enact a criminal code as it relates to federal elections, even if such regulations derive solely from state law.

Indeed, the “no incorporation by reference” argument proves too much. As *Minor v. Happersett*<sup>214</sup> recognized, the right to vote is a creature of state law that

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<sup>211</sup> See FRANITA TOLSON, A PROMISE UNFULFILLED: SECTION 2 OF THE FOURTEENTH AMENDMENT AND THE FUTURE OF THE RIGHT TO VOTE (forthcoming 2020).

<sup>212</sup> See Valelly, *supra* note 174, at 131 (calling Court’s decisions in *Clarke* and *Siebold* “stunning” by finding the “regulatory jailing of state and local elections officials . . . perfectly constitutional,” which the Court accomplished by relying on “a centralizing and muscular reading of Article I, Section 4”).

<sup>213</sup> *Ex parte Clarke*, 100 U.S. 399, 408 (1879) (Field, J., dissenting). As Justice Field argued:

There is no doubt that Congress may adopt a law of a State, but in that case the adopted law must be enforced as a law of the United States. Here there is no pretence of such adoption. In the case from Ohio it is for the violation of a State law, not a law of the United States, that the indictment was found. The judicial power of the United States does not extend to a case of that kind . . . . The judicial power thus defined may be applied to new cases as they arise under the Constitution and laws of the United States, but it cannot be enlarged by Congress so as to embrace cases not enumerated in the Constitution . . . . To authorize a criminal prosecution in the Federal courts for an offence against a law of a State is to extend the judicial power of the United States to a case not arising under the Constitution or laws of the United States.

*Id.* Notably, Justice Field’s arguments echoed those made by his older brother, David Dudley Field, a lawyer who also argued that the Enforcement Acts were unconstitutionally broad. See David Dudley Field, *Centralization in the Federal Government*, 132 N. AM. REV. 407, 412-13 (1881) (arguing that Enforcement Acts “are in themselves a displacement of State power far beyond anything written in the early days of the Constitution . . . [and] the theory on which they rest would, if carried out to its logical results, lead to the practical absorption in the central government of all the chief functions of sovereignty”). David Dudley Field’s criticism was consistent with those of many Democrats who, during the debates over the Enforcement Acts, voiced concerns about the scope of Congress’s authority to enforce the Fourteenth and Fifteenth Amendments.

<sup>214</sup> 88 U.S. (21 Wall.) 162 (1874).

is incorporated by reference into the Constitution because of the general rule that federal law does not create voters.<sup>215</sup> Requiring Congress to articulate with specificity each crime that comes within the purview of section 5515, instead of allowing that body to incorporate state law by reference, was arguably Justice Field's attempt to impose procedural hurdles—no different from a state action requirement, a presumption against preemption, or a clear statement rule—to limit the scope of federal law.<sup>216</sup> Instead of recognizing the Clause's unique structure, Justice Field analyzed it in the same terms as the Reconstruction Amendments, suggesting that section 5515 impermissibly commandeered state law and state officials.<sup>217</sup>

Fundamentally, the question of whether the Elections Clause is a federalism provision goes to the heart of the disagreement between the dissenters and the majority in all of these cases. Similar to Justice Alito's objection to the Court's reading of the NVRA in *Arizona Inter Tribal*,<sup>218</sup> Justice Field questioned the impact of section 5515 on state elections because of that provision's influence on the validity and scope of state regulations.<sup>219</sup> This concern is valid only if the

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<sup>215</sup> *Id.* at 171 (“The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters.”); see also *Clarke*, 100 U.S. at 421 (Field, J., dissenting) (“The act of Congress is not changed in terms with the changing laws of the State; but its penalty is to be shifted with the shifting humors of the State legislatures. I cannot think that such primitive legislation is valid, which varies, not by direction of the Federal legislators, upon new knowledge or larger experience, but by the direction of some external authority which makes the same act lawful in one State and criminal in another, not according to the views of Congress as to its propriety, but to those of another body.”).

<sup>216</sup> *Cf.* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2670 (2015) (“The Arizona Legislature urges that the first part of the Elections Clause, vesting power to regulate congressional elections in State ‘Legislature[s],’ precludes Congress from allowing a State to redistrict without the involvement of its representative body, even if Congress independently could enact the same redistricting plan under its plenary authority to ‘make or alter’ the State’s plan.”).

<sup>217</sup> *Clarke*, 100 U.S. at 409 (Field, J., dissenting) (“The act of Congress asserts a power inconsistent with, and destructive of, the independence of the States. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty is essential to that independence. If the Federal government can punish a violation of the laws of the State, it may punish obedience to them, and graduate the punishment according to its own judgment of their propriety and wisdom. It may thus exercise a control over the legislation of the States subversive of all their reserved rights.”).

<sup>218</sup> See *supra* note 99 and accompanying text.

<sup>219</sup> *Clarke*, 100 U.S. at 412-13 (Field, J., dissenting) (“So far as the election of State officers and the registration of voters for their election are concerned, the Federal government has confessedly no authority to interfere. And yet the supervision of and interference with the

Elections Clause preserves a decisive role for state authority that would constitutionally require Congress to consider the impact of any federal regulations on state elections, and there is no reason to believe that the Clause contains any such requirement.<sup>220</sup> To read the Clause in this manner would not only deny Congress the sovereignty to which it is rightly entitled given the Clause's "make or alter" language, it would also prioritize state sovereignty over federal power.<sup>221</sup>

Federalism is also the distinguishing factor between the Fourteenth and Fifteenth Amendment cases of *Cruikshank* and *Reese* and the Elections Clause cases of *Ex parte Clarke* and *Ex parte Siebold*, all of which engage in views of congressional power that at first seem diametrically opposed. In reality, any differences stem from the fact that the first subset of cases dealt with Amendments that sought to maintain some sort of federalism balance with respect to voter qualifications, and the later cases eschew state sovereignty altogether with respect to election administration.<sup>222</sup>

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State regulations, sanctioned by the act of Congress, when representatives to Congress are voted for, amount practically to a supervision of and an interference with the election of State officers, and constitute a plain encroachment upon the rights of the States, which is well calculated to create irritation towards the Federal government, and disturb the harmony that all good and patriotic men should desire to exist between it and the State governments.”).

<sup>220</sup> Cf. Weinstein-Tull, *supra* note 10, at 765 (discussing Ninth Circuit decision that upheld the NVRA as a proper exercise of congressional power under the Elections Clause but expressed concern that the burden on California's sovereignty was of “constitutional concern” (citing *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1412-13, 1415 (9th Cir. 1995))).

<sup>221</sup> *Ex parte Siebold*, 100 U.S. 371, 391-92 (1879) (“The more general reason assigned, to wit, that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and State governments in the election of representatives. It is at most an argument *ab inconveniente*. There is nothing in the Constitution to forbid such co-operation in this case.”).

<sup>222</sup> As the *Cruikshank* Court observed:

[T]he right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, &c., is.

The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.

*United States v. Cruikshank*, 92 U.S. 542, 555-56 (1876); cf. *United States v. Harris*, 106 U.S. 629, 639 (1883) (emphasizing federalism principles inherent in Fourteenth Amendment and stating that “when . . . the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress”).

Cases interpreting the scope of the Fifteenth Amendment are instructive of this point. In *Ex parte Yarbrough*,<sup>223</sup> the Supreme Court sustained portions of the Enforcement Act because the Fifteenth Amendment explicitly shifted the responsibility for ensuring that individuals exercise the right to vote free of racial discrimination from the states to the federal government.<sup>224</sup> Just as there are no federalism concerns when Congress seeks to protect a right created by the Constitution, there are no federalism concerns when Congress acts pursuant to a provision that gives it the authority to displace state law or make its own laws.<sup>225</sup> However, when Congress seeks to protect the right to vote in the absence of racial discrimination, as was the case with its ill-fated attempt at issue in *Reese*, then federalism once again becomes a decisive factor that cuts against the exercise of federal authority unless, as the next Part shows, a specific set of circumstances trigger Congress's authority to protect the right to vote under the Elections Clause.

### III. ESCHEWING STATE SOVEREIGNTY: THE REACH OF THE ELECTIONS CLAUSE AFTER *ARIZONA INTER TRIBAL*

In thinking about the full spectrum of congressional authority over elections, the Supreme Court must be careful to avoid applying the federalism framework

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<sup>223</sup> 110 U.S. 651 (1884).

<sup>224</sup> *Id.* at 664 (“The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States.”).

<sup>225</sup> *Id.* at 666 (“[W]hile it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself.”). Unlike the Fourteenth Amendment, there is no state action requirement under the Fifteenth Amendment. *See* BRANDWEIN, *supra* note 171, at 93 (“[T]he doctrine of state action/neglect applied only to the Fourteenth Amendment . . . [and] exempted the Fifteenth Amendment from state action neglect rules.”). But this doctrine has been limited based on federalism concerns by restricting Congress’s power to enacting only legislation that is explicitly limited to race-based denials of the ballot, *see* *United States v. Reese*, 92 U.S. 214, 218 (1876) (emphasizing that Fifteenth Amendment does not grant Congress “authority to impose penalties for every wrongful refusal to receive the vote,” but is limited to when discrimination is based on “race, color, or previous condition of servitude”), or if facially neutral, voting laws that are motivated by discriminatory purpose, *see* *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2627 (2013) (describing “substantial federalism costs” of Congressional intrusion into elections via the Fifteenth Amendment).

of the Reconstruction Amendments to the Elections Clause, which can have significant, and pernicious, effects on voting rights enforcement efforts. Importing federalism into this context makes Congress's enforcement authority appear more narrow than it actually is, impacting the Court's review of the legislative record underlying laws like the VRA. Despite this risk, the Court has attempted to create a firm boundary between time, place, and manner regulations, on one hand, and voter qualification standards, on the other, in an attempt to preserve separate regulatory spheres for the states and the federal government over federal elections. In *Arizona Inter Tribal*, for example, the Court deployed the Administrative Procedure Act ("APA") and a broad interpretation of state power under the Voter Qualifications Clause of Article I to engage in, what is, functionally, field preemption with respect to voter qualifications, stating:

Prescribing voting qualifications . . . "forms no part of the power to be conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." . . . Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.<sup>226</sup>

Given that the Court ultimately determined that Arizona's documentary proof-of-citizenship requirement was preempted by the NVRA, this passage represented a surprising turn in a decision that, at least initially, had reaffirmed the sovereignty of Congress over federal elections. Notably, the Court declined to apply the presumption against preemption to exercises of federal power under the Elections Clause, where the Court would have deferred to the state law unless Congress expressed a clear and unambiguous intent to preempt state law. In the Court's view, the presumption was not appropriate because every exercise of federal authority under the Clause is a preemption of state law.<sup>227</sup> Nonetheless, the Court's resort to the APA illustrated that its statement about the presumption against preemption was not intended to vindicate federal authority. Instead, the Court used the APA to safeguard the state's governing prerogatives by urging Arizona to utilize the administrative process to protect its authority over voter qualifications.<sup>228</sup> This is a course of action that is actually more protective of

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<sup>226</sup> *Arizona v. Inter Tribal Council of Ariz., Inc. (Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2258-59 (2013) (citation omitted).

<sup>227</sup> *Id.* at 2256 ("Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent.").

<sup>228</sup> *Id.* at 2260.

state power than applying the presumption against preemption because the presumption can be defeated.<sup>229</sup>

States thus have an opportunity, through administrative proceedings, to show that Congress has interfered with their discrete policymaking enclave over voter qualifications when Congress exercises its authority to “make or alter” election regulations.<sup>230</sup> It does not matter if manner regulations often bleed into voter qualification standards, as is the case with Arizona’s documentary proof-of-citizenship requirement that was a prerequisite to registering to vote in federal elections.<sup>231</sup> The dual sovereignty framework employed by the Court is not equipped to address the blurring of the categories and the Court instead relied on other means—here the APA—to maintain the boundary. The overlap between voter qualification standards and time, place, and manner regulations, and judicial attempts to keep the categories separate, will likely become more of an issue for federal voting rights laws as the federalism limits of the Fourteenth and Fifteenth Amendments become more pronounced in the caselaw.

Federalism limits notwithstanding, one of the enduring lessons of *Shelby County* is that the Fourteenth and Fifteenth Amendments cannot do all of the

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<sup>229</sup> See, e.g., *Kobach v. U.S. Election Assistance Comm’n*, 6 F. Supp. 3d 1252, 1256-57 (D. Kan. 2014), *rev’d*, 772 F.3d 1183 (10th Cir. 2014).

<sup>230</sup> *Ariz. Inter Tribal*, 133 S. Ct. at 2260 (“Arizona may, however, request anew that the [Election Assistance Commission’s (“EAC”)] include such a requirement among the Federal Form’s state-specific instructions, and may seek judicial review of the EAC’s decision under the Administrative Procedure Act.”). Nor can Congress interfere with this authority pursuant to the Fourteenth and Fifteenth Amendments without sufficient justification. See generally *Shelby Cty. v. Holder*, 133 S. Ct. 2613 (2013).

<sup>231</sup> *Ariz. Inter Tribal*, 133 S. Ct. at 2260 (“Should the EAC’s inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona’s concrete evidence requirement on the Federal Form.”); see also *id.* at 2262 (Thomas, J., dissenting) (arguing that “both the plain text and the history of the Voter Qualifications Clause, U.S. Const., Art. I, § 2, cl. 1, and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied”). But see Robert A. Maurer, *Congressional and State Control of Elections Under the Constitution*, 16 GEO. L.J. 314, 317-18 (1928) (“That the power to regulate the ‘manner’ of holding such elections is complete and far-reaching is illustrated in the Elective Franchise Statutes, commonly known as the Enforcement Acts of 1870 and 1871 . . . . Congress may determine what is necessary to secure a free, fair and honest vote and the proper conduct of the elections. It may, for these ends, provide the officers who shall conduct the Congressional elections and make return of the results, provide for security of life and limb to the voter, protect the act of voting, the place of voting and the man who votes, from personal violence or intimidation and the election itself from corruption and fraud.”).

work when it comes to protecting the integrity of the ballot.<sup>232</sup> The Elections Clause is important, not only as an additional source of federal power that can be deployed for this purpose, but also because its scope and structure give Congress considerable flexibility. For example, the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”),<sup>233</sup> enacted pursuant to the Elections Clause, created a uniform federal ballot specifically for use by a category of voters overlooked by state law—military personnel—and the law incorporated state voter qualification standards to determine which personnel were entitled to vote.<sup>234</sup>

The earliest attempts to protect military voters revealed that the source of authority pursuant to which Congress could enfranchise these individuals would be a point of contention.<sup>235</sup> The Supreme Court had not decided *Harper v. Virginia State Board of Elections*,<sup>236</sup> so voting was not yet a fundamental right

<sup>232</sup> Compare Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 113 (2013) (“Instead of the limited race-driven use of equal protection and the Fifteenth Amendment, there is untested room for expansion of congressional intervention under the Elections Clause.”), with Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. FORUM 19, 20 (2013) (“[T]he benefits of congressional interventions under the Elections Clause should not prompt us to abandon the Fifteenth Amendment.”).

<sup>233</sup> 52 U.S.C. §§ 20301-20311 (2018). In the House report, representatives argued that they could impose this uniform requirement on the states because of their authority under the Elections Clause. See *Uniformed and Overseas Citizens Absentee Voting: Hearing on H.R. 4393 Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 99th Cong. 66 (1986) (statement of Rep. William Thomas) [hereinafter *UOCAVA Hearings*] (“But my concern is that one possible solution is viewed as having the Federal Government impose a degree of uniformity on the States, which then makes it easier to explain what the State procedure is because they’re all the same. My concern is that if the States want to structure their election procedure differently, I think they have every right to. In fact, I don’t think, beyond certain requirements, that we ought to get into the ‘who’ aspect of the voting. But time, place, and manner, to a very great degree, we have that ability under the Constitution.”).

<sup>234</sup> 52 U.S.C. § 20310 (defining eligible voters as those who, notwithstanding their absence, would otherwise be qualified to vote in last place in which they resided).

<sup>235</sup> In 1942, Congress used its war powers to adopt the Soldier Voting Act of 1942, which required states to allow active military personnel to vote in federal elections regardless of the voter qualification standards of their home states. See KEVIN J. COLEMAN, CONG. RESEARCH SERV., RS20764, THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES 1-2 (2015). In 1944, reluctant to rely on its war power as the conflict was nearing its end, Congress amended the 1942 Act to recommend, but not require, that military voters be allowed to participate in federal elections. *Id.* at 2. In 1955, Congress adopted the Federal Voting Assistance Act, but this law similarly recommended, but did not require, states to allow military personnel to register and vote absentee. See Federal Voting Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584.

<sup>236</sup> 383 U.S. 663 (1966).

under the Equal Protection Clause;<sup>237</sup> there was no record of racial discrimination in voting such that the Fifteenth Amendment was implicated;<sup>238</sup> nor had the Court decided that state laws prohibiting military personnel from voting were unconstitutional.<sup>239</sup> In 1952, President Harry Truman wrote a letter to Congress, which recognized the difficulties of enacting a uniform federal regime for overseas voting, but noted that Congress had the authority to act since the states had shirked their duty:

I agree with the committee that, in spite of the obvious difficulties in the use of the Federal ballot, the Congress should not shrink from accepting its responsibility and exercising its constitutional powers to give soldiers the right to vote where the States fail to do so. Of course, if prompt action is taken by the States, as it should be, it may be possible to avoid the use of a Federal ballot altogether. . . . Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954.<sup>240</sup>

Over thirty years after Truman's letter, some states still did not provide for absentee voting in the manner UOCAVA later required.<sup>241</sup> As applied to those states, UOCAVA incorporated state voter qualification standards, allowing only those members of the military qualified to vote under their respective state laws

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<sup>237</sup> See Franita Tolson, *Offering a New Vision for Equal Protection: The Story of Harper v. Virginia State Board of Elections*, in *ELECTION LAW STORIES* 63, 64 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).

<sup>238</sup> See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (holding that literacy test requirement for voting was not racially discriminatory).

<sup>239</sup> Compare *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (finding Tennessee's durational residence laws unconstitutional), with *Tullier v. Giordano*, 265 F.2d 1, 4 (5th Cir. 1959) (dismissing voter's lawsuit against parish for failing to register him to vote because the denial "[did] not constitute such 'purposeful discrimination between persons or classes of persons' as would amount to a denial of the equal protection of the laws").

<sup>240</sup> *UOCAVA Hearings*, *supra* note 233, at 56 (letter from President Truman to House Committee on Elections, March 22, 1952).

<sup>241</sup> See *id.* at 71 (letter from Col. Charles C. Partridge to Rep. Al Swift) (noting that "most counties in most states fall short of the 35-day standard which the Department of Defense has recommended as representing the *minimum* time necessary for an absentee ballot to go from a local election official to an overseas voter and back"); *id.* at 60 (article by Jody Powell, *Fight Waged to Guarantee the Right to Vote*, DALL. TIMES HERALD, Nov. 12, 1983) ("State election laws in most of the 50 states can, and do, deprive many Americans who are serving their country of the right to help select its government. The culprit is the way absentee ballots are handled. Most states send them out so late and require them to be returned so early that voting is a practical impossibility for Americans stationed overseas . . .").

to utilize the federal absentee ballot.<sup>242</sup> For those states that had mechanisms in place for absentee military voting, the statute did not displace these regimes.<sup>243</sup> The practical effect of UOCAVA, through its incorporation of state voter qualification standards for a category of voters overlooked or insufficiently protected by state law, was to create a new category of voters for purposes of federal elections.<sup>244</sup> As a result, UOCAVA “made” law in some states and “altered” it in others, but more importantly, UOCAVA created a voter qualification standard for federal elections, illustrating that the states’ authority under Article I, Section 2 cannot be completely segregated from federal power.<sup>245</sup>

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<sup>242</sup> 52 U.S.C. § 20302(a)(2) (2018) (requiring states to accept absentee ballots from “otherwise valid” military voters).

<sup>243</sup> *Id.* § 20303(g) (“A State is not required to permit the use of the Federal write-in absentee ballot, if, on and after August 28th, 1986, the State has in effect a law providing that – (1) a State absentee ballot is required to be available to any voter . . . at least 90 days before the . . . election . . . involved; and (2) a State absentee ballot is required to be available to any voter . . . as soon as the official list of candidates . . . is complete.”); *see also UOCAVA Hearings, supra* note 233, at 90 (testimony of John Pearson, Office of the Secretary of State, Washington) (“As I mentioned earlier in my testimony, we enthusiastically support any efforts that you can make to ensure that service to one’s country does not result in an inability to participate in the decisionmaking process. We would ask, however, that Congress keep in mind that some States, such as ours, have already taken steps in this area and that these State efforts should not be superseded by Federal law that might be more restrictive in nature.”); *id.* at 80 (testimony of Julia Tashjian, Secretary of State, Connecticut) (“[W]e question the necessity for the imposition of a Federal write-in ballot in States which, like Connecticut, make write-in absentee ballots available to their overseas electors well before the availability of regular absentee ballots. The imposition of an additional early write-in ballot in Connecticut will invite confusion and add to the complexity of administering the absentee voting process.”).

<sup>244</sup> *Cf. Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 170 (1874) (holding that there are no voters of federal creation).

<sup>245</sup> Professor Brian Kalt recently wrote that UOCAVA is unconstitutional as it applies to permanent expatriates, persuasively arguing that the statute exceeds the scope of Congress’s authority under the Fourteenth Amendment. *See* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 442 (2016). In contrast, this analysis focuses on the statute as it applies to military personal who would otherwise be eligible to vote under the laws of their home state, which does not raise the same constitutional concerns as extending the right to vote to individuals who have no intention of returning to the United States. Arguably, the latter application of UOCAVA stretches federal power well beyond the Elections Clause, where federalism concerns do not hold sway so long as Congress is acting within its prescribed authority.

As the debate over UOCAVA shows, states often used their authority under the Clause to circumscribe the electorate, sometimes deliberately and, other times, through oversight. The remainder of this Part builds on this insight to show that an overly formalistic distinction between voter qualification standards and procedural regulations is not only ahistorical, but also impossible to maintain. Thus, the Court's concern in *Shelby County* that the VRA's preclearance regime impermissibly reaches nondiscriminatory voter qualification standards is somewhat misplaced given that the Court ignored another source of power, the Elections Clause, which permits such action by Congress in some limited circumstances.<sup>246</sup> This Part concludes by describing those instances in which it is within Congress's authority under the Clause to reach voter qualification standards, specifically where states fail to set voter qualifications for federal elections, or alternatively, seek to purposely circumscribe the electorate. The Court can then, in turn, assess the legislative record in light of these considerations.

#### A. *The Artificial Boundary Between Manner Regulations and Voter Qualification Standards*

This Section argues that, with respect to hybrid regulations—or regulations that implicate both voter qualifications and the manner of federal elections—the Supreme Court should read federal power broadly because it is difficult, if not impossible, to completely insulate voter qualification standards from federal authority under the Elections Clause.<sup>247</sup> The *Arizona Inter Tribal* analysis

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<sup>246</sup> In *Shelby County*, the Court did not explore whether Congress built a legislative record demonstrating that some states have adopted regulations designed to purposely circumscribe the electorate, but voter identification laws and other election regulations enacted in some jurisdictions formerly covered by section 5 would arguably meet this threshold. See Tolson, *supra* note 10, at 2226-29 (discussing voting laws in North Carolina and Texas).

<sup>247</sup> See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 122 (1970) (arguing that congressional power under the Elections Clause is broad enough to reach voter qualifications because “[s]urely no voter *qualification* was more important to the Framers than the *geographical qualification* embodied in the concept of congressional districts” and “[t]here can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal elections”). Compare *Dewitt v. Foley*, No. 10-CV-510, 1992 U.S. Dist. LEXIS 14571, at \*21 (N.D. Cal. Sept. 11, 1992), *aff'd*, 507 U.S. 901 (1993) (“The requirement that voters reside within the congressional district in which they vote is therefore properly understood as a restriction on the ‘place’ or ‘manner’ of election, which both Congress and the state legislature are empowered to prescribe.”), with *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (“Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the

proceeded as if the proof-of-citizenship requirement was part of a voter registration procedure that could, but did not necessarily have to, implicate voter qualifications over which Congress lacked constitutional authority.<sup>248</sup> In contrast, Justice Thomas, in dissent, considered voter registration to be a voter qualification standard governed by Article I, Section 2.<sup>249</sup> Notably, the majority referenced *Smiley v. Holm*,<sup>250</sup> which contains important language recognizing that Congress, pursuant to the Elections Clause, can implement “a complete code for congressional elections,” including manner regulations, that govern:

notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.<sup>251</sup>

Justice Thomas, however, dismissed *Smiley*'s treatment of voter registration as a manner regulation as “dicta,”<sup>252</sup> and noted that the “Framers did not intend to leave voter qualifications to Congress.”<sup>253</sup>

Justice Thomas's critique misses the point. Even if this language is dicta, *Smiley*, which rejected a congressional redistricting plan implemented without the governor's approval as required by state law, explicitly recognized that Congress can enact legislation that is necessary “to enforce the fundamental right involved.”<sup>254</sup> By definition, this view of federal power renders the line

exercise of the franchise. Indeed, “[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.” (alteration in original) (citations omitted)).

<sup>248</sup> *Arizona v. Inter Tribal Council of Ariz., Inc. (Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2258-59 (2013) (noting that prescribing voter qualifications is outside bounds of congressional power but explaining that Arizona had alternative means under statute to dictate qualification requirements).

<sup>249</sup> *Id.* at 2270 (Thomas, J., dissenting); see also Franita Tolson, *Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal*, 13 ELECTION L.J. 322, 323 n.6 (2014) (arguing that the current Supreme Court would not consider voter identification standards to be “manner” regulations despite a non-frivolous claim that Congress could regulate voter qualifications under the Elections Clause); William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 43-45 (making similar argument based on the Guarantee Clause of Article IV).

<sup>250</sup> 285 U.S. 355 (1932).

<sup>251</sup> *Id.* at 366.

<sup>252</sup> *Ariz. Inter Tribal*, 133 S. Ct. at 2268 (Thomas, J., dissenting).

<sup>253</sup> *Id.* at 2263.

<sup>254</sup> *Smiley*, 285 U.S. at 366.

between manner regulations and voter qualification standards unclear where both are implicated. And this has been the case, historically. In a comprehensive review of founding era sources discussing the “manner” of elections, Professor Robert Natelson observed that “English, Scottish, and Irish sources used the phrase ‘manner of election’ to encompass the times, places, and mechanics of voting; legislative districting; provisions for registration lists; the qualifications of electors and elected; strictures against election-day misconduct; and the rules of decision (majority, plurality, or lot).”<sup>255</sup> Professor Natelson further concluded that “Americans ascribed the same general content to the phrase ‘manner of election’ as the English, Irish, and Scots did.”<sup>256</sup> While it is clear that the Framers did not intend to give Congress plenary control over voter qualifications under the Clause,<sup>257</sup> these sources highlight the significant overlap between manner regulations and voter qualification standards at the country’s founding such that the boundary between the two was not readily apparent.

The Court’s caselaw has similarly recognized the difficulty with policing this area. In *Minor v. Happersett*, for example, the Court held that the right to vote was not a privilege or immunity of citizenship protected by the Fourteenth Amendment, but denied that this interpretation of the Fourteenth Amendment affected, or even implicated, congressional authority under the Elections

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<sup>255</sup> Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (2010). In his summary of the evidence, Professor Natelson noted that American, English, Irish, and Scottish lawmakers defined “manner of election” in largely the same way, encompassing factors such as elector and candidate qualifications, time of elections, terms of office, place of elections, rules for elections, mechanics of voting, election dispute procedures and regulation of election day misconduct. *Id.* at 17-18.

<sup>256</sup> *Id.* at 13-14 (discussing the 1721 South Carolina election code that “described ‘the Manner and Form of electing Members’ to the lower house of the colonial assembly as including the qualifications of office-holders and the freedom of voters from civil process on election days,” and the 1780 Massachusetts Constitution which “described the ‘manner’ by mandating the time of the election . . . property and age qualifications of electors, a notice of election, and who would serve as election judges”); *see also id.* at 16 (“State election laws adopted after Independence employed ‘manner of election’ and its variants in the same general way. The ‘mode of holding elections’ in a 1777 New York statute provided for public notice at least ten days before election in each county for elections for governor, lieutenant-governor, and senate. It specified the places for election, the supervising officers and election judges, times of notice, returns of poll lists, declaration of winner, and some voter qualifications.”).

<sup>257</sup> *See id.* at 20 (explaining that “[t]he constitutional language governing congressional elections differed from usual eighteenth-century ‘manner of election’ provisions” because the Constitutions lists “qualifications, times, and places separately from ‘Manner’” and describes “the residuum as ‘the Manner of holding Elections’”).

Clause.<sup>258</sup> Unlike *Arizona Inter Tribal*, which unrealistically attempted to place voter qualifications beyond the reach of the Clause, the *Minor* Court resisted the urge to read its terms in this way. As the Court observed:

It is not necessary to inquire whether this power of supervision thus given to Congress [under the Elections Clause] is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.<sup>259</sup>

“[U]ntil Congress acts” suggests that the Court reserved judgment on this issue, but by 1884, the Court definitively resolved whether Congress can protect the right to vote through its authority under the Elections Clause. In *Ex parte Yarbrough*, the Court sustained an indictment under the 1870 Enforcement Act against individual defendants who conspired against an African-American citizen “in the exercise of his right to vote for a member of the Congress of the United States . . . on account of his race, color, and previous condition of servitude . . . .”<sup>260</sup> The Court held that the Fifteenth Amendment “gives no affirmative right to the colored man to vote,” suggesting that this provision standing alone is insufficient support for the Act, but ultimately concluded that “it is easy to see that under some circumstances it may operate as the immediate source of a right to vote.”<sup>261</sup> Those circumstances are present where Congress is exercising its authority under the Elections Clause, as it was in *Yarbrough*, to regulate national elections.<sup>262</sup>

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<sup>258</sup> See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171 (1874) (stating that Congress may make or alter regulations of time, place, or manner of elections notwithstanding holding); see also *McPherson v. Blacker*, 146 U.S. 1, 39 (1892) (holding that the Reconstruction Amendments did not alter the balance of power between states and federal government such that states who allowed their citizens to vote for electors at the time of the ratification of these Amendments had surrendered their power under Article II to appoint electors permanently).

<sup>259</sup> *Minor*, 88 U.S. (21 Wall.) at 171.

<sup>260</sup> *Ex parte Yarbrough*, 110 U.S. 651, 657 (1884); see also Valelly, *supra* note 174, at 133 (noting that the *Yarbrough* Court, in holding that Congress has ample authority to protect federal elections under Elections Clause, “strengthened Fifteenth Amendment enforcement by fusing it to the congressional regulatory power contained in Article I”).

<sup>261</sup> *Yarbrough*, 110 U.S. at 665.

<sup>262</sup> *Id.* at 662 (upholding sections 5508 and 5520 of the 1870 Enforcement Act as a lawful exercise of Congress’s power under the Elections Clause, the Fifteenth Amendment, and the Necessary and Proper Clause because Congress “must have the power to protect the elections on which its existence depends from violence and corruption”); see also Valelly, *supra* note 174, at 135 (“[A] unanimous Court ruled that in order to protect the electoral processes that made it a national representative assembly, Congress could protect the right to vote of any citizen, Black or white.”).

In addition to recognizing that Congress could, in some instances, protect the right to vote from private interference through the Elections Clause, *Yarbrough* and another case, *In re Coy*,<sup>263</sup> also held that Congress's authority under the Elections Clause is not diminished simply because a federal regulation may affect state and local elections.<sup>264</sup> Federal law made it a crime for any election official to "violate or refuse to comply with his duty" at "any election for representative or delegate in Congress," but the defendant election inspectors argued they could not be indicted under federal law because they were tampering with the returns in order to taint state and local elections, not the House election.<sup>265</sup> The Court found this argument "manifestly contrary to common sense" because "[t]he manifest purpose of both systems of legislation is to remove the ballot-box as well as the certifications of the votes cast from all possible opportunity of falsification, forgery, or destruction."<sup>266</sup>

Despite caselaw embracing a pragmatic view of Congress's authority under the Clause, the Court retreated from enforcing constitutional protections for the right to vote in the late nineteenth and early twentieth centuries, which meant that state legislatures and complicit lower courts took the lead in reaffirming a narrow role for federal power in this area. For example, the 1890 Mississippi constitution, which disenfranchised a large segment of the state's African-American and white populations,<sup>267</sup> was not successfully challenged until 1965 because of a fundamental misunderstanding about the scope of the state's authority over voter qualifications. In the 1950s and 1960s, Mississippi amended its state constitution to add several prerequisites to voting, including a more

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<sup>263</sup> 127 U.S. 731 (1888).

<sup>264</sup> See *id.* at 752 (stating that federal government may regulate Congressional elections, regardless of state and local elections taking place); *Yarbrough*, 110 U.S. at 662 (stating that no federal powers are "annulled because an election for state officers is held at the same time and place").

<sup>265</sup> *Coy*, 127 U.S. at 749-50, 753.

<sup>266</sup> *Id.* at 755; see also Valelly, *supra* note 174, at 135-36 (arguing that the Court rejected the claim because "during the elections the state and local elections officials had, for all intents and purposes, become officers of the United States and were subject to the jurisdiction of the United States").

<sup>267</sup> See *United States v. Mississippi*, 380 U.S. 128, 132 (1965) ("Section 244 of that constitution established a new prerequisite for voting: that a person otherwise qualified be able to read any section of the Mississippi Constitution, or understand the same when read to him, or give a reasonable interpretation thereof. This new requirement, coupled with the fact that until about 1952 Negroes were not eligible to vote in the primary election of the Democratic Party . . . worked so well in keeping Negroes from voting . . . that by 1899 the percentage of qualified voters in the State who were Negroes had declined from over 50% to about 9%, and by 1954 only about 5% of the Negroes of voting age in Mississippi were registered.").

stringent literacy qualification and a requirement of “good moral character.”<sup>268</sup> A three judge court in *United States v. Mississippi*<sup>269</sup> found that the federal government did not have standing to challenge these provisions because Article I, Section 2, together with the Seventeenth and Twenty-Fourth Amendments, established that “the Congress of the nation and the people have affirmed in this century that the power to establish or change the qualifications of electors for federal officials can be accomplished by constitutional amendment alone.”<sup>270</sup> In other words, the court treated the Seventeenth and Twenty-Fourth Amendments as not only reaffirmations of state control over voter qualifications, but also as express limitations on federal power.<sup>271</sup>

It was not until the Court began to affirmatively police the political sphere again in the mid-twentieth century that the Elections Clause experienced a rebirth,<sup>272</sup> but most cases still failed to delineate between voter qualification standards and manner regulations in determining the scope of federal power. For example, in *Crawford v. Marion County Election Board*,<sup>273</sup> the Court assumed that voter identification laws are voter qualifications rationally related to the right to vote because they “protect[] the integrity and reliability of the electoral process.”<sup>274</sup> The Court then declined to apply strict scrutiny and upheld Indiana’s voter identification law.<sup>275</sup> Despite treating voter identification laws as voter qualification standards, the Court identified these laws as one method that states can use to comply with the restrictions placed upon them by the NVRA and the Help America Vote Act, both of which are procedural regulations enacted by Congress pursuant to the Elections Clause.<sup>276</sup> While the Court somewhat cavalierly moved between categories in defending the constitutionality of voter

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<sup>268</sup> *Id.* at 132-33.

<sup>269</sup> 229 F. Supp. 925 (D. Miss. 1964), *rev’d*, 380 U.S. 128 (1965).

<sup>270</sup> *Id.* at 947.

<sup>271</sup> *Id.* *But see* *Newberry v. United States*, 256 U.S. 232, 252 (1921) (“As finally submitted and adopted the [Seventeenth] Amendment does not undertake to modify Art. I, § 4, the source of congressional power to regulate the times, places and manner of holding elections. That section remains ‘intact and applicable both to the election of Representatives and Senators.’” (quoting 46 CONG. REC. 848 (1911))).

<sup>272</sup> *See Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (upholding the 1970 amendments to the VRA under the Elections Clause).

<sup>273</sup> 553 U.S. 181 (2008).

<sup>274</sup> *Id.* at 191.

<sup>275</sup> *See id.* at 202-03.

<sup>276</sup> *Id.* at 192 (“Two recently enacted federal statutes have made it necessary for States to reexamine their election procedures. Both contain provisions consistent with a State’s choice to use government-issued photo identification as a relevant source of information concerning a citizen’s eligibility to vote.”).

identification laws, its lack of clarity is a potential hazard for any federal legislation under the Elections Clause that could reach voter identification laws.

The lack of clarity between these two categories also abounds because many lawsuits over discriminatory voting schemes have involved joint challenges to voter qualification standards and procedural regulations. States enacted laws to further racial discrimination in voting without distinguishing between the two types of regulations. In *United States v. Louisiana*,<sup>277</sup> for example, the government challenged two state laws, one statutory (literacy test) and the other constitutional (moral fitness requirement) that together disenfranchised most African-Americans in the state.<sup>278</sup> In the post-Reconstruction era, the African-American vote often was decisive in resolving electoral disputes between the wealthy white planter class and white yeoman farmers.<sup>279</sup> To neutralize their power, Louisiana adopted a grandfather clause, exempting illiterate white voters registered prior to January 1, 1867 from its new qualifications.<sup>280</sup> The state then required all other voters to undergo new registration, thus cementing the newly enacted, discriminatory voter qualification standards.<sup>281</sup>

While these two provisions implicate voter qualifications and voter registration, respectively, to analyze each provision in isolation would ignore that, like most post-Reconstruction era state constitutions, Louisiana utilized both types of laws in order to disenfranchise their prospective voters. In striking down these regulations, the district court did not focus on the source from which state authority derived; instead, the court viewed federal power comprehensively, noting that the Elections Clause (“an affirmative grant of power to the United States”) and the Fourteenth and Fifteenth Amendments (“mandates expressly prohibiting discriminatory state action”) “deny plenary

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<sup>277</sup> 225 F. Supp. 353 (E.D. La. 1963).

<sup>278</sup> Article VIII, section 1(d) of the state constitution provided in pertinent part that:

He [a voter] shall be a person of good character and reputation, attached to the principles of the Constitution of the United States and of the State of Louisiana, and shall be able to understand and give a reasonable interpretation of any section of either Constitution when read to him by the registrar, and he must be well disposed to the good order and the happiness of the State of Louisiana and of the United States and must understand the duties and obligations of citizenship under a republican form of government.

*Id.* at 357-58 (alteration in original) (emphasis omitted).

<sup>279</sup> *Id.* at 369-70 (emphasizing the influence of the African-American vote in 1892 and 1896 gubernatorial elections).

<sup>280</sup> *Id.* at 373.

<sup>281</sup> *Id.* at 374 (“To make the disenfranchisement effective, the legislature directed a complete new registration of all voters. Registration rolls before and after the adoption of the [1898] Constitution show the prompt effect the grandfather clause had on Negro voters.”).

and exclusive power to the States to determine voting requirements and give special protection to a citizen against discrimination in the electoral process.”<sup>282</sup>

The Court’s aggressive posture towards these regimes in the mid-twentieth century (including, notably, the invalidation of the all-white Democratic primary) led to some creativity among states in crafting both procedural laws and voter qualification standards that circumscribe the reach of the electorate, but under the guise of enforcing the state’s power over voter qualifications.<sup>283</sup> In 1956, the Association of Citizens’ Councils published a pamphlet, “Voter Qualification Laws in Louisiana – The Key to Victory in the Segregation Struggle,” which advocated both the purging of the voter rolls and strict application of a constitutional interpretation test.<sup>284</sup> Similarly, Alabama adopted the “Boswell” amendment in 1946, which allowed only individuals who could understand a provision of the U.S. Constitution to register to vote.<sup>285</sup> In *Davis v. Schnell*,<sup>286</sup> a three judge court struck down the Boswell amendment on the grounds that it violated the Fifteenth Amendment because it was enacted with a discriminatory purpose; thus the question of the state’s authority under the Elections Clause was never before the court.<sup>287</sup> But *Davis* shows that Alabama, like Louisiana, used procedural (voter registration) and voter qualification standards (literacy tests) to circumscribe the electorate, implicating the Elections Clause.

For this reason, the VRA, enacted in 1965 to address widespread racial discrimination in voting, had to be broad enough to reach procedural regulations and voter qualification standards, even those facially neutral laws enacted as a part of a comprehensive scheme of disenfranchisement that may or may not have the requisite discriminatory intent. Because of its scope, the VRA cannot be justified based on the Fourteenth and Fifteenth Amendments alone. While discriminatory voter qualification standards triggered coverage under section 4(b), the suspension of new voting laws applied to all changes, not just those changes that were racially discriminatory, procedural, or applied to the

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<sup>282</sup> *Id.* at 358; *see also id.* at 360-61 (“Nothing in the language or history of the Tenth Amendment gives the State exclusive sovereignty over the election processes against the Federal government’s otherwise constitutional exercise of a power. . . . The totality of implied powers these sections grant to Congress are full authority for Congress to enact the Civil Rights Act [of 1960] or other appropriate legislation to regulate elections (including registration) under Article I, Section 4, and to protect the integrity of the electoral process under the Fourteenth and Fifteenth Amendments.”).

<sup>283</sup> *Id.* at 378-79 (detailing efforts in 1950s by white Association of Citizens’ Councils to purge African-Americans from voter rolls).

<sup>284</sup> *Id.* at 378.

<sup>285</sup> *See Davis v. Schnell*, 81 F. Supp. 872, 874 (D. Ala. 1949).

<sup>286</sup> 81 F. Supp. 872 (D. Ala. 1949).

<sup>287</sup> *Id.* at 880 (examining history of Boswell amendment).

qualification of voters. Congress recognized that states routinely relied on their control over voter qualifications and their autonomy over the times, places, and manner of federal election in order to further racial discrimination in voting through facially neutral regulations. Congress therefore crafted the preclearance regime of sections 4(b) and 5 very broadly to capture discrimination writ large, and in doing so, recognized that any boundaries between time, place, and manner regulations, and voter qualification standards, respectively, were mere parchment barriers.<sup>288</sup>

B. *Voter Qualification Standards as Manner Regulations: A Blueprint for Federal Intervention*

Historically, states have used their authority over state elections and voter qualifications to discourage voter turnout in federal elections.<sup>289</sup> This misuse of power reveals the clear danger of imposing a dual sovereignty framework on the Elections Clause, a framework that places voter qualifications squarely within the province of state governments and potentially leads to voter apathy and broad disenfranchisement in federal elections. This is the danger of *Shelby County* as precedent—the decision imposes a rigid barrier between state and federal authority that undermines Congress’s authority under the Elections Clause, which is an unarticulated, but still justifiable, source of authority for the VRA.

Given this insight, the key takeaway from *Arizona Inter Tribal* is not its broad reading of congressional power under the Elections Clause. Prior cases had already referred to Congress’s authority under the Clause as paramount.<sup>290</sup> *Arizona Inter Tribal* is of vital importance because the Court treated state law as presumptively valid, even in finding that federal law preempted this particular iteration of the Arizona proof-of-citizenship requirement.<sup>291</sup> This illegitimate nod to state power is contrary to the Clause’s structure and purpose, which would forbid Arizona’s proof-of-citizenship law if its effect on the federal electorate is

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<sup>288</sup> See Tolson, *supra* note 15, at 1203-07 (defending preclearance regime as constitutional exercise of Congress’s authority under Elections Clause).

<sup>289</sup> See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2624-25 (2013) (noting the wide disparity between white and minority voter registration before enactment of the VRA).

<sup>290</sup> See, e.g., *Ex parte Siebold*, 100 U.S. 371, 384 (1880) (indicating that no deference to state sovereignty is necessary because federal law is “paramount”).

<sup>291</sup> See *Arizona v. Inter Tribal Council of Ariz., Inc. (Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2258-59 (2013) (“Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications. If, but for Arizona’s interpretation of the ‘accept and use’ provision, the State would be precluded from obtaining information necessary for enforcement, we would have to determine whether Arizona’s interpretation, though plainly not the best reading, is at least a possible one.”).

deleterious and render unnecessary any demonstration that the federal law interferes with the state's ability to enforce its voter qualification standard. Arguably, Congress can intervene when a state voter qualification standard has significant implications for participation and turnout in federal elections, as in the case of voter identification laws and proof-of-citizenship requirements.<sup>292</sup> Congress can also regulate when states have "under-legislated" with respect to voter qualifications in order to purposely circumscribe the electorate, as was the case with the all-white Democratic primary. This Section discusses each of these contentions in turn.

### 1. State Law Undermines Turnout and Participation in Federal Elections

The prior sections argued that it is difficult to police the boundary between voter qualification standards and manner regulations because of the uncertainty surrounding the definition of these terms. As this Section shows, this problem is actual, not simply theoretical, and has real world effects on turnout and participation in federal elections. For example, one could argue that voter identification laws are more like manner regulations than voter qualification standards, and Congress can prevent the state from prioritizing its interest in ensuring the integrity of the electoral process over a prospective voter's right to cast a ballot through its authority under the Elections Clause.<sup>293</sup> Requiring that a voter show identification to prevent fraud or to ensure the integrity of the

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<sup>292</sup> This Article does not argue that the Elections Clause gives Congress plenary authority over voter qualifications. For example, states can still enact proof-of-citizenship and voter identification requirements for federal elections if they produce empirical evidence that these requirements are necessary to further their regulatory interests and Congress has not barred these restrictions. See Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 162 (2015) ("Under heightened scrutiny, the Court would strike down restrictive regulations that are not supported by empirical evidence, or that do not directly respond to a problem in the state's electoral system."). Nor does the theory advocated herein disturb the Court's holding in *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970), which stated that Congress cannot lower the voting age in state and local elections from twenty-one to eighteen when legislating under the Elections Clause. The Court focused on whether there was any evidence that restricting the electorate to those over twenty-one disproportionately affected racial minorities, *id.*, but there was also no evidence that the age restriction kept a substantial portion of the population from voting in federal elections. Instead, this approach is analytically similar to the Court's Commerce Clause cases, where it has held that Congress can reach noneconomic, intrastate activity where the failure to do so could undermine a lawful regulation of interstate commerce. See *Gonzalez v. Raich*, 254 U.S. 1, 22 (2005) (holding that Congress may regulate "purely intrastate activity" affecting interstate commerce).

<sup>293</sup> See Tolson, *supra* note 10, at 2269 (arguing that the Court must "conced[e] the sovereignty that Congress has under the [Elections] Clause, which may, in some limited instances, permissibly interfere with state control over voter qualifications").

electoral process aligns more with regulating the mechanics of the actual election, as opposed to functioning as a voter qualification standard that determines whether a person is qualified to vote (such as age or residency requirements). As Professor Derek Muller argued, unlike voter qualification standards that are “tethered to some concept of who may participate in the political process,” voter identification laws are better seen as a “means of enforcing qualifications” because they lack a clear link to the state’s determination of who can participate.<sup>294</sup> Yet defining these laws as voter qualification standards, despite this definitional uncertainty, would place this category firmly beyond the reach of federal law regardless of its overall impact on voter participation.<sup>295</sup>

Less clear are proof-of-citizenship requirements, which are an unusual mix of voter qualification standards and election procedure. They implicate questions of whether a voter is qualified to cast a ballot in the first instance and also whether the voter has presented sufficient evidence of citizenship such that they can register to vote. Given their hybrid nature, these laws illustrate that the Elections Clause can and should reach voter qualification standards if states adopt stringent proof-of-citizenship requirements that undermine turnout and participation in federal elections. There is a sufficient nexus between proof-of-citizenship requirements as voter qualification standards and proof-of-citizenship requirements as voter registration/manner regulations that arguably justifies this view of congressional authority.

In recent years, states have enacted proof-of-citizenship requirements under the guise of preventing non-citizen voting, but the effect of these regulations has been to depress turnout among individuals who can legally cast a ballot.<sup>296</sup> *Arizona Inter Tribal* punted on the question of whether the NVRA interfered with Arizona’s authority to enforce its voter qualifications, inviting Arizona to submit a request to the Election Assistance Commission (“EAC”) to include proof-of-citizenship requirements as a part of the federal voter registration form’s state-specific instructions.<sup>297</sup>

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<sup>294</sup> Muller, *supra* note 10, at 316 n.82 (“Voter registration and voter identification, then, are less qualifications and more means of enforcing qualifications.”).

<sup>295</sup> See *Ariz. Inter Tribal*, 133 S. Ct. at 2258-59 (noting that a federal statute precluding a state from enacting voting qualifications would be constitutionally questionable). *But see Mitchell*, 400 U.S. at 122 (referring to the single-member district requirement for congressional elections as a voter qualification standard).

<sup>296</sup> BRENNAN CTR. FOR JUSTICE, NYU SCH. OF LAW, VOTING RIGHTS & ELECTIONS SERIES: PROOF OF CITIZENSHIP 1 (Sept. 12, 2006), <http://www.brennancenter.org/sites/default/files/analysis/Proof%20of%20Citizenship.pdf> [<https://perma.cc/9TRG-DPXB>] (indicating that proof-of-citizenship requirements disenfranchise many eligible voters).

<sup>297</sup> *Ariz. Inter Tribal*, 133 S. Ct. at 2260.

Two days later, Arizona did exactly as the Court recommended, and not even a year later, found itself in litigation again—this time with the State of Kansas as a co-plaintiff—requesting judicial review of the EAC’s decision to decline the states’ request that the proof-of-citizenship requirement be added to the federal voter registration form.<sup>298</sup> Citing to the constitutional issues expressed in *Arizona Inter Tribal*, the district court found that the EAC’s decision to deny the states’ requested instructions interfered with the states’ authority to enforce their voter qualification standards.<sup>299</sup> The court held that the EAC had a “nondiscretionary duty” to update the federal form to reflect each state’s law.<sup>300</sup> This finding prioritized the states’ control of voter qualifications over Congress’s sovereign authority to regulate the times, places, and manner of federal elections, which it had exercised in enacting the NVRA.

The district court’s approach in *Kobach v. United States Election Assistance Commission*<sup>301</sup> of making a hard delineation between voter qualifications and manner regulations was substantively no different from the Supreme Court’s decision to treat state law as presumptively valid in *Arizona Inter Tribal*. The district court explicitly viewed proof-of-citizenship requirements as voter qualification standards (and any state laws within that category as presumptively valid), whereas the NVRA, in the court’s view, implicated Congress’s broad authority to regulate voter registration for federal elections; thus, the Kansas statute raised no preemption concerns because it addressed a different subject than the federal statute.<sup>302</sup> But the district court’s opinion left the door open for the subversion of federal elections through the disenfranchisement of legal voters. Eight months later, the Court of Appeals for the Tenth Circuit reversed and remanded, applying *Chevron* deference to the EAC’s decision and holding it to be final and valid.<sup>303</sup>

Although reversed on appeal, the district court’s decision in *Kobach* highlighted a key tension between the State’s control over voter qualification and Congress’s sovereignty over the administration of federal elections, a tension that has continued to haunt later proceedings in the case. After litigating its proof-of-citizenship requirement in 2014 and 2015, Kansas—along with

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<sup>298</sup> See *Kobach v. U.S. Election Assistance Comm’n*, 6 F. Supp. 3d 1252, 1256-57 (D. Kan.), *rev’d*, 772 F.3d 1183 (10th Cir. 2014).

<sup>299</sup> *Id.* at 1263 (“Here, the EAC’s decision to deny the states’ requested instructions has precluded the states from obtaining proof of citizenship that the states have deemed necessary to enforce voter qualifications.”).

<sup>300</sup> *Id.* at 1271.

<sup>301</sup> 6 F. Supp. 3d 1252 (D. Kan.), *rev’d*, 772 F. 3d 1183 (10th Cir. 2014).

<sup>302</sup> *Id.* at 1267 (“It is clear that the text of the NVRA does not address the same subject as the states’ laws—documentary proof of citizenship.”).

<sup>303</sup> *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183, 1190-94 (10th Cir. 2014).

Alabama and Georgia—once again requested the EAC to add this requirement to the federal form’s state-specific instructions.<sup>304</sup> Surprisingly, the EAC’s new executive director, Brian Newby, unilaterally and without the input of the EAC commissioners, approved the modifications.<sup>305</sup> Residents and organizations in these states filed suit, seeking declaratory and injunctive relief, and the district court held that the EAC’s grant of the states’ requests constituted final agency action.<sup>306</sup>

On appeal, the Court of Appeals for the D.C. Circuit reversed Director Newby’s decision.<sup>307</sup> While the court acknowledged that its decision would not affect proof-of-citizenship requirements that apply to state and local elections, the court recognized that these requirements made it extremely difficult for organizations to register voters for federal elections as well.<sup>308</sup> The court explained:

[The League of Women Voters] held registration drives both in formal venues, like naturalization ceremonies, and a wide variety of informal ones, like shopping malls, community festivals, and even bus stops. But the Kansas proof-of-citizenship requirement *substantially limited* the ability of the Kansas League to successfully register voters because (1) often potential voters didn’t have citizenship documents with them, (2) even if they did, the League didn’t have equipment to copy those documents, and (3) some potential voters balked at the idea of allowing the League’s volunteers to copy their sensitive citizenship documents (and members of the League echoed those concerns). Predictably, the number of voters successfully registered at League drives plummeted.<sup>309</sup>

Recognizing the sovereignty that Congress retains under the Elections Clause can help resolve issues that arise when a state’s election regulations blur the lines between qualification standards and procedural regulations, and this recognition

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<sup>304</sup> *League of Women Voters of U.S. v. Newby*, 195 F. Supp. 3d 80, 85-86 (D.D.C. 2016), *rev’d*, 838 F.3d 1 (D.C. Cir. 2016).

<sup>305</sup> *Id.* at 86 (indicating that Newby approved the states’ requests before EAC commissioners formally considered or voted on the requests).

<sup>306</sup> *Id.* at 88-95 (holding that, per requirements for preliminary injunctive relief, the organizations failed to demonstrate irreparable harm).

<sup>307</sup> *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 14 (D.C. Cir. 2016).

<sup>308</sup> *Id.* at 8. To understand how these difficulties were exacerbated, see *Belenky v. Kobach*, No. 2013CV1331, 2016 WL 8293871, at \*5-6 (D. Kan. Jan. 15, 2016), which held that Kansas law required qualified federal form applicants to be registered for all elections, and *Kobach v. U.S. Election Assistance Commission*, 6 F. Supp. 3d 1252, 1257 (D. Kan.), *rev’d*, 772 F.3d 1183 (10th Cir. 2014), which allowed the state proof-of-citizenship requirements to be used with the federal form.

<sup>309</sup> *Newby*, 838 F.3d at 8 (emphasis added).

places a finger on the scale in favor of broad enfranchisement in federal elections. Consistent with this reasoning, the appellate court held that it was the EAC's job to determine whether the documentary proof-of-citizenship requirement was necessary, and it was within the EAC's discretion whether to defer to the State's declaration of noncitizen voting as sufficient evidence to justify its law.<sup>310</sup> The court implicitly acknowledged that proof-of-citizenship requirements carry a substantial risk of disenfranchisement at all levels, such that the EAC can require the State to come forward with actual proof of significant noncitizen voting to justify the regulation.<sup>311</sup>

The concern about broad disenfranchisement was also present in the parallel proceeding before the Tenth Circuit over whether the NVRA preempted Kansas's proof-of-citizenship requirement, and the Tenth Circuit's decision is best understood as the vindication of federal authority over a contrary state voter qualification standard that would suppress voter turnout.<sup>312</sup> The issue before the court was whether section 5 of the NVRA, which provides that the state motor voter form "may require only the minimum amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process," interfered with Kansas's ability to enforce its documentary proof-of-citizenship requirement.<sup>313</sup>

Kansas, like Arizona, required documents such as a birth certificate or a passport to prove citizenship, whereas the NVRA required only that voters attest to their citizenship status.<sup>314</sup> The court held that "attestation under penalty of perjury is the *presumptive* minimum amount of information necessary for state election officials to carry out their eligibility-assessment and registration duties."<sup>315</sup> Should state officials need more information, "the presumption ordinarily can be rebutted (i.e., overcome) only by a factual showing that substantial numbers of noncitizens have successfully registered to vote under the NVRA's attestation requirement."<sup>316</sup> While the court did not definitively resolve whether the proof-of-citizenship requirement is a voter qualification standard or a procedural regulation, focusing instead on the fact that voter registration falls

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<sup>310</sup> *Id.* at 11.

<sup>311</sup> *Id.* at 12-14.

<sup>312</sup> While *Arizona Inter Tribal* involved a facial challenge to the NVRA, the Tenth Circuit case involved an as-applied challenge.

<sup>313</sup> *Fish v. Kobach*, 840 F.3d 710, 716 (10th Cir. 2016) (upholding district court order granting the plaintiff's motion for a preliminary injunction against enforcement of Kansas's documentary proof-of-citizenship law).

<sup>314</sup> *Id.* at 717.

<sup>315</sup> *Id.* at 716-17.

<sup>316</sup> *Id.* at 717.

within the ambit of Congress's power under the Elections Clause, the court recognized that federal authority under the Clause has to be read in light of its broad purpose: protection against the states' refusal to conduct federal elections, "effectively terminating the national government."<sup>317</sup> Depressing turnout in federal elections can have a similar deleterious effect.

The Tenth Circuit's view of the NVRA citizenship requirement as a baseline from which states cannot deviate without providing proof that change is needed reflected the concern, also embodied in *League of Women Voters of U.S. v. Newby*,<sup>318</sup> about the impact of voter qualification standards on the viability and health of federal elections. Thus, the NVRA can properly reach proof-of-citizenship requirements, even if such requirements are found to be voter qualification standards, because these requirements are not only inexplicably intertwined with voter registration, but they can drive down voter turnout in federal elections, triggering Congress's Elections Clause authority.

## 2. The "Under-Legislation" of Voter Qualification Standards

As illustrated by UOCAVA, Congress arguably has reserve power to set voter qualifications under both Article I, Section 2 and the Elections Clause in order to guard against the possibility that states will refuse to regulate with respect to federal elections. In *Oregon v. Mitchell*,<sup>319</sup> for example, the Court upheld the 1970 amendments to the VRA that lowered the voting age in national elections from twenty-one to eighteen.<sup>320</sup> Age is arguably a voter qualification standard, but the justices engaged in a broad reading of federal power to sustain the provision. For example, Justice Black, writing for himself on this point, argued that "the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed it advisable to do so."<sup>321</sup> Four other Justices argued that the Equal Protection Clause would sustain the extension of the franchise to eighteen-year-olds even though the record was devoid of any evidence of racial discrimination in voting or impermissible motivation on the

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<sup>317</sup> *Id.* at 724. On remand, the district court held a bench trial and determined that the Kansas proof-of-citizenship law violated the NVRA. *See Fish v. Kobach*, 309 F. Supp. 3d 1048, 1113 (D. Kan. 2018).

<sup>318</sup> 838 F.3d 1 (D.C. 2016).

<sup>319</sup> 400 U.S. 112 (1970).

<sup>320</sup> *Id.* at 120.

<sup>321</sup> *Id.* at 119 (arguing that Elections Clause and Necessary and Proper Clause gave Congress authority to set voter qualifications for federal elections).

part of the states.<sup>322</sup> *Arizona Inter Tribal* is in tension with *Mitchell*,<sup>323</sup> creating uncertainty about how far congressional authority extends when states not only fail to act on voter qualifications, but more commonly, “under-legislate” in determining who can participate.<sup>324</sup>

Treating voter qualification standards as manner regulations in some limited instances can mitigate this problem, and this approach has an analytical parallel in the Supreme Court’s long history with the all-white primary. The use of procedural regulations to increase the effectiveness of discriminatory voter qualification standards was common in the pre-VRA South,<sup>325</sup> but the extent to which the Elections Clause played a role in dismantling these systems has been overlooked in the legal literature. Part of this oversight is because the all-white primary, invalidated under the Fourteenth and Fifteenth Amendments, was the primary mechanism through which states used under-legislation as a tactic to facilitate racial discrimination in voting. While determining who can participate

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<sup>322</sup> See, e.g., *id.* at 143 (Douglas, J., concurring in part and dissenting in part) (noting “election inequalities created by state laws and based on factors other than race may violate the Equal Protection Clause . . .”).

<sup>323</sup> See *Arizona v. Inter Tribal Council of Ariz., Inc. (Ariz. Inter Tribal)*, 133 S. Ct. 2247, 2258 n.8 (2013) (“In *Mitchell*, the judgment of the Court was that Congress could compel the States to permit 18-year-olds to vote in federal elections. Of the five Justices who concurred in that outcome, only Justice Black was of the view that congressional power to prescribe this age qualification derived from the Elections Clause, while four Justices relied on the Fourteenth Amendment. That result, which lacked a majority rationale, is of minimal precedential value here.” (citations omitted)). However, the *Arizona Inter Tribal* majority overlooked that *Mitchell* also endorsed an interpretation of the Fourteenth Amendment that many members of the Court are unlikely to support today.

<sup>324</sup> This Section focuses on the “White Primary Cases,” see discussion *infra* 327-346, as the paradigmatic example of under-legislation, but under-legislation generally includes any circumstance in which the state legislature either fails to define a key term with respect to voter qualifications, or delegates the responsibility for defining the term to a third party. After Reconstruction, for example, states would delegate significant authority to election registrars in order to facilitate private discrimination through under-legislation. See Tolson, *supra* note 183, at 464-65. A famous modern day example would be the Florida Supreme Court’s failure to define the “intent of the voter” standard that governed the recount during the 2000 presidential election. See *Gore v. Harris*, 772 So. 2d 1243, 1254-55 (Fla.), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>325</sup> *United States v. Louisiana*, 225 F. Supp. 353, 381-82 (E.D. La. 1963) (“The decision to enforce the interpretation test more than thirty years after its adoption was accompanied, in almost every parish where the test has been used, by a wholesale purge of Negro voters or by periodic registration so that Negro voters were required to re-register *after* the test came into use. Citizen Council members challenged the registration of large numbers of Negro voters on the ground that they had not satisfied all of the requirements of the Louisiana voter qualification laws at the time they registered.”).

in the primary falls firmly within the voter qualification camp, there was an interconnectedness between the use of election procedure and voter qualification standards to disenfranchise African-Americans during this time period.<sup>326</sup>

In the “White Primary Cases,” the Supreme Court invalidated a succession of Texas laws that prohibited African-American voters from participating in the Democratic Party’s primary. The 1923 version of the law stated, “[i]n no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas.”<sup>327</sup> The Court, in *Nixon v. Herndon*,<sup>328</sup> struck the law down as a facially discriminatory effort by the state to disenfranchise African-Americans on the basis of race in violation of the Fourteenth Amendment.<sup>329</sup> *Herndon*’s promise of rigorous judicial enforcement proved to be illusory, however.

In *Newberry v. United States*,<sup>330</sup> the Court reversed the convictions of defendants who had violated the Federal Corrupt Practices Act (“FCPA”) on the ground that Congress’s authority under the Elections Clause did not extend to enacting legislation that applied to party primaries.<sup>331</sup> Similarly, in *Grove v. Townsend*,<sup>332</sup> the Supreme Court upheld a Texas Democratic Party resolution that limited membership to whites on the grounds that there was no direct state action that ran afoul of the Fourteenth and Fifteenth Amendments.<sup>333</sup> The Court

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<sup>326</sup> See *id.* at 377 (“The white primary not only effectively kept Negroes from voting in the only election that had any significance in the Louisiana electoral process but it also correspondingly depressed Negro registration to insignificantly low numbers.”).

<sup>327</sup> 1923 Tex. Gen. Laws 74.

<sup>328</sup> 273 U.S. 536 (1927).

<sup>329</sup> *Id.* at 540–41 (“We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.”); see also *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (“The Fourteenth Amendment, adopted as it was with special solitude for the equal protection of the members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.”).

<sup>330</sup> 256 U.S. 232 (1921).

<sup>331</sup> *Id.* at 258. The FCPA provided, in pertinent part that, “No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides . . . .” Federal Corrupt Practices Act, 2 U.S.C. §§ 241–248, *repealed by* Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101–30126 (2018); *Newberry*, 256 U.S. at 243. The FCPA tracked the Enforcement Act of 1870 by incorporating state law by reference.

<sup>332</sup> 295 U.S. 45 (1935).

<sup>333</sup> *Id.* at 55 (“We find no ground for the holding that the respondent has in obedience to the mandate of the law of Texas discriminated against the petitioner or denied him any right guaranteed by the Fourteenth and Fifteenth Amendments.”).

refused to intervene even though it was clear that the resolution was an instance of under-legislation, or where the state left a gap in its regulatory regime in order to delegate to the party the responsibility of furthering discrimination.

The *Grovey* Court's focus on the state action requirement was not that surprising in light of *Newberry*. While earlier cases placed significant weight on the fact that Congress enjoyed substantial authority to protect rights created by the Constitution,<sup>334</sup> the *Newberry* Court found "no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from [the Elections Clause]."<sup>335</sup> The Court's about-face from *Herndon* to *Newberry* can be explained only in federalism terms. Under a conservative interpretation of *Newberry*, the State's failure to police the primary process could justify federal action. Instead, the Court goes further in protecting state authority and the autonomy of the political parties by finding that Congress has no power to regulate party primaries at all.<sup>336</sup>

In the years following *Grovey* and *Newberry*, the Court recognized that its position ignored the practical reality that African-Americans were being disenfranchised indirectly through the party primary process and that the State was complicit in this disenfranchisement. In *United States v. Classic*,<sup>337</sup> the Court sustained the indictment of election commissioners who altered election returns in a primary election, and in doing so, upheld the constitutionality of federal criminal laws enacted pursuant to Congress's authority under the Elections Clause and the Necessary and Proper Clause that prohibited anyone acting under color of state law from depriving an individual of any "rights,

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<sup>334</sup> See *Ex parte Clarke*, 100 U.S. 399, 404 (1880); *Ex parte Siebold*, 100 U.S. 371, 383 (1880). Chief Justice White criticized the majority for this switch in his dissent in *Newberry*, noting that, without the Elections Clause, states do not have any authority to regulate the times, places, and manner of federal elections. 256 U.S. at 261-62 (White, C.J., dissenting) ("[I]t follows that the state power to create primaries as to United States Senators depended upon the grant [the Elections Clause] for its existence. It also follows that, as the conferring of the power on the States and the reservation of the authority in Congress to regulate were absolutely coterminous . . . it results that nothing is possible of being done under the former which is not subjected to the limitation imposed by the latter.").

<sup>335</sup> *Newberry*, 256 U.S. at 249.

<sup>336</sup> *Id.* at 258 ("We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the State and infringe upon liberties reserved to the people.").

<sup>337</sup> 313 U.S. 299 (1941).

privileges, and immunities secured and protected by the Constitution and laws of the United States.”<sup>338</sup> The Court found that the commissioners interfered with the right to vote “at the only stage of the election procedure when their choice is of significance . . . .”<sup>339</sup> This case also corroborated that Congress’s authority to regulate party primaries under Article I and the Elections Clause is not only broader than it is under the Fourteenth and Fifteenth Amendments, but also that there is no state action requirement:

While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”

Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.<sup>340</sup>

In the Court’s view, the Elections Clause and the Necessary and Proper Clause extended federal authority to party primaries and ensured that voters qualified under state law could cast their ballot.<sup>341</sup> Thus, states still have the primary role of choosing voter qualifications, but the Court is clear that, with respect to policing the procedure of elections, state control over voter qualifications exists only to the extent that Congress has not exercised its powers pursuant to the Elections and Necessary and Proper Clauses.<sup>342</sup> *Classic*, and its holding that the primary is an integral part of the election for selecting congressman, opened the door for a successful challenge to the all-white primary, but did so with significant help from the Elections Clause.

Two of the later White Primary Cases highlight, in rather dramatic fashion, that federal power in this area should be viewed comprehensively. *Smith v.*

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<sup>338</sup> *Id.* at 309-10.

<sup>339</sup> *Id.* at 314.

<sup>340</sup> *Id.* at 315 (citations omitted).

<sup>341</sup> *Id.* at 325. Notably, the Court introduced the idea that the right to vote has independent federal significance separate from its regulation by the states. For more on this point, see generally TOLSON, *supra* note 211.

<sup>342</sup> *Classic*, 313 U.S. at 315.

*Allwright*,<sup>343</sup> which held that the Democratic Party's practice of excluding African-Americans from their primary violated the Fifteenth Amendment,<sup>344</sup> and *Terry v. Adams*,<sup>345</sup> which extended *Smith*'s broad reading of federal power to primaries conducted by a county political organization,<sup>346</sup> illustrate the difficulty of creating a firm boundary between manner regulations and voter qualification standards: the problem of circumvention. Under-legislation by the State with respect to voter qualifications is often intended to circumvent the restrictions of the Fourteenth and Fifteenth Amendments and use private organizations to promote racial discrimination.<sup>347</sup> But key to federal power being able to reach these discriminatory regulations was a judicial recognition that Congress could regulate party primaries under the Elections Clause.

As a result, any analysis that ignores the broad spectrum of congressional authority over elections is woefully inadequate. Enforcing a rigid boundary between voter qualification standards and time, place, and manner regulations has had real world consequences beyond the all-white Democratic primary for much of the twentieth century. For example, in 1965, less than one percent of African-Americans were registered to vote in Dallas County, Alabama, even though African-Americans constituted half of the county population. The registration office was open only two days a month, and the registrars would arrive late, leave early, and take long lunches, making the process of registering to vote difficult, if not impossible. In addition to literacy tests and other discriminatory voter qualification standards, the difficulty of registering to vote—which is a manner regulation under the Clause—arguably contributed to the low percentage of African-Americans in the county capable of exercising their right to vote. Federalism theory, with its state-centric focus, would promote a theory of elections that walls off voter qualification standards, ignoring that these regulations, in conjunction with time, place, and manner laws, can unduly affect the health of federal elections and undermine the strength of the right to vote.

#### CONCLUSION

The VRA is a permissible exercise of federal power, justifiable pursuant to the Fourteenth and Fifteenth Amendments and the Elections Clause.

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<sup>343</sup> 321 U.S. 649 (1944).

<sup>344</sup> *Id.* at 766 (“Here we are applying . . . the well established principle of the Fifteenth Amendment, forbidding the abridgment by a state of a citizen’s right to vote.”).

<sup>345</sup> 345 U.S. 461 (1953).

<sup>346</sup> *Id.* at 462.

<sup>347</sup> Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 429 (2014) (“The Court found that the anti-circumvention norm justified abrogating the First Amendment rights of a private association because the state was using the Democratic Party to circumvent the protections of the Fourteenth and Fifteenth Amendments.”).

Nonetheless, battles over the legitimacy and scope of the VRA, and its impact on the states' authority over elections, have been hard fought and extensively litigated, the apotheosis of which has been the recent invalidation of section 4(b) of the Act in *Shelby County*. But these federalism battles are not why the VRA is unique among statutes; instead, these battles illustrate a deeper, and more problematic, pathology surrounding the relationship between federalism and elections in the Supreme Court's caselaw.

The Court's commitment to federalism means that even those constitutional provisions that eschew federalism are at risk of being narrowed in the name of state sovereignty. With respect to the Reconstruction Amendments, in particular, it is conceptually difficult to present a framework for congressional power that limits Congress to enacting only remedial legislation if such legislation is also premised on the Elections Clause, which is not limited by the same federalism concerns as other provisions.

This Article illustrates that any federalism concerns can be overcome if federal action derives from more than one source of constitutional authority. Although the scope of federal power is often ambiguous or uncertain in these circumstances, it arguably gives Congress greater power than when proceeding under one provision alone. In addition, the boundary between voter qualification standards and manner regulations is fluid enough that the overlap between the two should not stand as a barrier to federal intervention. Indeed, states have routinely used the ambiguity of this regulatory space to undermine the health and legitimacy of federal elections. If the Court credits the full range of congressional power in this area—by analyzing the legislative record in light of Congress's authority under the Elections Clause as well as the Fourteenth and Fifteenth Amendments—the federalism justifications touted by the *Shelby County* Court become significantly less compelling.

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