

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

Statement of Franita Tolson

Professor of Law and Vice Dean for Faculty and Academic Affairs*
University of Southern California Gould School of Law
699 Exposition Blvd.
Los Angeles, CA 90089
213-740-5502
ftolson@law.usc.edu
<https://gould.usc.edu/faculty/?id=73521>

***affiliation for identification purposes only**

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

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

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

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

¹ The Elections Clause, in its entirety, provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” U.S. CONST. art. I, § 4, cl. 1.

² See, e.g., FRANITA TOLSON, IN CONGRESS WE TRUST?: THE EVOLUTION OF FEDERAL VOTING RIGHTS ENFORCEMENT FROM THE FOUNDING TO THE DAWN OF THE JIM CROW ERA (forthcoming 2022).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹² *Id.* at 431.

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

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

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

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

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

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

¹⁴ *Id.* § 21083(b)(2)(B).

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

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

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

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

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

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

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

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

¹⁹ *See id.*

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

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

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

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

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

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

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

²⁴ See The Enforcement Act of 1870, § 22, ch. 114, 16 Stat. 140, 145 (1870). For example, Section 22 of the Act provided: That any officer of any election at which any representative or delegate in the Congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States or by or under any State, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election ... shall be deemed guilty of a crime and shall be liable to prosecution and punishment therefor.

Id.

²⁵ *Id.* § 2.

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

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

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

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

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

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

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

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

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

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

³² *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴³ *Id.*

⁴⁴ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵³ 446 U.S. 156, 173 (1980).

⁵⁴ *Id.*

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

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

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

I agree with the committee that, in spite of the obvious difficulties in the use of the Federal ballot, the Congress should not shrink from accepting its responsibility and exercising its constitutional powers to give soldiers the right to vote where the States fail to do so. Of course, if prompt action is taken by the States, as it should be, it may be possible to avoid the use of a Federal ballot altogether. . . . Any such legislation by Congress should be temporary, since it should be possible to make all the necessary changes in State laws before the congressional elections of 1954.⁶²

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

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

⁵⁸ 383 U.S. 663 (1966).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁸ *Minor*, 88 U.S. at 171.

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

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

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

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

⁷⁰ *Yarbrough*, 110 U.S. at 665.

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

⁷² 127 U.S. 731 (1888).

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

⁷⁴ *Coy*, 127 U.S. at 749-50, 753.

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

⁷⁶ 400 U.S. 112 (1970).

⁷⁷ *Id.* at 120.

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁴ 1923 Tex. Gen. Laws 74.

⁸⁵ 273 U.S. 536 (1927).

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

⁸⁷ 256 U.S. 232 (1921).

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

⁸⁹ 295 U.S. 45 (1935).

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

⁹¹ 313 U.S. 299 (1941).

⁹² *Id.* at 309-10.

⁹³ *Id.* at 314.

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

Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.⁹⁴

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

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

⁹⁴ *Id.* at 315 (citations omitted).

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

⁹⁶ *Classic*, 313 U.S. at 315.

⁹⁷ 321 U.S. 649 (1944).

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

⁹⁹ 345 U.S. 461 (1953).

¹⁰⁰ *Id.* at 462.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹⁰ *See* Part I (B), *supra*.

¹¹¹ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787 (2015).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹⁸ *Id.* at 666.

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

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

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

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

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

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

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

¹²³ 448 U.S. 448 (1980).

¹²⁴ *Id.* at 490.

¹²⁵ *See id.* at 473-76.

¹²⁶ 333 U.S. 138 (1948).

¹²⁷ *Id.* at 144.

¹²⁸ *Id.*; *see also* *Wilson-Jones v. Caviness*, 99 F.3d 203, 208 (6th Cir. 1996) (“A source of power has been held to justify an act of Congress even if Congress did not state that it rested the act on the particular source of power.”).

¹²⁹ 392 U.S. 409 (1968).

¹³⁰ *Id.* at 413.

¹³¹ *Id.* at 455 (Harlan, J., dissenting) (presenting a comprehensive review of the legislative history suggesting that many in the Thirty-Ninth Congress believed that 1866 Civil Rights Act was unconstitutional).

¹³² 384 U.S. 641 (1966).

¹³³ *Id.* at 655-58 (concluding that New York’s english literacy requirement for voters could discriminate against New York’s large Puerto Rican community, but not requiring congressional findings that prove this proposition).

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

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

Conclusion

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

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

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

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

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

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

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

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

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