

**U.S. House Committee on the Judiciary**  
**Subcommittee on the Constitution, Civil Rights and Civil Liberties**  
**Hearing on**  
**“Congressional Authority to Protect Voting Rights after *Shelby County v. Holder*”**  
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**Statement of Franita Tolson**

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Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the House Judiciary Committee:

Thank you for the opportunity to appear and speak about the scope of congressional power to protect voting rights. 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.<sup>1</sup> My comments will focus on the issue of whether Congress has constitutional authority to enact the coverage formula in the Voting Rights Amendment Act (“VRAA”), which would premise preclearance on, among other things, the violation of federal voting rights laws. First, I will explain how Congress’s authority to regulate elections is much broader than the U.S. Supreme Court has acknowledged, extending beyond the scope of the Fourteenth and Fifteenth Amendments to also include congressional power under the Elections Clause of Article I, Section 4 of the Constitution. Second, I will discuss how the VRAA, as authorized by these provisions, sufficiently addresses the concerns raised in *Shelby County v. Holder* regarding the deficiencies of the prior coverage formula.<sup>2</sup>

*Congress Has Broad Authority to Regulate Federal Elections Under the Elections Clause and the Fourteenth and Fifteenth Amendments*

The Constitution gives Congress broad authority over elections. In addition to its power to enforce the guarantees of the Fourteenth and Fifteenth Amendments, which prohibit racial discrimination in voting and elections,<sup>3</sup> the Elections Clause of Article I, Section 4 provides that the states shall choose “[t]he Times, Places, and Manner of holding elections,” for representatives and senators, but subject to Congress’s authority to “make or alter such Regulations.”<sup>4</sup> As I have argued elsewhere,<sup>5</sup> this provision forms the basis of our system of federal elections by giving states plenary authority to set the ground rules while Congress retains a veto power over state regulations.<sup>6</sup> Congress’s authority under the Elections Clause is, in the words of the Supreme Court, “paramount.”<sup>7</sup>

The Elections Clause has been overlooked as a source of authority for the Voting Rights Act of 1965 (“VRA”),<sup>8</sup> even though the Clause provides additional authorization for its provisions.

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<sup>1</sup> See, e.g., FRANITA TOLSON, IN CONGRESS WE TRUST?: THE EVOLUTION OF FEDERAL VOTING RIGHTS ENFORCEMENT FROM THE FOUNDING TO THE PRESENT (forthcoming 2020).

<sup>2</sup> *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (invalidating the preclearance formula of section 4(b) of the Voting Rights Act of 1965).

<sup>3</sup> *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>4</sup> U.S. CONST. art. I, § 4. 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.

<sup>5</sup> See, e.g., Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B. U. L. REV. 317 (2019) (hereinafter, *Spectrum of Congressional Authority*); Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2212 (2018) (hereinafter, *Election Law Federalism*); Franita Tolson, *Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal*, 13 ELECTION L.J. 322 (2014); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012).

<sup>6</sup> *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (noting that the Elections Clause is a “default provision” that “invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state choices” (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997))).

<sup>7</sup> *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

<sup>8</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

Sections 4(b) and 5 of the Act suspended all changes to state election laws in covered jurisdictions, including nondiscriminatory voter qualification standards and procedural regulations that govern state elections. In *Shelby County v. Holder*, the Supreme Court held that section 4(b) of the Voting Rights Act was unconstitutional because the Act forced certain states to seek federal approval before implementing laws that they were otherwise constitutionally authorized to enact.

In striking down section 4(b), *Shelby County* accorded no significance to the fact that authority for the VRA rested on both the Fourteenth and Fifteenth Amendments.<sup>9</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. Instead, the Court contended that section 4(b) failed both rational basis review<sup>10</sup> and the standard derived from its decision in *Northwest Austin Municipal Utility District Number One v. Holder*<sup>11</sup> (“NAMUDNO”), which “guides [its] review under both [the Fourteenth and Fifteenth] Amendments.”<sup>12</sup> *NAMUDNO*, however, did not articulate a standard of review under these provisions.<sup>13</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>14</sup> In making this pronouncement, the Court did not confront the relationship between the Elections 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.

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 how it interprets 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. This ambiguity has created substantial confusion about the level of deference that the Court should accord to Congress when reviewing the legislative record of any federal voting rights legislation.

The presence of multiple sources of congressional power to justify a federal law is germane in

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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.

<sup>9</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 constitutionality of congressional action. *See Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2629 (2013) (discussing only the Fifteenth Amendment); *Shelby Cty. v. Holder*, 568 U.S. 1006 (2012) (mem.) (acknowledging Fourteenth and Fifteenth Amendments in grant of certiorari).

<sup>10</sup> *See id.* at 2625 (explaining that § 4(b) was rational “in both practice and theory” when adopted but is now irrational). *But see* *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 327 (1966) (applying rational basis review to assess constitutionality of § 5 of the VRA).

<sup>11</sup> 557 U.S. 193 (2009).

<sup>12</sup> *Shelby Cty.*, 133 S. Ct. at 2622 n.1.

<sup>13</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>14</sup> *Shelby Cty.*, 133 S. Ct. at 2623-24 (explaining that VRA departs from “basic principles” of equal sovereignty).

determining whether a remedy is appropriate under the Court's framework in *City of Boerne v. Flores*.<sup>15</sup> The analytical framework of *City of Boerne*,<sup>16</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>17</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>18</sup> Since *City of Boerne*, the Court has been inconsistent in deciding whether the presence of multiple sources of constitutional authorization affects the means/ends analysis required by that decision.<sup>19</sup>

For its part, *City of Boerne* cited the VRA as an appropriate use of congressional power under the Fourteenth Amendment, but ignored that Congress had also enacted the Act pursuant to the Fifteenth Amendment.<sup>20</sup> Unlike the Fourteenth Amendment, the Fifteenth Amendment specifically addresses the right to vote free of racial discrimination and can serve as the predicate for far reaching congressional legislation designed to ferret out such discrimination.<sup>21</sup> 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.<sup>22</sup>

Congress can reduce the risk that the Supreme Court will invalidate the coverage formula of the VRAA by explicitly relying on provisions, like the Elections Clause, that bolster federal power when coupled with Congress' enforcement authority under the Fourteenth and Fifteenth Amendments. The Elections Clause, standing alone, is insufficient to support the full scope of the VRA because the Clause is limited to federal elections, but a legislative record showing that states engaged in discriminatory behavior in violation of the Fourteenth and Fifteenth Amendments, or of any federal voting rights law enacted pursuant to their provisions, becomes more compelling in light of the federal interest in the health and vitality of congressional elections that the Clause protects.

The Elections Clause has its own unique set of values that place a premium on congressional sovereignty, and Congress has, on occasion, imposed substantive requirements that states must follow in structuring federal elections.<sup>23</sup> While the Clause is not frequently invoked in order to

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<sup>15</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 v. Raich*, 545 U.S. 1, 38 (2005) (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)).

<sup>16</sup> 521 U.S. 507 (1997).

<sup>17</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>18</sup> *Id.* at 530-32 (searching legislative history for patterns of religious discrimination to justify federal action).

<sup>19</sup> See Tolson, *Spectrum of Congressional Authority*, *supra* note 5.

<sup>20</sup> *City of Boerne*, 521 U.S. at 532-33 (discussing Congress's enforcement power to enact VRA).

<sup>21</sup> See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980).

<sup>22</sup> Compare *James v. Bowman*, 190 U.S. 127, 136-39 (1903) (explaining that Fifteenth Amendment is similar to Fourteenth Amendment), with *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (holding that Fourteenth Amendment only reaches discriminatory state action). But see *Ex Parte Yarbrough*, 110 U.S. 651, 665 (1884) (explaining that Fifteenth Amendment reaches private action and limits the power of states).

<sup>23</sup> For example, Congress enacted the Help America Vote Act of 2002 (“HAVA”), 52 U.S.C. §§ 21001 et seq., in response to the controversy over the 2000 election and the statute sets minimum standards for election administration, primarily dealing with upgrades for voting technology. The National Voter Registration Act (“NVRA”), 52 U.S.C. §§

nationalize election administration or to limit state power to a particular substantive area, Congress assumes that well-functioning states will fill in most of the blanks with respect to the nuts and bolts of federal elections, but has been willing to impose uniformity if the need arises. Indeed, the overarching purpose of the Clause is to ensure the continued existence and legitimacy of federal elections, so the text empowers Congress to engage in the quintessentially anti-federalism action of displacing state law and commandeering state officials towards achieving this end.<sup>24</sup>

The Elections Clause avoids many of the traps that have constrained congressional power under the Reconstruction Amendments. 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 Fourteenth and Fifteenth Amendments.<sup>25</sup> The Clause is also distinct from these provisions because the Clause does not require any evidence of discriminatory intent in order for Congress to intervene, providing further justification for a legislative record that shows that states acted with discriminatory effect or in ways that otherwise abridge or deny the right to vote. Additionally, there is no Eleventh Amendment bar to abrogate state sovereign immunity under the Elections Clause, like that which exists under the Commerce Clause.<sup>26</sup> Congress can also “make” law under the Elections Clause, which includes the authority to legislate independent of any action on the part of the states in order to ensure that federal elections are properly administered.<sup>27</sup> The very structure of the Elections Clause complicates the federalism narrative that scholars and courts embrace in describing our election system because federalism is not a barrier to aggressive federal action under the Clause seeking to protect the fundamental right to vote in federal elections.<sup>28</sup>

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20503, 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”).

<sup>24</sup> See Tolson, *Elections Clause Federalism*, *supra* note 5.

<sup>25</sup> Compare *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.’”); *McCConnell 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) with *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (striking down provisions of the Age Discrimination in Employment Act 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).

<sup>26</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>27</sup> See Tolson, *Election Law Federalism*, *supra* note 5, at 2218 (“Congress has commandeered both state officials and state offices by imposing affirmative obligations on the states to implement the NVRA. Under section 10 of that statute, each state must designate a state officer as the chief state election official responsible for coordinating the requirements of the Act. The NVRA also requires each state to designate as voter registration agencies all offices in the state that provide either public assistance or state-funded programs primarily engaged in providing services to persons with disabilities.”) (internal citations omitted).

<sup>28</sup> See *id.* at 2212 (“[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.”).

The historical record supports this broad reading of the Elections Clause. During Reconstruction, the Supreme 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>29</sup> But that Court expressed a surprising willingness to enforce Congress’s broad authority under the Elections Clause, contradicting the traditional narrative that all federal voting rights legislation enacted during this period was constrained by federalism. The Enforcement Act of 1870, typically categorized as Fifteenth Amendment legislation but also enacted pursuant to the Elections Clause, criminalized violations of state law that governed federal elections.<sup>30</sup> This exposed state officials to dual liability, creating a category of nationally protected rights, and, in the process, significantly expanding federal authority. In *Ex Parte Siebold* and *Ex Parte Clark*, the Supreme Court upheld the constitutionality of the Act, explicitly relying on the Elections Clause.

Similarly, the Enforcement Act of 1871, which was also enacted pursuant to these same sources of authority, went further than its counterpart enacted a year earlier, instituting a system of federal oversight for congressional elections that would ferret out both voter fraud and behavior prohibited by the 1870 Act that unlawfully prevented individuals from voting.<sup>31</sup> As this legislation shows, Congress has enacted, and the Supreme Court has generally endorsed, broad federal legislation under the Elections Clause and the Reconstruction Amendments to regulate federal elections.

*Congress has Limited, but Still Substantial, Authority to Regulate State Elections and Voter Qualification Standards under the Elections Clause and the Fourteenth and Fifteenth Amendments*

More difficult constitutional questions surround the relationship between the states and the federal government over the regulation of state elections and voter qualification standards. The states, consistent with their authority under the Tenth Amendment, have primary authority over state elections.<sup>32</sup> States also have authority, under Article I, Section 2 to set voter qualifications for federal elections. Given this delegation of authority to the states, it is uncontroversial that federal power is at its maximum when Congress seeks to regulate federal elections and at its lowest ebb 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

<sup>29</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).

<sup>30</sup> See Enforcement Act of 1870, § 22, ch. 114, 16 Stat. 140, 145 (1870).

<sup>31</sup> See Enforcement Act of 1871, ch. 99, 16 Stat. 433, 436 (incorporating Sec. 20 of the 1870 Enforcement Act); see also *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.”); *Id.* at § 5 (“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.* at § 8 (designating marshalls to protect the election supervisors and to arrest individuals who violate the provisions of the Act).

<sup>32</sup> *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (“[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.” (quoting *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892))); see also *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2263 (noting that the states, not Congress, have the authority to set voter qualifications for state and federal elections).

nondiscriminatory.<sup>33</sup> Instead of clarifying the “gray,” the Court has simply deferred to the states on federalism grounds, even if such deference is unwarranted.<sup>34</sup>

State power in this area is constrained by the Fourteenth and Fifteenth Amendments, which give the federal government authority to regulate voter qualifications and state elections, and the Elections Clause can supplement federal power in this domain as well.<sup>35</sup> These constitutional amendments recognize that the states had “by degrees subvert[ed] the Constitution” through their sole control over the qualifications of electors, and stand as explicit limitations on state authority.<sup>36</sup> Thus, the Court has interpreted Section 1 of the Fourteenth Amendment as encompassing a fundamental federal interest in voting; Section 2 of the Fourteenth Amendment allows Congress to reduce a state’s representation if abridges the right to vote for almost any reason; and Section 1 of the Fifteenth Amendment similarly prohibits states from abridging the right to vote on the basis of race. These amendments, and several others, give Congress substantial authority over voter qualifications, and effectively augment Congress’s power under the Elections Clause.<sup>37</sup>

Because of this overlapping authority, 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 Court has recognized the difficulty of delineating the “manner” regulations that Congress can reach from the nondiscriminatory voter qualification standards that are within the domain of states. For example, voter registration stands as a paradigmatic hybrid regulation that is both procedural and inextricably linked to voter qualification standards, but the Supreme Court, with little explanation, has held that Congress can regulate voter registration under the Elections Clause.<sup>38</sup> In *Arizona v. Inter Tribal Council of Arizona*, the Court held that an Arizona law that required individuals to present documentary proof of citizenship in order to register to vote in state and federal elections was preempted by the NVRA, which only required affirmation of citizenship status, not documentary proof. 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>39</sup>

Notably, the Court rejected arguments by the dissenting justices that the majority’s interpretation of

<sup>33</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. v. Holder*, 133 S. Ct. 2612, 2625 (2013) (criticizing Congress for regulating permissible state action in order to deter voting rights violations).

<sup>34</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).

<sup>35</sup> Besides the Amendments’ explicit nondiscrimination principle, another basis for federal intervention in state elections is where, for example, “the election process itself reaches the point of patent and fundamental unfairness” and therefore implicates the Due Process Clause of the Fourteenth Amendment. *Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (internal quotation marks omitted); *see also* *Bush v. Gore*, 531 U.S. 1060 (2000). Otherwise, states retain control over their own elections.

<sup>36</sup> Notes of James Madison (Aug. 10, 1787), in II THE RECORDS OF THE FEDERAL CONVENTION OF 1787 248, 250 (Max Farrand ed., rev. ed. 1937) (statement of James Madison, [http://avalon.law.yale.edu/18th\\_century/debates\\_810.asp](http://avalon.law.yale.edu/18th_century/debates_810.asp) (arguing that voter qualifications should be fixed by the Constitution because of the concern that states could use this control to undermine the Constitution and empower political factions)).

<sup>37</sup> *Arizona Inter Tribal*, 133 S. Ct. at 2263.

<sup>38</sup> See *id.* at 2253 (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>39</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 . . .”).

the NVRA interfered with the State’s power to enforce its proof-of-citizenship requirement, which is a voter qualification standard within the state’s constitutional authority to regulate.<sup>40</sup> Justice Thomas argued that 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>41</sup> Nevertheless, when regulations like voter registration implicate both voter qualifications and the manner of federal elections, courts have been 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.

For example, in 2014 and 2015, Kansas—along with Alabama and Georgia—again requested that a proof of citizenship requirement be added to the federal form’s state-specific instructions.<sup>42</sup> Surprisingly, the Election Assistance Commission, the body responsible for fielding these requests, approved the changes to the federal form at the behest of its new executive director, Brian Newby.<sup>43</sup> Residents and organizations in these states filed suit.<sup>44</sup> On appeal, the Court of Appeals for the D.C. Circuit reversed Director Newby’s decision.<sup>45</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, leading it to conclude that Director Newby had acted inappropriately in approving the request without requiring the requesting states to come forward with actual proof of significant noncitizen voting to justify their regulations.<sup>46</sup>

As the *Arizona Inter Tribal* litigation shows, there is a line drawing problem that exists between voter qualification standards and manner regulations, and the artificial boundary between the two does not prevent Congress from using its authority under the Elections Clause to address a state’s attempt to purposely circumscribe its electorate through its authority over voter qualifications. As I have argued in prior work, there are limited circumstances in which Congress can reach voter qualifications under the Elections Clause: when states implement voter qualification standards that unduly circumscribe the federal electorate, as with proof of citizenship requirements, or, alternatively, fail to set or “under-legislate” with respect to voter qualifications for its own elections.

Congress has attempted to address “under-legislation” with the Uniformed and Overseas Citizens

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<sup>40</sup> *Id.* at 2262 (Thomas, J., dissenting).

<sup>41</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.”).

<sup>42</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>43</sup> *Id.* at 86 (indicating that Newby approved the states’ requests before EAC commissioners formally considered or voted on the requests).

<sup>44</sup> *Id.* at 88-95 (holding that, per requirements for preliminary injunctive relief, the organizations failed to demonstrate irreparable harm).

<sup>45</sup> *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 14 (D.C. Cir. 2016).

<sup>46</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.



Absentee Voting Act (“UOCAVA”),<sup>47</sup> which is Elections Clause legislation that created a uniform federal ballot specifically for use by a category of voters overlooked by state law—military personnel—that incorporated state voter qualification standards to determine which personnel were entitled to vote.<sup>48</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>49</sup> When this issue first arose, the Supreme Court had not decided *Harper v. Virginia State Board of Elections*,<sup>50</sup> so voting was not yet a fundamental right under the Equal Protection Clause;<sup>51</sup> there was no record of racial discrimination in voting such that the Fifteenth Amendment was implicated;<sup>52</sup> nor had the Court decided that state laws prohibiting military personnel from voting were unconstitutional.<sup>53</sup> In 1952, President Harry Truman wrote a letter to Congress, recognizing the difficulties of enacting a uniform federal regime for overseas voting, but noting 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>54</sup>

Over thirty years after Truman’s letter, some states still did not provide for absentee voting in the manner that UOCAVA later required.<sup>55</sup> As applied to those states, UOCAVA incorporated state

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<sup>47</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>48</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>49</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>50</sup> 383 U.S. 663 (1966).

<sup>51</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>52</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>53</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>54</sup> *UOCAVA Hearings*, *supra* note 47, at 56 (letter from President Truman to House Committee on Elections, March 22, 1952).

<sup>55</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

voter qualification standards, allowing only those members of the military qualified to vote under their respective state laws to utilize the federal absentee ballot.<sup>56</sup> For those states that had mechanisms in place for absentee military voting, the statute did not displace these regimes.<sup>57</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>58</sup>

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 both proof of citizenship requirements and military voters shows, states often used their authority under the Clause to circumscribe the electorate, sometimes deliberately and, other times, through oversight. For this reason, an overly formalistic distinction between voter qualification standards and procedural regulations is not only ahistorical, but also impossible to maintain, thereby justifying federal regulation of voter qualification standards under the Clause in some circumstances.

It is also difficult to insulate procedural regulations that govern state elections from the reach of federal power for many of the same reasons. Not only do voters in state and federal elections have the same qualifications, but states and local governments use many of the same practices in federal elections as they do for state and local elections. For example, voters are registered simultaneously in federal, state, and local elections in most states. Voters also go to the same polling place, at the same time, and vote on one ballot for federal, state, and local elections in most places. As a result, a voting change affecting state and local elections will also affect federal elections. If a voting change will have the effect of undermining the health of federal elections, then the Elections Clause provides sufficient authority for Congress to regulate those changes.

*The VRAA as a Constitutional Exercise of Congressional Authority under the Elections Clause and the Fourteenth and Fifteenth Amendments*

The VRAA, if enacted pursuant to the Elections Clause and the Reconstruction Amendments with a legislative record that establishes that states have in engaged in recent voting practices that are motivated with discriminatory intent and/or have discriminatory effect, addresses all of the objections lodged against the prior preclearance regime by the Supreme Court in *Shelby County v.*

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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 . . .”).

<sup>56</sup> 52 U.S.C. § 20302(a)(2) (2018) (requiring states to accept absentee ballots from “otherwise valid” military voters).

<sup>57</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 47, 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>58</sup> *Cf. Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 170 (1874) (holding that there are no voters of federal creation).

*Holder*. The Court was concerned that preclearance for covered jurisdictions was determined based on decades old practices, such as literacy tests, and outdated information, such as 1960s and 1970s era voter registration rates, rather than current voting rights violations. The VRAA links preclearance to voting rights violations committed in the state in recent decades, the existence of which illustrates that the state has failed in its obligation to protect the right to vote such that federal intervention is required under the Fourteenth and Fifteenth Amendments.<sup>59</sup> Under the proposed formula, an entire state can be covered for 25 years if fifteen or more voting violations occur within the state during this time period. The formula also imposes liability where the state itself is an active participant in voting rights violations, further cementing the link between current voting rights violations and the remedy of preclearance. Coverage would be imposed for ten or more violations if the state itself is guilty of at least one voting rights violation, consistent with the Court’s recognition of the constitutional significance of discriminatory behavior in which the state is an active participant and Congress’s power to deter such behavior.<sup>60</sup>

The formula also allows preclearance to be tailored to a specific political subdivision within the state if that subdivision, rather than the state, commits the violation. In *Shelby County*, the Court expressed concerns about the scope of the prior formula, which singled out southern jurisdictions by requiring them to preclear all voting laws—even those that are constitutional—but not equally guilty northern states.<sup>61</sup> The proposed formula is much more tailored than its predecessor, subjecting a political subdivision to preclearance if it commits 3 or more violations in a 25 year period, regardless of its location. In addition, coverage is rolling, so jurisdictions can be removed or added over time.

The proposed VRAA also addresses constitutional objections that seek to challenge congressional power to premise liability on violations of federal voting rights laws that, unlike constitutional claims, do not require the plaintiff to establish the presence of discriminatory intent.<sup>62</sup> The proposed coverage formula defines a voting rights violation in several ways including a determination by a court that a state or political subdivision violated federal voting rights law, or a denial of preclearance under section 5 of the Voting Rights Act. Neither sections 2 or 5 of the Act require a showing of discriminatory intent for their terms to be violated. Similarly, the VRAA proposes changes to section 3(c), which would allow courts to bail in jurisdictions upon a finding that the jurisdiction has adopted voting changes that are discriminatory in effect.

Despite Congress’s interest in preventing behavior that could circumvent the protections of the Amendments, it is questionable after *Shelby County* if the presence of discriminatory effect—rather

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<sup>59</sup> See *United States v. Morrison*, 529 U.S. 598 (2000) (arguing that Congress can remedy discriminatory conduct where the state has failed to provide adequate state remedies).

<sup>60</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976)).

<sup>61</sup> *Shelby County v. Holder*, 133 S.Ct. 2612, 2616 (2013) (noting that “despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.”).

<sup>62</sup> See, e.g., *Veasey v. Abbott*, 830 F.3d 216, 317 (5th Cir. 2015) (*en banc*) (Clement., J, dissenting) (suggesting that the majority’s application of section 2 rendered that statute constitutionally suspect because “a wide swath of racially neutral election measures will be subject to challenge, a previously unthinkable result under the Fourteenth Amendment and the Constitution’s federalist design.”).

than intent—is sufficient to justify voting rights legislation that distinguishes between the sovereign states.<sup>63</sup> In assessing the legislative record underlying the VRA, the majority noted that, “Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the “pervasive,” “flagrant,” “widespread,” and “rampant” discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time,” suggesting that Congress has a steep hill to climb should it seek to reauthorize a coverage formula relying on some combination of discriminatory intent and effects (both in the legislative record and as a basis of liability).<sup>64</sup>

However, the Elections Clause, when coupled with the Fourteenth and Fifteenth Amendments, provides sufficient constitutional justification for a regime that premises liability on both discriminatory intent and effects.<sup>65</sup> Many of the regulations that have been found to violate section 2 of the VRA on the grounds that they have a discriminatory effect, such as voter identification laws<sup>66</sup> and the use of at-large districting to dilute minority voting power,<sup>67</sup> would deter voting and turnout in federal elections, thereby undermining the health and vitality of federal elections that is of core concern to the Elections Clause. Importantly, there is no requirement of discriminatory intent under the Elections Clause, which decreases the amount of intentionally discriminatory behavior that Congress has to amass in compiling the legislative record for the VRAA.

A preclearance regime based on a mix of discriminatory intent and effect is constitutionally appropriate for another reason. While litigation under section 2 and preclearance under sections 4(b) and 5 made it easier to hold states responsible for deleterious behavior than if suing under the Constitution,<sup>68</sup> the effects-based statutory regime gave the *Shelby County* Court cover to claim that racism no longer existed.<sup>69</sup> In *Shelby County*, the Court touted the progress in African-American voter registration and turnout that has been achieved in the years since the Voting Rights Act became law, implying that intentional discrimination was a thing of the past.

However, a finding that a state acted with discriminatory effect is not indicative of the absence of discriminatory intent. Since 2013, courts have found that states acted with discriminatory intent in an increasing number of cases,<sup>70</sup> but in some instances, courts will not find that a jurisdiction engaged in intentional discrimination, even if there is evidence of intent, because federal voting rights law does not require that showing. In *Veasey v. Abbott*, for example, a panel of the Fifth Circuit Court of Appeals invalidated Texas’s voter identification law as a violation of section 2 of the

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<sup>63</sup> Compare *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (“The doctrine of the equality of States . . . applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”), with *NAMUDNO*, 557 U.S. 193, 203 (2009) (“[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”).

<sup>64</sup> *Shelby County*, 133 S.Ct. at 2617.

<sup>65</sup> See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980) (stating that Congress has authority to address state action that has a discriminatory effect in enforcing the Fifteenth Amendment).

<sup>66</sup> *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

<sup>67</sup> *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 730 (S.D. Tex. 2017).

<sup>68</sup> See, e.g., *Bartlett v. Strickland*, 556 U.S. 1 (2009) (stating that section 2 did not protect districts that were less than fifty percent majority-minority); *Reno v. Bossier Parish*, 528 U.S. 320 (2000) (holding that the government had to preclear a redistricting plan enacted with discriminatory, but nonretrogressive, purpose).

<sup>69</sup> *Shelby Cty.*, 133 S.Ct. 2612 (2013).

<sup>70</sup> Letter from Sherilyn Ifill to Bob Goodlatte, Request for a Hearing on the Restoration of the Voting Rights Act of 1965, Sept. 7, 2017 (discussing ten instances in which lower courts have found that jurisdictions acted with intentional discrimination against minority voters).

Voting Rights Act, but the district court had found wide ranging evidence of intentional discrimination on the part of the state.<sup>71</sup> Both the Fifth Circuit panel and the *en banc* Fifth Circuit that later reviewed the case also shied away from relying on an intentional discrimination framework, even though they concluded that there might be enough evidence to support a finding of invidious purpose. Both panels concluded that the district court judge erred in analyzing the intent evidence, and remanded with instructions to reassess it.<sup>72</sup> The Court of Appeals was much more comfortable, for this reason, with assessing the section 2 violation, which relieved plaintiffs of the obligation to prove discriminatory intent.

The VRAA recognizes the reluctance that courts have had in the last three decades of decreeing states guilty of intentional discrimination by premising preclearance on violation of federal law, regardless of motivation. This approach is consistent with Congress's constitutional prerogative, as the Supreme Court has long recognized, to both remedy and deter constitutional violations under the Fourteenth and Fifteenth Amendments. The presence of additional sources of authority gives Congress greater leeway on the deterrence side, especially since the Elections Clause, with its focus on maintaining the legitimacy and health of federal elections, does not require any finding that states act with discriminatory intent to justify federal intervention. With the authority granted by these provisions, Congress's constitutional authority to enact the VRAA is substantial.

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

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<sup>71</sup> *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex.), *stay granted*, 769 F.3d 890 (5th Cir. 2014), *aff'd in part, vacated in part sub nom.* *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

<sup>72</sup> *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2015) (*en banc*), *cert. denied*, 137 S. Ct. 612 (2017) (“In sum, although some of the evidence on which the district court relied was infirm, there remains evidence to support a finding that the cloak of ballot integrity could be hiding a more invidious purpose.... [S]ince there is more than one way to decide this case, and the right court to make those findings is the district court, we must remand....”).