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Committee on House Administration  
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“Strengthening American Democracy”  
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**Statement of Guy-Uriel E. Charles**  
Professor of Law and Edward & Ellen Schwarzman Professor of Law  
Duke Law School  
(affiliation for identification purposes only)  
210 Science Drive  
Durham, NC 27708  
919-613-7191  
charles@law.duke.edu

Chairperson Lofgren, Ranking Member Davis, and members of the Committee on House Administration:

My name is Guy-Uriel Charles. I am a tenured member of the faculty of Duke University Law School where I am also the Edward and Ellen Schwarzman Professor of Law and the co-Director of the Duke Center on Law, Race, and Politics.<sup>1</sup> I teach Constitutional Law, Civil Procedure, Race and Law, and Election Law. Much of my research is on the law of democracy. I have written in many areas of election law, including voting rights, campaign finance, and redistricting. I also research and write about issues of racial justice and racial equality.

Thank you for affording me the privilege of testifying before you on how we can strengthen American democracy. In my view, the most consequential act that Congress can take to strengthen American democracy is to pass H.R. 1, For the People Act. If enacted, H.R. 1 would be the most transformative civil rights statute passed by Congress since the Civil Rights Act of 1964 and the Voting Rights Act of 1965. H.R. 1 empowers voters by making it easier for all voters to exercise consequential voice in American politics. I will emphasize in my testimony the necessary responsibility that Congress has for enforcing voting rights and political participation. I will similarly underscore the Constitutional power that Congress has for passing this bill.

### **Voting as a Fundamental Right**

One of the most important contributions of H.R. 1 is the explicit declaration by Congress that voting is a fundamental right. Section 1011(b)(1)(A) of H.R. 1 unequivocally proclaims: “the right to vote is a fundamental right of citizens of the United States.” If H.R. 1 is enacted as law, this recognition, that voting is a fundamental right of citizenship, would be a consequential shift in American legal and political culture.

Most lay people and even some lawyers are surprised that federal law does not protect the right to vote as an affirmative and positive right. Moreover, unlike most modern democracies, there is no provision in the Constitution of the United States that explicitly protects voting as a positive right. Our Constitution generally addresses the franchise through a series of discrete negative prohibitions. Most saliently, the Fourteenth Amendment bars any state from denying to anyone the “equal protection of the laws.”<sup>2</sup> The Supreme Court has held that this Equal Protection Clause applies to voting disputes.<sup>3</sup> The Fifteenth Amendment, ratified in 1870, prohibits both the federal government and the states from restricting access to the franchise “on account of race, color, or previous condition of servitude.”<sup>4</sup> The Nineteenth Amendment, ratified in 1920, precludes the

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<sup>1</sup> I gratefully acknowledge the support of my research assistant Mandy Boltax and the critical feedback of my colleagues Jane Bahnson and Luis Fuentes-Rohwer.

<sup>2</sup> U.S. CONST. amend. XIV. The text of the Fourteenth Amendment provides in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>3</sup> See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

<sup>4</sup> U.S. CONST. amend. XV. The text of the Fifteenth Amendment provides in part: “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.”

government from voting discrimination “on account of sex.”<sup>5</sup> The Twenty-fourth Amendment, adopted in 1964, does not allow the government to impose a poll tax or a tax of any kind as a prerequisite to voting in federal elections.<sup>6</sup> The Twenty-sixth amendment, adopted in 1971, prohibits the federal government and the states from denying the franchise on the basis of age to electors who are eighteen years of age or older.<sup>7</sup> These constitutional provisions do not provide an affirmative grant; they simply disallow the government from restricting the franchise on the criterion articulated—race, sex, the payment of a poll tax, and age if the elector is eighteen or older.

By contrast, almost all advanced democracies protect voting as a positive and fundamental right of citizenship. By way of example, Title I, Article 3 of the French Constitution provides: “Suffrage may be direct or indirect as provided for by the Constitution. It shall always be universal, equal and secret. All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute.”<sup>8</sup> Chapter 2, section 19 of South Africa’s Constitution states: “Every adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.”<sup>9</sup> Bolivia’s Constitution declares: “The right to participate includes . . . [the] right to suffrage, by equal, universal, direct, individual, secret, free and obligatory vote, which is publicly counted.”<sup>10</sup>

To be sure, these constitutions are not perfect. However, even taking into account their flaws, they reflect constitutional and political cultures in which the default position of the legal and political system is a respect of suffrage as a fundamental right that must be available to all. By contrast, the United States is on a list that includes Iran, Singapore and Libya of countries that do not guarantee voting as a right of national citizenship.<sup>11</sup>

Even though the text of the Constitution does not explicitly provide for and therefore does not explicitly protect voting as a fundamental right, the Supreme Court of the United States has long recognized that voting is a fundamental right.<sup>12</sup> Perhaps there is no better articulation of the Court’s recognition of the centrality of voting as a fundamental right in a proper functioning representative democracy than the soaring rhetoric that serves as the background music to Chief Justice Earl Warren’s opinion in the landmark reapportionment case of *Reynolds v. Sims*.<sup>13</sup>

Chief Justice Warren’s opinion—consisting of a series of odes attesting to the importance of the franchise in a free, fair, and democratic society—perhaps represents our best understanding of the centrality of voting in a representative democracy. “Undoubtedly,” Chief Justice Warren states emphatically and unequivocally, “the right of suffrage is a fundamental matter in a free and

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<sup>5</sup> U.S. CONST. amend. XIX. The text of the 19<sup>th</sup> Amendment provides in part: “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 sex. Congress shall have power to enforce this article by appropriate legislation.”

<sup>6</sup> U.S. CONST. amend. XXIV. The text of the 24<sup>th</sup> Amendment provides in part: “The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.”

<sup>7</sup> U.S. CONST. amend. XXVI. The text of the 26<sup>th</sup> Amendment provides in part:

<sup>8</sup> [https://www.constituteproject.org/constitution/France\\_2008.pdf?lang=en](https://www.constituteproject.org/constitution/France_2008.pdf?lang=en).

<sup>9</sup> [https://www.constituteproject.org/constitution/South\\_Africa\\_2012.pdf?lang=en](https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en).

<sup>10</sup> [https://www.constituteproject.org/constitution/Bolivia\\_2009.pdf](https://www.constituteproject.org/constitution/Bolivia_2009.pdf).

<sup>11</sup> See, e.g., Mo Rocca, *The Right to Vote*, <https://www.nytimes.com/2012/08/29/opinion/the-right-to-vote.html>.

<sup>12</sup> See, e.g., *Harper v. Virginia Board of Elections*, 363 U.S. 663 (1966) (discussing the Court’s right to vote jurisprudence).

<sup>13</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”<sup>14</sup> Elsewhere in the opinion, Chief Justice Warren asserts: “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of the representative government.”<sup>15</sup> One also cannot ignore Chief Justice Warren’s declaration, in the same text, that “the political franchise” is “a fundamental political right, because preservative of all rights.”<sup>16</sup> This last insight, that voting is a fundamental political right because it is preservative of all rights, was first uttered by Justice Matthews in 1886, in *Yick Wo v. Hopkins*,<sup>17</sup> a very well-known race discrimination case.

Though *Reynolds* may be notable and perhaps singular as a paean to the importance of the franchise, it is among a series of cases in which the Court acknowledges the necessity of the right to vote in a democratic republic. Consistent with *Reynolds* and reflecting a similar sentiment, none other than Justice Black, writing for the Court in *Wesberry v. Sanders*, stated: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>18</sup> Fifteen years later, in *Illinois State Board of Elections v. Socialist Workers Party*,<sup>19</sup> Justice Thurgood Marshall would speak in the same register, confirming that “voting is of the most fundamental significance under our constitutional structure.”<sup>20</sup> And in 1992, in a case called *Burson v. Freeman*, Justice Blackmun stated that voting is “a right at the heart of our democracy.”<sup>21</sup> More recently, Justice Kennedy, in the 2009 case of *Bartlett v. Strickland*<sup>22</sup> noted in passing that the right to vote is “one of the most fundamental rights of our citizens.”<sup>23</sup>

Thus, since at least 1886, in *Yick Wo v. Hopkins*, the Supreme Court has recognized that voting is a fundamental right of citizens and that its availability is critical to sustaining representative government. By declaring that voting is a fundamental right as a matter of federal law, H.R. 1 aligns with longstanding Supreme Court doctrine.

### **Congress is an Indispensable and Necessary Partner with the Court in Protecting the Right to Vote**

Yet, notwithstanding the Supreme Court’s explicit recognition of the franchise as fundamental, the federal courts alone cannot protect the right to vote. Congress is an indispensable and necessary partner in enforcing the fundamental right to vote. This is so for a number of reasons. I will briefly touch on four that I find particularly compelling. First, relying upon the federal courts to enforce and protect the right to vote depends upon lawsuits and litigation and places the burden and costs of disenfranchisement on voters and voting rights groups. To rely on litigation to vindicate voting rights is akin to the proverbial shutting the stable door after the horse has bolted. Litigation is an

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<sup>14</sup> *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

<sup>15</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

<sup>16</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

<sup>17</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>18</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>19</sup> *Illinois State Board v. Socialist Workers Party*, 440 U.S. 173 (1979).

<sup>20</sup> *Illinois State Board v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

<sup>21</sup> *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

<sup>22</sup> *Bartlett v. Strickland*, 556 U.S. 1 (2009).

<sup>23</sup> *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009).

important and powerful tool, but it is a complement, not a substitute, for robust statutory protection that only Congress can provide.

In this context, as in many contexts, the Voting Rights Act of 1965 serves as an instructive guide. In *South Carolina v. Katzenbach*,<sup>24</sup> in a sweeping opinion by Chief Justice Earl Warren, upholding the Voting Rights Act, a nearly unanimous Court recognized the inadequacy of litigation as the primary mechanism for vindicating voting rights.<sup>25</sup> Litigation is costly. It is time consuming. Moreover, states can easily evade judicial rulings by passing new laws. By enacting a comprehensive statute that addressed the problem of voting discrimination at its root and by minimizing the role of voting rights litigation as the dominant instrument to vindicate violations of voting rights, the VRA shifted the burden of voting discrimination from individual voters to the offending states.<sup>26</sup>

Second, Congress has a critical role to play because courts may under protect voting rights. The judiciary may not have the institutional competence, compared to Congress, to make the types of findings and judgment necessary to conclude that certain voting practices frustrate the ability of voters, or a subset of them, to exercise their right to vote.<sup>27</sup>

Take as an example *Crawford v. Marion County Election Board*,<sup>28</sup> a 2008 case addressing a constitutional challenge to an Indiana statute demanding that voters present a photo voter identification when they are voting in person on election day or voting in person at the office of the circuit clerk prior to election day.<sup>29</sup> The Court essentially divided in thirds with no individual opinion garnering the support of a majority. Justice John Paul Stevens wrote an opinion announcing the judgment of the Court in which he was joined by Chief Justice John Roberts and Justice Kennedy. Justice Antonin Scalia wrote an opinion concurring in the judgment in which he was joined by Justices Clarence Thomas and Samuel Alito. Justice David Souter penned a dissenting opinion that was join by Justice Ruth Bader Ginsburg. Justice Stephen Breyer authored a solo dissent.

Justice Stevens's opinion upheld the Indiana statute on the grounds that the photo identification requirement did not impose an "exceedingly burdensome requirements' on any class of voters."<sup>30</sup> The plurality did acknowledge that a photo identification requirement imposed "a somewhat heavier burden . . . on a limited number of persons."<sup>31</sup> In particular, "elderly persons born out of State, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed."<sup>32</sup> Although the plurality recognized the possibility that a photo identification requirement imposes a burden on some of the state's most vulnerable voters, the plurality, nevertheless, reasoned that the statute was not discriminatory; that the state's

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<sup>24</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>25</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 313-315 (1966).

<sup>26</sup> See, e.g., Guy-Uriel E. Charles & Luis Fuentes Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131 (2013).

<sup>27</sup> This has long been a concern of some Justices, such as Justice Felix Frankfurter. See, Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1123 (2002).

<sup>28</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

<sup>29</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181, 185 (2008).

<sup>30</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181, 202 (2008).

<sup>31</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181, 202 (2008).

<sup>32</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181, 199 (2008).

interests were sufficiently important; and that the statute “imposes only a limited burden on voters’ rights.”<sup>33</sup>

Justice Scalia, joined by Justices Thomas and Alito, would have affirmed Indiana’s law on the ground that the law is “nonsevere” and “nondiscriminatory.”<sup>34</sup> Justice Scalia’s opinion, perhaps inadvertently, identified the limitations that the Court faces when it is trying to determine whether an electoral rule unconstitutionally undermines the fundamental right to vote. As Justice Scalia’s opinion recognized,<sup>35</sup> in order to determine whether a law undermines the right to vote, the Court applies a balancing test derived from two cases: *Anderson v. Celebrezze*<sup>36</sup> and *Burdick v. Takushi*.<sup>37</sup>

The *Anderson/Burdick* approach is a function of the Court’s attempt to distinguish between electoral rules that unconstitutionally burden the right to vote because they impose a significant burden on voters and electoral rules that are permissible even though they impose some inadvertent burdens on voters. As the Court stated in *Burdick*: “Election laws will invariably impose some burden upon individual voters. . . . Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”<sup>38</sup>

In *Anderson*, the Court stated: “[A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>39</sup>

If a law severely burdens the right to vote, the Court and the courts will apply strict scrutiny, the highest level of scrutiny available, and more than likely strike down that law as unconstitutional.<sup>40</sup> If a law does not impose a severe burden, but imposes “reasonable, nondiscriminatory restrictions,” the law will be upheld if the state’s interests, its justifications for passing the law, are sufficiently important.<sup>41</sup> Some regulations fall in a middle ground and in those cases, some courts apply a “sliding scale” approach.<sup>42</sup>

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<sup>33</sup> Crawford v. Marion County Election Board, 553 U.S. 181, 203 (2008) (quoting *Burdick v. Takushi*, 504 U.S. 428, 439 (1992)).

<sup>34</sup> Crawford v. Marion County Election Board, 553 U.S. 181, 204-05 (2008) (Scalia, J., concurring in judgment).

<sup>35</sup> “To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick v. Takushi*.” Crawford v. Marion County Election Board, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in judgment).

<sup>36</sup> *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

<sup>37</sup> *Burdick v. Takushi*, 504 U.S. 428 (1992).

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<sup>40</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

<sup>41</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

<sup>42</sup> See, e.g., *Daunt v. Benson*, 956 F.3d 396 (6<sup>th</sup> Cir. 2020). (“Regulations falling somewhere in between—i.e., regulations that impose a more-than-minimal but less-than-severe burden—require a ‘flexible’ analysis, ‘weighing the burden on the plaintiffs against the state’s asserted interest and chosen means of pursuing it.’”) (quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6<sup>th</sup> Cir. 2016) (quoting *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 546 (6<sup>th</sup> Cir. 2014))).

As Justice Scalia recognized in *Crawford*, the most critical step in the *Anderson-Burdick* analysis is the first step, determining whether a state law imposes a severe burden on the right to vote.<sup>43</sup> But this is also where the analysis goes awry. Whereas Justice Souter, in dissent, was troubled by the disproportionate burden imposed by Indiana’s law on the “poor, the old, the immobile,”<sup>44</sup> Justice Scalia was not. Justice Scalia would find no burden because the law applied to everyone, even though it affected groups of voters differentially. Depending upon how voters are situated, the law would impact them differently. Justice Scalia refused to consider this differential impact on the ground that “weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence.”<sup>45</sup>

*Crawford* illustrates the perils of relying solely upon the unreliable *Anderson-Burdick* test to vindicate voting rights. *Anderson-Burdick* presents at least two drawbacks. Some justices, such as Justice Scalia, may conclude that courts do not have the ability to customize election rules to lower burdens to political participation, particularly with respect to vulnerable populations. Additionally, a balancing test in the context of election law is very difficult to apply. It forces courts to treat as commensurate values that are often incommensurable.

Unlike courts, who may not have the inclination or ability to properly weigh differential burdens and make fine judgments about administer differential burdens, Congress is not so limited. Congress has the ability, and the responsibility, to identify the best set of practices to make voting and democratic participation accessible to all, particularly to the most vulnerable members of our political community.

Third, Congress has a critical role to play in vindicating core rights of political participation because the Court has abdicated its role in some areas in law and politics. Where the Court has abdicated its role and has declared that an area of law and politics presents a non-justiciable political question, the political rights at stake can only be vindicated in the political process, particularly by Congress. The essential example, of course, is the Court’s 2019 decision in *Rucho v. Common Cause*.<sup>46</sup> In *Rucho*, voters in North Carolina and Maryland filed suit challenging Congressional district maps in their respective states alleging that the maps were unconstitutional partisan gerrymanders.<sup>47</sup> A divided Court concluded that partisan gerrymanders were non-justiciable.

In an opinion for the majority, Chief Justice Roberts explained that the drafters of the Constitution provided “to state legislatures the power to prescribe the ‘Times, Places and Manner of holding Elections’ for Members of Congress” in Article I, section 4, cl. 1, the Elections Clause.<sup>48</sup> Via the Elections Clause, the Framers also provided “supervisory authority” to Congress by granting “Congress the power to ‘make or alter’ any such regulations” enacted by the states.<sup>49</sup> Chief Justice Roberts observed, arguably approvingly, that “Congress has regularly exercised its Elections Clause

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<sup>43</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181, 205-206 (2008) (Scalia, J., concurring in judgment).

<sup>44</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181, 209, 216 (2008) (Souter, J., dissenting).

<sup>45</sup> *Crawford v. Marion County Election Board*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring in judgment).

<sup>46</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084 (2019).

<sup>47</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2491 (2019).

<sup>48</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2495 (2019).

<sup>49</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2495 (2019).

power.”<sup>50</sup> The Chief Justice described Congress’s Elections Clause power as necessary to “check[] and balance[]” the authority of the states.<sup>51</sup>

“Partisan gerrymandering claims,” Chief Justice Roberts remarked, “have proved . . . difficult to adjudicate.”<sup>52</sup> This is because, per the Chief Justice, partisan gerrymandering claims require courts make political and theoretical judgments that they are ill-equipped to make. Additionally, and perhaps most consequentially, the Framers “entrust[ed]” these political decisions to “political entities.”<sup>53</sup> The Chief Justice concluded that the Constitution does not provide any authority or judicially-manageable standards to enable the courts to make such political judgments.<sup>54</sup>

Toward the end of the opinion, Chief Justice Roberts once again noted that “the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause.”<sup>55</sup> He singled out H.R. 1 as reflecting a priority of the 116<sup>th</sup> Congress and as evidence that Congress is not ignorant of the problem. Though the Chief Justice disclaimed any desire to opine on the political or constitutional merits of “pending proposals” before the states or Congress, he did “note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.”<sup>56</sup>

Finally, Congress is a necessary partner for addressing voting rights and political participation because Congress can perform a coordinating function that no other entity can perform. For example, the fact that there is uniform regulation of campaign financing in federal elections presumably makes it easier for individuals, candidates, political parties and entities participating in federal elections to regulate their affairs.

### **H.R. 1 Makes the Right to Vote Accessible**

A right to vote is a hollow one if it is not accessible. This has been of the major deficiencies of the American system. Like the Voting Rights Act of 1965, H.R. 1 is transformational as it contains a number of provisions for making the exercise of the right consequential and accessible in federal elections. By way of illustration, I will briefly touch on some of the ones I find most salient here.

First, H.R. 1, Congress shifts the burden of voting and political participation from the individual voter to the government. Section 1011(b)(1)(B) of H.R. 1 categorically states: “It is the responsibility of the State and Federal Government to ensure that every eligible citizen is registered to vote.” This provision would represent a fundamental change in how some elected officials think about electoral laws. One specific examples of this burden-shifting is H.R. 1’s automatic voter registration provision, with an opt-out and not an opt-in mechanism. A state’s chief election officer is required to “establish and operate a system of automatic registration.” 1012(a)(1). Individuals will be registered unless they opt-out of registration. 1012(c)(2)(B).

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<sup>50</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2495 (2019).

<sup>51</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2496 (2019).

<sup>52</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2497 (2019).

<sup>53</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2497 (2019).

<sup>54</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2498-2508 (2019). Though I had urged the Court to resolve these issues on the merits, see Guy-Uriel E. Charles & Luis Fuentes Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236 (2018) and Amicus Brief of Mathematicians, Law Professors, and Students in Support of Appellees and Affirmance, a majority of the Court obviously disagreed.

<sup>55</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2508 (2019).

<sup>56</sup> *Rucho v. Common Cause*, 139 S. Ct. 2084, 2508 (2019).

Second, through H.R. 1, Congress incorporates and makes uniform best practices for making voting and political participation effective. The bill requires each state to provide online voter registration. It provides for early voting. It mandates same day registration. It standardizes how states count provisional ballots. In short, it contains numerous provisions that reflect what we know to be best practices to assure that all eligible voters are able to exercise their right to vote. Notably, H.R. 1 does not simply tell the states what they cannot do in administering federal elections, it tells what they must do to make voting effective.

### **Congress has the Power to Pass H.R. 1**

The Constitution vests Congress with broad power to regulate federal elections. This power derives primarily from Article I, Section 4, Clause 1 (“Elections Clause”), which empowers Congress to regulate the “Times, Places and Manner” of congressional elections, and grants Congress broad authority to promulgate federal election regulations and override contrary state regulations in this area. With regard to presidential elections, Article II, Section 1, Clause 4 provides the most explicit grant of Congress’s regulatory authority, but textually confers less expansive authority than the Elections Clause.

Numerous Constitutional amendments likewise empower Congress to enact federal election reforms, including the Fourteenth and Fifteenth Amendments, as well as the Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments.<sup>57</sup> Indirectly, Congress can also exercise its Spending Power to encourage states to voluntarily reform their federal election systems in compliance with federal regulations in exchange for federal funding.<sup>58</sup> Finally, Congress can exercise its power under the Guarantee Clause. In sum, from a straightforward and textualist reading of the Constitution, it is clear that Congress is vested with broad powers to enforce voting rights and make political participation meaningful and consequential.

### **Congressional Elections**

Congress’s authority to promulgate federal election regulations derives primarily from Article I, Section 4, Clause 1 (“Elections Clause”), which empowers Congress to regulate the “Times, Places and Manner” of congressional elections, and encompasses Congressional authority:

to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.<sup>59</sup>

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<sup>57</sup> U.S. CONST. amd. XIV, §§ 1, 2 (Equal Protection: the basis for some voting rights claims; and specifies the method for House apportionment); U.S. CONST. amd. XV (prohibits race-based disenfranchisement); U.S. CONST. amd. XIX (prohibits sex-based disenfranchisement); U.S. CONST. amd. XXIII (provides electoral college votes to the District of Columbia); U.S. CONST. amd. XXIV (prohibits poll taxes in federal elections); U.S. CONST. amd. XXVI (grants 18-year-olds voting rights).

<sup>58</sup> (“We accordingly asked whether the financial inducement offered by Congress was so coercive as to pass the point at which pressure turns into compulsion.”) (internal quotations removed).

<sup>59</sup> *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Courts have long upheld the broad substantive language of the Elections clause, according it an equally broad interpretation.<sup>60</sup> As early as 1880, the Supreme Court has asserted the breadth and supremacy of Congress’s Elections Clause authority, noting in *Ex parte Siebold* that Congress’s power to regulate congressional elections “may be exercised as and when Congress sees fit to exercise it” and “necessarily supersedes” conflicting State regulations.<sup>61</sup> Shortly thereafter, in *Ex parte Yarborough*, the Court described that Congress had regulatory authority whenever it “finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting.”<sup>62</sup> Over the next century, the Court’s jurisprudence confirmed the power of Congress to regulate Congressional elections, noting “it is well settled that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the States.”<sup>63</sup>

Specifically, the Court’s Election Clause jurisprudence describes that Congress’s regulatory power “is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.”<sup>64</sup> Thus, although the Supreme Court has at times interpreted federalism as a constraint on Congressional power derived from the Fourteenth and Fifteenth Amendments, Congress’ power to regulate federal elections is uniquely unencumbered by federalism constraints.<sup>65</sup>

Likewise, the anti-commandeering principle does not limit Congress’s power pursuant to the Elections Clause.<sup>66</sup> Accordingly, Circuit courts have consistently rejected anti-commandeering challenges to the National Voter Registration Act (NVRA) which requires certain state officials both make federal voter registration forms available and process those forms according to the NVRA’s specifications.<sup>67</sup>

Despite the robust power the Elections Clause confers, Congress has only invoked its “comprehensive” authority infrequently, which may foster confusion about the constitutional scope of Congress’s power to regulate federal elections. As the *Yarborough* Court presciently stated,

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<sup>60</sup> *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013)

<sup>61</sup> *Ex Parte Siebold*.

<sup>62</sup> *Ex parte Yarborough*

<sup>63</sup> *Foster v. Love*, 522 U.S. 67, 69 (1997) (internal quotations removed). See e.g. *Smiley v. Holms* (1932); *United States v. Classic* (1941); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (“Unless Congress acts, Art. I, § 4, empowers the States to regulate.”); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–833 (1995).

<sup>64</sup> See *Arizona*, 570 U.S. at 9 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997) and *Ex parte Siebold*, 100 U.S. 371, 392 (1880)) (internal quotations removed). See also, Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. FORUM 171 (2019); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317 (2019).

<sup>65</sup> Compare *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932) (describing Congress’s power to legislate pursuant to Elections Clause power: “The phrase ‘such regulations’ plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It ‘has a general supervisory power over the whole subject.’”) with *Shelby County*, 133 S. Ct. at 2621–24, 2630–31 (invalidating VRA Section 4(b) for infringing on “equal sovereignty” when there was no rational reason for the federal government’s continued reliance on the 40-year-old coverage formula).

<sup>66</sup> See Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 102, 101–102.

<sup>67</sup> See *id.* at 102 n. 136–138 (2016) (citing “*Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) (“Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators.”); see also *Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997) (affirming the NVRA’s constitutionality because the Elections Clause empowers Congress to direct states to amend their laws governing federal elections); *Ass’n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995) (pre-Printz case affirming NVRA).”).

observing that Congress did not first act under the power conferred by the Elections Clause until 1842:

it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted.<sup>68</sup>

However, even without effectuating the full force of their power to promulgate federal election regulations, courts have upheld considerable election reforms enacted by Congress, which address several major aspects of the voting process, including: (1) the timing of federal elections;<sup>69</sup> (2) voter registration (both state and federal);<sup>70</sup> (3) absentee voting requirements;<sup>71</sup> (4) accessibility provisions for the elderly and handicapped;<sup>72</sup> (5) prohibitions against discriminatory voting practices;<sup>73</sup> (6) prohibitions against political gerrymandering;<sup>74</sup> (7) districting and redistricting of federal elections;<sup>75</sup> (8) criminalization of fraudulent voting activity in federal elections.<sup>76</sup>

## Presidential Elections

As compared to the expansive “Times, Places and Manner” language of Article I, in the context of presidential elections, the Constitution’s text is more limited:

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<sup>68</sup> *The Ku Klux Cases*, 110 U.S. 651, 660 (1884).

<sup>69</sup> See *Foster v. Love*, 522 U.S. 67, 69 (1997); U.S. GEN. ACCOUNTING OFFICE, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION 11-12 (2001) (discussing 1872 legislation which set date for popular election of Representatives, 1914 legislation setting same date for senator election following ratification of the Seventeenth Amendment, and under 3 U.S.C 1 establishing the date for the selection of presidential electors”).

<sup>70</sup> National Voter Registration Act of 1993 (establishing voting procedures designed to “increase the number of eligible citizens who register to vote in elections for Federal office,” without compromising “the integrity of the electoral process” or the maintenance of “accurate and current voter registration rolls.”); see also *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 20 (2013) (holding NVRA preempted Arizona’s proof-of-citizenship requirement); *Ass’n of Cmty. Organizations for Reform Now v. Edgar*, 56 F.3d 791, 795-96 (7th Cir. 1995) and *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) (both upholding the National Voter Registration Act of 1993 as constitutional pursuant to Congress’s Elections Clause powers.)

<sup>71</sup> Uniformed Overseas Citizens Absentee Voting Act, 52 U.S.C. §§20301-20311.

<sup>72</sup> Voting Accessibility for the Elderly and Handicapped Act of 1984, as enacted, see P.L. 98-435, as currently codified, see 52 U.S.C. §§20101-20107 (with few exceptions, conferred responsibility on states’ political subdivisions to ensure polling places and registration sites were accessible to handicapped and elderly voters).

<sup>73</sup> Voting Rights Act of 1965, enacted as P.L. 89-110 and codified currently at 52 U.S.C. §§10101-10702 (codifying and effectuating the Fifteenth Amendment guarantee against race-based disenfranchisement); but see *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013) (invalidating the Section 4(b) coverage formula and rendering Section 5 preclearance inoperable).

<sup>74</sup> 2 U.S.C. §2; and 13 U.S.C. §141; see also *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion of Scalia, J., also joined by Thomas, J.).

<sup>75</sup> See *id.* at 275.

<sup>76</sup> 52 U.S.C. §20511(2); see also *Ex parte Clark*, 100 U.S. 399 (1879); *Ex parte Siebold*, 100 U.S. 371 (1879) (reading congressional power under the Elections Clause broadly to uphold criminal prosecutions under the Enforcement Acts of 1870 and 1871); *United States v. Slone*, 411 F.3d 643, 650 (6th Cir. 2005) (upholding Congressional legislation under the VRA criminalizing voting fraud, pursuant to Congress’s authority under the Elections Clause and the Necessary and Proper Clause).

Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.<sup>77</sup>

One might argue, on the theory that the Constitution removed the “Places and Manner” language from Article II, § 1, cl. 4, that Congress has administrative power over the only the “Time” but should not have control over the “Manner” in which citizens cast their votes in presidential elections.<sup>78</sup> In a similar vein, some argue that federalism principles should carry more weight in the context of presidential elections because the power to appoint presidential electors was historically and remains today a function of state legislatures.<sup>79</sup>

Nevertheless, the case law on this issue suggests Congress’s regulatory authority over presidential elections is more extensive than one might assume. A reasonable read of the text leads to the conclusion that state interests must cede to national interest in protecting the integrity of presidential elections.<sup>80</sup> In the 1892 case *McPherson v. Blacker*, the Court expounded, “the appointment and mode of appointment of electors belongs exclusively to the states.”<sup>81</sup> However, by 1934, the Court in *Burroughs v. United States* would draw its reasoning from dicta in *Yarborough*, decided seven years earlier, and finding controlling that the *Yarborough* court made no distinction the Constitution’s textual grant of Congress’s power to regulate congressional and presidential elections.<sup>82</sup> The Court reasoned:

[t]he President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.<sup>83</sup>

Over the next seven decades the Court’s jurisprudence continued to build on Congress’s constitutional powers to regulate presidential elections. In 1970, in *Oregon v. Mitchell*, Justice Black,

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<sup>77</sup> U.S. CONST. art. II, §1, cl. 4.

<sup>78</sup> *Oregon v. Mitchell*, 400 U.S. 112,211 (1971) (Harlan, J., dissenting) (“Even the power to control the ‘Manner’ of holding elections, given with respect to congressional elections by Art. I, § 4, is absent with respect to the selection of presidential electors.”), superseded by U.S. CONST. amend. XXVI; see also Dan T. Coenen & Edward J. Larson, *Congressional Control Over Presidential Elections: Lessons From the Past and Reforms for the Future*, 43 WILLIAM & MARY L. REV. 851, 899 (2002).

<sup>79</sup> See U.S. CONST. art. II, §1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct. . .”).

<sup>80</sup> *Ex parte Yarborough*, This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of congress and its president are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice.

<sup>81</sup> *McPherson v. Blacker*, 146 U.S. 35 (1892).

<sup>82</sup> See *Burroughs v. United States*, 290 U.S. 534, 545–47 (1934) (“It is true that, while section 5520 includes interferences with persons in giving their support to the election of presidential and vice presidential electors, the indictments related only to the election of a member of Congress. The court in its opinion, however, made no distinction between the two, and the principles announced, as well as the language employed, are broad enough to include the former as well as the latter.”)

<sup>83</sup> *Burroughs v. United States*, 290 U.S. at 545.

speaking on behalf of a plurality, reasoned that the national government must have the “ultimate power. . .to fill its offices under its own laws,” because “[i]t cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.”<sup>84</sup> Shortly thereafter, the Court affirmed *Mitchell* in *Kusper v. Pontikes*, holding “with respect to elections to federal office, however, the Court has held that Congress had the power to establish voter qualifications.”<sup>85</sup> Years later, in *Buckley v. Valeo*, the Court citing *Burroughs* in support of the Court’s constitutional jurisprudence granting “broad congressional power to legislate in connection with the elections of the President and Vice President.”<sup>86</sup> In fact, until the turn of the century when *Bush v. Gore* invoked *McPherson* in support of the proposition that “the state legislature’s power to select the manner for appointing electors is plenary,” *Yarborough* and *Burroughs* controlled, and *McPherson* appearing only in scattered dissents and concurrences.<sup>87</sup>

To borrow from Justice Elena Kagan’s dissent in *Rucho v. Common Cause*,<sup>88</sup> the electoral practices that Congress address through H.R. 1 are necessary to maintain our system of self-governance and consequential political participation. Congress is amply empowered by the Constitution to do defend the foundations of representative democracy. Congress also has a distinctive responsibility and a particular role to play as an important guardian of our representative system. No value is more important than free and fair elections.<sup>89</sup>

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<sup>84</sup> *Oregon v. Mitchell*, 400 U.S. 112, 123 (1970).

<sup>85</sup> *Kusper v. Pontikes*, 414 U.S. 51, 57 n. 11 (1973).

<sup>86</sup> *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) (“The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case.”)

<sup>87</sup> *Bush v. Gore*, 531 U.S. 98, 104 (2000)

<sup>88</sup> *Rucho v. Common Cause*, 139 S. Ct. 2509 (2019) (Kagan, J., dissenting).

<sup>89</sup> *Rucho v. Common Cause*, 139 S. Ct. 2525 (2019) (Kagan, J., dissenting).