Congressional Power Over Presidential Elections: Lessons From the Past and Reforms for the Future

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INTRODUCTION

Presidential election controversies are nothing new. They have plagued our republic since 1801, when the fourth election for the office ended in a muddle that nearly deprived the rightful winner of the presidency. Each controversy has led to calls for reform. In every instance, the cryptic and troublesome constitutional text has hampered congressional efforts to correct the problems. Simply stated, the Constitution offers little explicit guidance on when and how Congress can regulate the selection of the President. In this Article, we explore the implications of this textual deficiency, looking both at what Congress has done in the past and at what it might do now.

Our analysis proceeds in five steps. Part I of our Article highlights relevant features of the constitutional text. Part II explores how Congress reluctantly but successfully used this text to enact significant reform legislation in response to the Hayes-Tilden election debacle of 1876. Part III identifies some reforms that Congress has under consideration to address the problems that complicated the 2000 presidential vote, focusing on measures that would lead to nationwide use of a uniform ballot and federally approved voting devices and machinery. Part IV then examines whether Congress has the power to enact these measures, concluding (in an analysis that covers six possible sources of authority) that it does. Part V urges Congress to wield this power by enacting significant reform legislation in time for the 2004 election.

Our central message is that our federal leaders should learn from the past. Following the election of 1876, Congress was able, in time, to put aside partisan wrangling and constitutional concerns to enact presidential election reforms that have served our nation well for more than a century. The present Congress should take bold action as well. Invoking the powers we identify in this Article, our federal leaders should respond to the essentially technical and mechanical problems that cast a lingering cloud over the 2000 election. In short, Congress should address with visionary legislation the gravest problems that surfaced in the last election to ensure they do not reoccur in the future.
I. THE CONSTITUTIONAL TEXT

The Constitution says surprisingly little about the process of choosing those individuals empowered to select our President. In pertinent part, it provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress ...." These electors, meeting in their respective states, elect the President and Vice President by majority vote. The Constitution expressly gives Congress only two roles in this process. First, as to the time of choosing electors and the day on which the electors vote, it states: "The 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." Second, as to the counting of votes cast by the electors, it states: "The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted." Only if the electors fail to elect a President or Vice President by majority vote does Congress take center stage by choosing those officers from among the top electoral-vote recipients.

The constitutional process was altered by the Twelfth Amendment after the 1800 election ended in a tie between Republicans Thomas Jefferson and Aaron Burr, a deadlock resulting from the failure of the original constitutional text to permit electors to distinguish between their votes for President and Vice President. Republican Party electors, who held a narrow eight-vote majority

1. U.S. Const. art. II, § 1 (emphasis added).
2. In re Green, 134 U.S. 377, 379 (1890).
3. U.S. Const. art. II, § 1. This provision stands in contrast to the Article I clause that confers on Congress power with respect to the election of its own members. Regarding congressional elections, the Constitution states: "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 Senators." U.S. Const. art. I, § 4. For a discussion of this power, see generally infra notes 250-62 and accompanying text.
5. Id.; U.S. Const. amend. XII.
of the electoral college, all duly voted for Jefferson and Burr, intending the former to become President and the latter to become Vice President. The resulting tie threw the election into the House of Representatives, where lame-duck Federalists saw an opportunity to frustrate their opponents by electing Burr (or even their own candidate, the third place finisher John Adams) over Jefferson. In the end, the Federalists relented, and the new Republican-dominated Congress promptly passed a constitutional amendment specifying that electors must separately designate their votes for President and for Vice President. The Twelfth Amendment also clarified that, if no candidate for President receives a majority of the electoral vote, then the House of Representatives chooses the President by majority vote (with the delegation from each state casting a single vote) from among the three top candidates. Similarly, if no candidate for Vice President receives a majority of the electoral vote, then the Senate elects the Vice President by majority vote from among the two top candidates. The states quickly ratified this amendment, but never again effected any constitutional changes regarding the electoral-vote process. Thus the cryptic provisions of Article II and the Twelfth Amendment remain unadorned in the constitutional text to this day.

7. Id.
8. Id.
9. U.S. CONST. amend. XII.
10. Id.
11. Id.
12. See 15 CONG. REC. 5456 (1884), where Rep. Abraham X. Parker of New York observed: "No difference existed between the old Constitution and the amendment except as relating to separate action in the selection of Vice-President. The language as to the electoral count is the same in both." See also 17 CONG. REC. 815 (1886), where Senate President Pro Tempore John Sherman of Ohio added:

The constitutional provision as to the election of President was unsatisfactory to the framers of the Constitution, and it was changed after the celebrated difficulty when it was a long time in doubt whether Aaron Burr or Thomas Jefferson should be President of the United States. This demonstrated that the original provision of the Constitution was faulty, and our predecessors of that day undertook to correct it and adopt a new provision, but that new provision presents many of the same difficulties that occurred under the old, and to this day Congress has never been able to solve any of them.
Under these provisions, state legislatures are empowered to devise their own "Manner" for appointing presidential electors. In one of its few decisions interpreting this language, the Supreme Court stated:

The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

Delegates to the Constitutional Convention did consider various methods for selecting electors, but ultimately rejected them all in favor of leaving the choice to the individual state legislatures. The records of the Convention disclose that separate proposals that the President be elected either by "the citizens of the United States" through a nationwide vote or "by electors to be chosen by the people of the several states" were defeated even though James Madison favored the former approach and Alexander Hamilton favored the latter one. For a time, the Convention leaned toward having the President chosen by Congress, an approach favored by Roger Sherman, but in the end left it to the state legislatures, who would presumably either appoint electors directly, provide for their popular election by district, or opt for their election by statewide vote.

All three of these different methods of choosing electors were employed by various states at various times. In the first presidential election, for example, electors were chosen directly by the legislatures in about half of the states and elected by district or statewide vote in the rest. This rough split in approaches

13. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XII.
16. 1 ELLIOT'S DEBATES, supra note 15, at 156; MADISON, supra note 15, at 88, 90.
18. Id. at 29.
continued through the presidential election of 1796, but thereafter most states moved toward choosing electors through some sort of popular vote.\(^{19}\) Initially, states' electors were chosen on a district-by-district basis, with one elector chosen from each congressional or electoral district (typically with two electors chosen at large where congressional districts were used).\(^{20}\) The district method fell out of favor early in the 1800s, as states sought to gain influence in federal politics by block voting.\(^{21}\) By 1836, every state had adopted the statewide election method of choosing electors except for South Carolina, which followed the legislative-appointment approach until 1868.\(^{22}\) Despite the occasional argument that the district method offered a more democratic approach to electing electors,\(^{23}\) that method is now used only in Maine and Nebraska.\(^{24}\) Occasionally, temporary expediencies have caused individual states that otherwise would have chosen their electors by popular vote to appoint them legislatively, such as Florida in 1868 and Colorado in 1876.\(^{25}\) Yet the votes of these electors were counted by Congress (just as they were when unusual procedures were used by Hawaii in 1960)\(^{26}\) in keeping with the idea that the method of choosing electors is expressly reserved to state legislatures.\(^{27}\)

The principle of broad state control over selecting electors was affirmed by one of the great constitutional craftsmen of the early nineteenth century, Justice Joseph Story. In his historic and influential \textit{Commentaries on the Constitution of the United States}, Justice Story explained:

\begin{quote}
In some states the legislature have [sic] directly chosen the electors by themselves; in others they have been chosen by the people by a general ticket throughout the whole state; and in others by the people in electoral districts, fixed by the legislature, a certain number of electors being apportioned to
\end{quote}

\begin{flushright}
19. \textit{Id.} at 30-31; \textit{Norton et al., supra} note 6, at 223.
21. \textit{See id.} at 32.
23. \textit{See id.} at 294-324.

each district. No question has ever arisen, as to the constitutionality of either mode, except that of a direct choice by the legislature. But this, though often doubted by able and ingenious minds, has been firmly established in practice, ever since the adoption of the constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it.28

After recounting this history, Story added a personal, concluding observation about presidential elections: “It has been thought desirable by many statesmen to have the constitution amended so, as to provide for a uniform mode of choice by the people.”29

Congress repeatedly considered such amendments in the years before and after Story wrote, but never passed any of them.30 In one 1874 report recommending such an amendment, the Senate Elections Committee emphasized:

The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the State, or any other agent of its will, to appoint these electors.

This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them [without a Constitutional amendment]. . . .31

More than 125 years have passed since the issuance of this Senate report, and nearly 175 years have passed since Justice Story wrote

28. 3 Joseph Story, Commentaries on the Constitution of the United States, with A Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution 328-29 (1833) (citations omitted).
29. Id. at 329.
on the matter. Yet these commentaries remain valid restatements of the constitutional law on presidential elections.

In its most direct pronouncement on the subject prior to *Bush v. Gore*,\(^3\) the Supreme Court wrote in 1890 about the boundaries between state and federal authority over the electoral-vote process:

> Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress.

> In accord with the provisions of the Constitution, Congress has determined the time as of which the number of electors shall be ascertained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each state, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them.

> Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the now general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States.\(^3\)

This pronouncement is significant in part because it followed closely on the heels of heated congressional debate over the subject and cited with apparent approval the statutory fruit of that debate, the Electoral Count Act of 1887.\(^4\) This Act—which treated the subjects of vote certification, transmission and counting—has remained in effect ever since and represents the full extent to which Congress has assumed authority over the electoral vote process. The

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32. 531 U.S. 98 (2000).
34. Electoral Count Act, ch. 90, 24 Stat. 373 (1887).
legislative history of that Act thus provides critical legal and practical precedent for any future congressional action in this area.

II. ELECTORAL REFORM AND THE 1876 ELECTION

In the bitter aftermath of the Civil War, presidential elections of the late 1800s were far less civil than they have been in more recent times. The partisan divide separating Democrats and Republicans, nurtured by wartime hatreds and postwar demagoguery, tested the electoral process as never before, and as never since. Adding to the uncivil federal politics of the era, the American electorate was so evenly split along partisan lines that neither party could gain a clear advantage. From the congressional elections of 1874 (the first postwar election in which the South fully participated) through the congressional elections of 1894 (by which point wartime divisions had somewhat healed) there was divided control of Congress. 35 Democrats controlled the House of Representatives for all but two years (1889-1891) of this twenty-year period while Republicans controlled the Senate during the entire period except for two years (1879-1881), during which each party held an equal number of Senate seats. 36 To further complicate matters, throughout this period no candidate for President received a majority of the nationwide popular vote except for Samuel J. Tilden in 1876, and he lost the presidency in a disputed electoral-vote count conducted by a divided Congress. 37

Prior to this twenty-year span of bitter partisan division, the United States had generally experienced long stretches of one-party ascendency. Indeed, from the founding of the Republic through 1875, control over Congress and the Presidency, and between the two houses of Congress, had rarely been divided between the political parties. 38 The only exceptions to this pattern of unified control arose during brief transition intervals, such as when Jefferson's Republicans replaced Adams's Federalists after the election of 1800, when the old Democratic-Republican Party

35. NORTON ET AL., supra note 6, app. at A-45, A-46 (noting party strength in Congress from 1874 through 1894).  
36. Id.  
37. For election results and analysis, see id. at 489-95, app. at A-32.  
38. Id. app. at A-30 to A-46.
splintered in the election of 1824 into factions led by John Quincy Adams, Andrew Jackson, Henry Clay, and William Crawford, and when the modern Republican Party coalesced during the 1850s. Only in these periods of change did challenges arise to the electoral-vote process, but they quickly died down with the return of one-party rule.

With the rise of persistent divided government following 1874, however, the electoral-vote process became problematic. All agreed that state legislatures controlled the basic methods of choosing electors, but heated debate arose over the extent of congressional power in supervising the process. In tight elections with razor-thin margins conducted in an era of Northern military occupation of the South and widespread political corruption, the power to supervise could determine the result. But what power did Congress have in the process? The Constitution (as we have seen) states only that "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." Does this language empower the Congress (as opposed to the President of the Senate) to count electoral votes? If so, should it act as a single canvassing board or concurrently as two legislative houses? In either event, can Congress go behind the certificates in determining the legitimacy of particular electoral votes? Can it choose between conflicting electoral certificates submitted from a single state, and if so, when and how? Can it impose any standards on the states to prevent fraud or miscounting? All these issues and more were raised on the floor of Congress during the post-Civil War debates over the presidential election process.

From 1861 to 1875, Republicans controlled both houses of Congress. They used their resulting power to adopt and to enforce a joint congressional rule to the effect that, in the case of any

39. For election results and analysis, see id. at 226, 380, app. at A-30 to A-31, A-45 to A-46.
40. E.g., 18 CONG. REC. 46, 74 (1886); 17 CONG. REC. 818, 1058-60 (1886); 15 CONG. REC. 5079, 5460, 5466-67, 5547 (1884).
41. See supra notes 35-37 and accompanying text; infra notes 43-117 and accompanying text.
42. U.S. CONST. amend. XII.
43. See supra note 40 and accompanying text.
44. NORTON ET AL., supra note 6, app. at A-46.
controversy over the legitimacy of electoral votes from any state, contested votes were excluded unless the House of Representatives and Senate concurred in counting them. The rule worked well for Republicans because, in the immediate aftermath of the Civil War, Democrats could not hope to win the presidency without electoral votes from Southern states. In the states of that region, however, the explosive mix of unreconstructed native whites on the Democratic side versus carpetbaggers and freed former slaves backed by federal troops on the Republican side made election disputes endemic. Thus, the joint congressional rule tended to favor Republicans whose "safe" Northern states generated fewer election controversies. This rule, in effect for the 1864, 1868, and 1872 presidential elections, was used by the Republican majorities in Congress during each of those elections to exclude electoral votes cast for Democratic candidates. Importantly, however, the excluded votes never determined the ultimate outcome of any of these elections.

Events played out differently in 1876, when contested votes did decide the final result and sparked a national crisis. A narrow

45. See 15 CONG. REC. 5458 (1884) (statement of Rep. Parker setting forth this joint rule and describing its impact).
46. See W. DEAN BURNHAM, PRESIDENTIAL BALLOTS 1836-1892, at 158-59 (1955).
47. MICHAEL LES BENEDICT, THE BLESSINGS OF LIBERTY 214 (1996). Discussing elections in the former Confederacy during this period, constitutional historian Benedict writes: In several states, fraud and violence led both Republicans and Democrats to claim victory in elections. Each party then appealed to President Grant to recognize and support its claim under the constitutional clause empowering the national government to guarantee republican government in the states. Several Republican state governments remained in power only through such decisions and the willingness of Grant to use troops to enforce them.

Id.
48. See id. (describing predominantly southern election disputes).
49. See 17 CONG. REC. 815 (1886); 15 CONG. REC. 5458, 5466 (1884).
50. See id. (featuring congressional analysis and comment to this effect).
51. Comparing the intervention of Congress in prior post-Civil War electoral counts with its intervention in the 1877 count, Ohio Senator John Sherman, who had witnessed it all as a leading Republican member of Congress since 1855, an architect of Hayes's electoral triumph, and a member of Hayes's cabinet, observed: Several times that condition of affairs existed, until finally, in 1877, we came to a point that did really threaten our national existence; when civil war might have occurred under certain circumstances; where the disputed votes did change the result; where a change even to the extent of one vote might have altered the result.
partisan divide split the country in 1876. Republicans still controlled in the Senate, but Democrats had taken the House of Representatives and would not be party to the joint congressional rule that had bolstered Republican electoral margins in the previous three contests. When the popular votes were counted for President in 1876, the Democrat, Samuel J. Tilden of New York, won a clear majority over the Republican, Rutherford B. Hayes of Ohio—by a margin of fifty-one percent to forty-eight percent—and appeared to have won the electoral contest as well, thanks in part to a clean sweep of the South.

National Republican leaders, however, were convinced that white Democrats kept black Republicans from voting across the South and would not accept Tilden’s apparent victory. They could not do much about the outcome in reconstructed Southern states, but Republican governments still clung to power with the support of federal troops in three former Confederate states: Florida, Louisiana and South Carolina. With small popular-vote adjustments in each of these three states, Hayes could claim their electoral votes and, with them, the election—by a single electoral vote. Republican Party leaders set about to make that result a reality. In the contested states, Republican-controlled election boards held the power to disqualify votes tainted by fraud or intimidation. Using this power, they threw out enough democratic votes to allow Republican electors to win in all three states. When these Republican electors met in their respective state capitals, however, Democratic electors convened as well. Both sets of electors duly voted and submitted their conflicting votes to Washington.

After weeks of partisan deadlock and rising threats of violence, Congress created a federal election commission to resolve the

17 Cong. Rec. 815 (1886).
54. Id. at 276.
55. Id. at 275.
56. Id. at 276-77.
57. Id. at 275.
58. Id. at 277-79.
59. Id. at 275.
60. Id. at 278; Benedict, supra note 47, at 214.
The decisions of this commission regarding the contested electoral votes could be rejected only by the joint action of both the Republican Senate and Democratic House of Representatives, so its ruling in favor of either candidate would stand as a practical matter. The creation of this commission was an act more of expediency than of statesmanship, for leaders of each party thought that the commission would favor its side. The Senate appointed five Republican senators to the commission; the House appointed five of its Democratic members to it; and five members came from the Supreme Court. Two of the Supreme Court members were to be chosen from the Court’s Republican majority; two were to be the Court’s two Democratic justices; and the fifth was to be the Court’s lone Independent, David Davis. Democrats thought that the highly principled Davis would support Tilden as the rightful winner. On the other hand, Davis had been named to the Supreme Court by a Republican President and confirmed by a Republican-controlled Senate, giving Republicans reason to expect his support. In the end, however, Davis did not vote with the commission at all. At the time, Davis was a third-party candidate for the U.S. Senate in his home state of Illinois. Hoping to win his favor on the commission, Illinois Democrats threw their support behind him. When Davis won, however, he felt honor-bound not to serve as a Supreme Court representative on the commission. The Court had to name a replacement, with only Republicans left to fill the vacancy.

61. HOOGENBOOM, supra note 53, at 285; CHRISTIANSON, supra note 52, at 190.
62. HOOGENBOOM, supra note 53, at 285.
63. Id.
64. Id.
65. Id.
66. Id. at 286.
67. Id.
68. Id.
69. Id.
70. See BENEDICT, supra note 47, at 215; HOOGEBOM, supra note 53, at 285. For later congressional analysis to this effect by some of the individuals involved, see 17 CONG. REC. 1024 (1886) (statement of Rep. Ingalls) (“The Electoral Commission of 1877 was a contrivance that will never be repeated in our politics. It was a device that was favored by each party in the belief that it would cheat the other, and it resulted, as I once before said, in defrauding both.”); 15 CONG. REC. 5079 (1884) (statement of Rep. Browne) (similar). In the immediate aftermath of the Civil War, with ongoing disputes about voting rights similar for freed slaves, the electoral process throughout the South was deeply flawed. Many Republican leaders
After months of squabbling and with just hours left before the inauguration, congressional Republicans backed by Republican members of the electoral commission (which voted eight to seven along party lines in every instance) accepted the Republican electors from all three disputed states.\footnote{71} Enraged Democratic congressmen boycotted the session.\footnote{72} Hayes was called by the title “His Fraudulency” (or worse) and did not stand for reelection in 1880.\footnote{73} At the time, even the respected Republican Henry Adams, a descendent of two presidents involved in disputed electoral contests, dismissed Hayes as “a third-rate nonentity.”\footnote{74}

In the aftermath of the Hayes-Tilden deadlock, and with the prospect of similarly close elections to come, a deeply divided and highly suspicious Congress tried to lay out rules that would guide and constrain its future role in counting electoral votes. Legislators from both parties sincerely doubted if the Republic could survive a repeat of the 1876-1877 debacle. “It is as certain as that God’s sun shines that men will not submit to wrongs of that character again—never again,” declared Democrat William W. Eaton, who served as a senator at the time of the Hayes-Tilden election and later as a House member.\footnote{75} “There must be some mode of counting the electoral votes that we can agree upon ….”\footnote{76}

For ten years, from 1877 to 1887, Congress struggled to come together on a law that would set rules in advance to prevent the types of electoral-vote difficulties that marred the 1876 election.\footnote{77} Most critically for the purposes of this Article, the main cause for delay and disagreement over the enactment of reform legislation did not involve policy or partisan differences. It came instead from

sincerely believed that if blacks had been allowed to participate fully and fairly in the 1876 presidential election, then Hayes would have won all three of the key states. Even without the participation of freed slaves, he probably did receive more popular votes than Tilden in South Carolina and Florida. At the time, neither side conceded anything and it came down to which electors Congress would count. HOOGENBOOM, supra note 53, at 277-79.

\footnote{71} HOOGENBOOM, supra note 53, at 294.
\footnote{72} Id.
\footnote{74} Id.
\footnote{75} 15 CONG. REC. 5079 (1884); see also 17 CONG. REC. 2427 (1886) (statement of Sen. Hoar); 17 CONG. REC. 1025 (1886) (statement of Sen. Ingalls).
\footnote{76} 15 CONG. REC. 5079 (1884) (statement of Rep. Eaton).
\footnote{77} See 15 CONG. REC. 5547 (1884) (statement of Rep. Herbert).
the concern of many Democratic lawmakers (most of whom clung to Jacksonian notions of states' rights forged in the years leading up to and including the Civil War) over the extent of Congress's constitutional power to interfere by federal statute in the state electoral-vote process.78 Only the imminent prospect of a repeat of the 1876 deadlock in the 1888 election finally forced a sufficient number of these states-rights Democrats to swallow their doubts and join with their colleagues of both political parties to pass the 1887 statute that has governed the electoral-vote process to this day.79 These century-old congressional debates over federal power are instructive as Congress again considers statutory reform in this field.

Essentially the same legislation was debated in each congressional session following the 1876 election. Usually it passed the Republican-dominated Senate on a bipartisan basis.80 Then it would die in the Democratic-led House.81 The stalemate finally broke in 1887, when legislation was narrowly crafted to address the specific problem of post-election rule changes that had triggered the Hayes-Tilden debacle.82 Under it, states could ensure that Congress would count their electoral votes as cast if they designated their electors pursuant to state laws enacted prior to election day and certified those electors at least six days before the day fixed by Congress for electors to vote.83 In the case of electors not so designated or certified and in the case of multiple certified slates of electors from a state, the House of Representatives and the Senate would

78. E.g., 17 Cong. Rec. 1019 (1886) (statement of Sen. Hoar) ("I think I may say as a mater [sic] now settled by a pretty long experience that the arguments which are made against the bill almost all proceed from supposing that it is an attempt to amend a defect which is due to the Constitution itself and criticising [sic] it in that respect . . . ."); 17 Cong. Rec. 863-64 (1886) (statement of Sen. Morgan) ("So in the debate on this question we may all assume that there is no political controversy involved, and that we are trying to find the boundary and measure of our powers under the Constitution . . . ."). For a discussion of the notion of states' rights held by many Northern and Southern Democrats during this period, see Benedict, supra note 47, at 186-87, 200-15.
79. See 15 Cong. Rec. 5459, 5546, 5548 (1884).
80. E.g., 15 Cong. Rec. 430 (1884).
81. E.g., 17 Cong. Rec. 863-64 (1886) (statement of Sen. Morgan regarding a bill frequently adopted by the Senate, but rejected by the House).
83. Id.
concurrently rule on which electors to accept.\textsuperscript{84} If the two bodies could not agree, then the slate of electors certified by the state's governor would be counted, with none counted if the governor had either not certified any electors or had certified more than one slate.\textsuperscript{85} Although this statute thus leaves matters largely to the states, it limits state discretion as to important matters of timing (including by vigorously discouraging ex post facto interference with the electoral process).\textsuperscript{86} In addition, and even more importantly, the law asserts final congressional authority in counting electoral votes.\textsuperscript{87} As a result, Congress claimed a decisive role in the electoral-vote process and created a precedent for an even larger role should the need arise. Most critically, it would be a congressional statute, not only the Constitution, that set the precise parameters for state and federal control of the electoral-vote process.

The constitutional basis that lay behind congressional action in 1887 is instructive for Congress today. First and foremost, supporters of reform claimed the authority to act in this area based on an express power to count the electoral votes. Referring to the constitutional provision that electoral certificates be opened before a joint session of Congress, where "the votes shall then be counted,"\textsuperscript{88} Democratic Representative Luke Prior from Alabama, a House committee chairman and proponent of electoral-vote reform, observed: "I repeat and now insist that in this word vote is included the ascertainment and determination of all defects, irregularities, illegalities, non-qualifications of electors or persons voted for, frauds, corruptions, or coercions, from the suffragan through its transit to this Federal board ...."\textsuperscript{89} Prior went on to declare, "we have the right and it is our duty, if need be, to go into and behind the returns of electors ... to find the true will of the sovereign of sovereigns—the people."\textsuperscript{90} Similarly, Democratic Representative Andrew Jackson Caldwell of Tennessee asserted:

\begin{itemize}
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id.
  \item \textsuperscript{88} U.S. Const. amend. XII.
  \item \textsuperscript{89} 15 CONG. REc. 5101 (1884).
  \item \textsuperscript{90} Id. at 5105.
\end{itemize}
"The power of the two Houses in counting the vote is something more than ministerial and perfunctory merely. Congress may provide by law or joint rule the manner of counting the vote."\textsuperscript{91} Other congressional proponents of the legislation made similar statements.\textsuperscript{92}

Proponents supplemented their reliance on Congress's authority to count with invocations of the general Article I power of Congress "[t]o make all Laws which shall be necessary and proper" to carry out its enumerated powers.\textsuperscript{93} For example, Democratic Representative William M. Springer of Illinois, a long-serving House Committee Chairman and future federal appellate court judge, expounded: "If Congress may make all laws which are necessary to carry into effect the powers granted by the Constitution, it may make such laws as it may deem necessary to carry out that express provision of the Constitution, to count the votes for President and Vice-President."\textsuperscript{94} Likewise, Democratic House Committee Chairman and future cabinet member Hilary Herbert, normally a strict constructionist, stated in this context:

[T]he Constitution vests in the Federal Government the power to count the votes; and the exercise of that power is a Federal function, to be controlled by the Federal Government .... A power has been given, and it is perfectly plain that the Constitution vests in Congress the power to enact what legislation is necessary and proper to carry out the purposes of the provision granting the power.\textsuperscript{95}

Other supporters made similar assertions of congressional authority.\textsuperscript{96}

\textsuperscript{91} 18 CONG. REC. 30 (1886).
\textsuperscript{92} E.g., id. at 49 (1886) (statement of Rep. Cooper); 15 CONG. REC. 5464 (1884) (statement of Rep. Peters).
\textsuperscript{93} U.S. CONST. art. I, § 8.
\textsuperscript{94} 15 CONG. REC. 5461 (1884).
\textsuperscript{95} 18 CONG. REC. 75 (1886). Regarding the role of federal government, Herbert once said, "I believe in as little government as possible—that Government should keep hands off and allow the individual fair play." DANIEL J. KEVLES, THE PHYSICISTS: THE HISTORY OF A SCIENTIFIC COMMUNITY IN MODERN AMERICA 55 (1978) (discussing Herbert's views on states' rights and limited federal government).
\textsuperscript{96} E.g., 18 CONG. REC. 49 (1886) (statement of Rep. Cooper); id. at 50 (1886) (statement of Rep. Eden).
Congressional opponents of the legislation, while generally agreeing that reform was advisable,\textsuperscript{97} denied the power of Congress to act in this area, at least by way of statute. Representative Thomas M. Browne of Indiana declared:

\begin{quote}
The framers of the Constitution withheld from Congress the power to interfere with this count; they withheld it by not committing the power to it. When the Constitution confers a power it does so in express words, as Congress shall have power to borrow money, collect taxes, regulate commerce, coin money, and the like. By no words, by no implication, has the power been given Congress to settle questions concerning the electoral count.\textsuperscript{98}
\end{quote}

Senator John Tyler Morgan of Alabama, a former secessionist leader and Confederate general, claimed that “this notion of a new constitutional power” over the electoral count was “drawn solely from the generous warmth and fertility of the imagination of the senator from Ohio,”\textsuperscript{99} John Sherman, younger brother of the famed Union general William Tecumseh Sherman. The younger Sherman was a master politician who at the time reigned over the Republican Senate as President Pro Tempore and as a committee chairman, once served as Hayes’s Treasury Secretary, and would later serve as President McKinley’s Secretary of State.\textsuperscript{100} He was also a prime architect of the reform legislation, just as he had been of the electoral commission that deprived Tilden of the 1876 election.\textsuperscript{101} Southern Democrats were deeply suspicious of him.\textsuperscript{102}

Agreeing with Morgan’s view of the matter, Democratic Representative Samuel Dibble of South Carolina argued that “Congress has no power in relation to the electoral vote except to

\textsuperscript{97} E.g., 17 CONG. REC. 1058 (1886) (statement of Sen. Wilson).
\textsuperscript{98} 15 CONG. REC. 5465 (1884).
\textsuperscript{99} 17 CONG. REC. 865 (1886).
\textsuperscript{100} For background on John Sherman, including Sherman’s role in authoring many of the era’s most important laws, including the Sherman Antitrust Act, see Charles W. Calhoun, \textit{John Sherman}, in 4 DONALD C. BACON ET AL., \textit{THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS 1813-16} (1995).
\textsuperscript{101} Id. (describing Sherman’s role in reform legislation); HOOGENBOOM, supra note 53, at 277-94 (describing Sherman’s role in the election of 1876).
\textsuperscript{102} See 17 CONG. REC. 865 (1886) (slurring reference of Sherman’s role in this matter by a Southern senator).
count, in the sense of enumeration." Other opponents leveled similar charges. Concerns over the statute's constitutionality were not limited to its opponents. Even its chief sponsor in the House of Representatives, William Eaton of Connecticut, expressed grave doubts about Congress's authority over the electoral-vote process. Only his fear for the survival of the Republic in the face of electoral chaos led him to support the reform legislation. Biting the bullet, he prodded his reluctant colleagues to act by invoking a then-familiar aphorism: "[G]reat men made precedents and little ones followed them. Now, let us make a precedent." On this point, his Democratic colleague Hilary Herbert agreed:

I believe this Congress at this session ought to pass some law on this question. The situation is just as it was eight years ago [in 1876]. We are entering on what is likely to be a very exciting Presidential campaign. The House is Democratic and the Senate is Republican, and if we adjourn this session without having agreed upon any rule or any law which shall regulate the count of the electoral vote we may have a deadlock again next winter. I do not believe the country would submit to another electoral commission [sic]. Upon the passage of some law now to regulate the count may depend the peace of the country and the perpetuity of our institutions. I believe that a bad law would be better than no law at all.

This sentiment ultimately carried the day, and Congress passed the Electoral Count Act of 1887 despite lingering concerns regarding its constitutionality.

As Representative Eaton predicted, the new statute has served a vital purpose. With minor modifications, it has remained the law of the land to this day. Its gravest test came in the very next election, conducted in 1888. In that highly partisan and bitterly

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103. 18 CONG. REC. 45 (1886).
104. E.g., 17 CONG. REC. 1058 (1886) (statement of Sen. Evarts).
105. E.g., 15 CONG. REC. 5076-78 (1884).
106. Id. at 5079, 5459, 5546.
107. Id. at 5548.
108. Id. at 5546 (statement of Rep. Herbert).
divided race, the Democratic candidate and incumbent President Grover Cleveland won a plurality of the popular vote (48.6% to 47.9%) but lost the electoral vote to Republican Benjamin Harrison on the basis of highly suspect vote totals from two key states that Cleveland had won four years earlier. According to those final tallies, Cleveland lost his own home state of New York by a mere 14,000 votes (or fewer than one percent of the votes cast) and Harrison’s home state of Indiana by even less. Some of Cleveland’s advisors urged him to challenge those results, and Republican efforts for Hayes in 1876 gave him ample precedent for doing so. The Republican electors from New York and Indiana, however, had been duly certified in accord with the provisions of the 1887 Act, which Cleveland himself had signed into law. So he did not challenge the submission of New York or Indiana, and when asked why he lost the election, he coyly replied, “[I]t was mainly because the other party had the most votes.” Four years later, the American people rewarded Cleveland with a convincing popular and electoral vote victory in a rematch with Benjamin Harrison. Cleveland’s biography is titled A Study in Character. His action set a standard for our nation’s lawful transfer of presidential power. That standard was founded on Congress’s willingness to take the responsibility to forge statutory rules for presidential elections. Congress asserted its power to act in 1887, and that assertion of power has never been successfully challenged.

III. CURRENT REFORM PROPOSALS

Like the Hayes-Tilden contest, the disputed election of 2000 has demonstrated a need to reform how the United States chooses its President. Many of the reform proposals are not new and, whatever
their merits, do not distinctively address the problems raised by the 2000 election. Reformers have debated the merits of directly electing the President by popular vote since the founding of the Republic, for example, and the occasional occurrence of a candidate winning the highest office in the land without a plurality of the popular vote inevitably resurrects the issue. The 2000 election proved no exception, though it is unlikely to produce any such fundamental reform.

Less sweeping proposals for altering the electoral college system have also been resurrected, such as replacing the winner-take-all approach currently used by forty-eight states with a proportional system tied to either the statewide popular vote or the popular vote of individual electoral districts. In recent years, reformers have persistently tried to tighten campaign finance laws, and the vast amount of money flooding through loopholes in the current statutory regime during the 2000 election has increased their zeal.

More peculiar to the 2000 election, however, was the spectacle of simply trying to count the votes accurately in Florida. Given the near-even split in other states, the electoral votes of Florida would decide the presidency, yet for weeks it remained uncertain whether George W. Bush or Al Gore had received the most votes there. The final official tally gave Bush the edge by fewer than 1000 votes, with over ten times that many disputed ballots in Miami-Dade County alone. Subsequent unofficial recounts seem to have confirmed Bush's win on the basis of valid ballots but have not erased concern over the large number of invalid ones. For example, as to the 10,644 Miami-Dade County ballots that election

118. See supra notes 35-117 and accompanying text.
119. See Richard E. Cohen & Louis Jacobson, Can It Be Done?, 32 Nat'l J., Nov. 18, 2000, at 3658-60 (discussing postelection calls for abolishing the electoral college but suggesting that a sufficient number of small states will oppose such a reform to block any constitutional amendment to that effect); Stanley Fish, The High-Minded Fight Over Florida, N.Y. Times, Nov. 15, 2000, at A29.
120. E.g., Yuval Rosenberg, Building a Better Election, Newsweek, Nov. 20, 2000, at 20.
122. See Upon Further Review ... Bush Still Wins, Atlanta J.-Const., Feb. 26, 2001, at A1 (reviewing the election contest in Florida and reporting that a postelection recount by the Miami Herald confirmed Bush the winner by a 140-vote margin).
officials excluded from the count because they bore no machine-readable vote for President, an unofficial recount found that 3061 ballots bore some kind of marking that could be interpreted as a vote for either Bush or Gore (netting Gore a total of 49 votes); 4892 ballots bore no markings for President; 527 ballots bore markings for more than one presidential candidate; and 1912 (or more than enough to decide the outcome) bore clean punches in vacant ballot positions, with 1667 of these just below the numbers corresponding to one of the two major candidates. \(^{123}\) Even graver concerns were raised about the accuracy of the vote in Florida's Palm Beach County, where the layout of the punch-card ballot apparently led thousands of voters to punch the hole for Reform Party candidate Pat Buchanan rather than the one for Al Gore. \(^{124}\) These voting and counting problems may well have decided the election.

Events in Florida have fueled calls for reform in voting procedures to reduce the number of such errors. Shortly after the election, for example, one commentator wrote:

> Democracy is—or should be—more than voting, but if votes aren't even accurately counted, democracy is a fraud and there's less reason for anyone to head to the polls. This year's balloting could have been a civics lesson in how every vote can count; instead it has shown how many votes don't. The Florida fiasco (which could have been repeated in many other states) demonstrated that America doesn't take democracy seriously enough to make even the modest investments needed for technological reliability.\(^{125}\)

Although this commentator advocated such long-advocated "wholesale" reforms as direct election of the President, proportional electoral voting and broadened campaign-finance restrictions, he also stressed that "better technical methods of counting votes, more politically neutral election officials and national minimum standards for federal elections would be a small step in the right

\(^{123}\) Id.
\(^{125}\) Moberg, supra note 121, at 13.
Numerous other commentators have called for similar procedural reforms in the wake of the Florida vote. These proposals have centered on two key procedural reforms. One involves minimum national standards for voting devices or machines. Another proposes a uniform national ballot. Like the electoral-vote reforms enacted by federal statute after the Hayes-Tilden election, these reforms narrowly address identifiable problems highlighted in a particular presidential election. Constitutional scholars have questioned whether Congress has the power to impose these narrow procedural reforms, but this fact has not stopped individual members of Congress from proposing them.

In the first forty-five days of the 107th Congress, six bills were introduced in the Senate or House of Representatives dealing with standardizing voting procedures across the country. One of these bills, entitled the National Election Standards Act of 2001, introduced by Senator Reid of Nevada, would direct the current Federal Elections Commission to set uniform national standards for federal election procedures including for “the type of ballots used” and the “use of counting machines.” The other five bills, which include proposals introduced into both houses of Congress and sponsored by members of both major parties, propose forming a new national commission to study such issues. Two of these bills would direct the commission to investigate and recommend ways to implement “standardized voting procedures, including standardized technology” in federal elections. A third speaks of “the need for

126. Id. at 14.
128. E.g., Rosenberg, supra note 120, at 20.
130. E.g., Sullivan, supra note 127, at A29.
uniform standards for the design and maintenance of voting equipment and technology." 134 A fourth bill, introduced on the first day of the new Congress by a bipartisan coalition of thirty House members, would specifically charge the commission with reporting on "the feasibility and advisability of setting uniform national ballot design and technology standards." 135 The fifth bill urges commission consideration of "[ballot design, voting equipment, the methods employed in counting and recounting votes, and the procedures for challenging the results." 136 Each of these bills raises the prospect of Congress imposing national election-technology standards and uniform ballots for federal elections. 137 This in turn raises the question of Congress's constitutional power to do so, which is the subject of our next section.

IV. CONGRESSIONAL POWER TO ENACT PRESIDENTIAL-ELECTION REFORMS

The presidential-election crisis of 1876 (as Part II reveals) triggered unprecedented reforms of the presidential-election system. 138 The presidential-election crisis of 2000 (as Part III reveals) has spurred calls for even more far-reaching action. 139 In the years that followed 1876, congressional debates came to focus on the scope of congressional power over presidential elections. 140 A similar debate has begun anew.

This modern debate arises, however, in a setting far removed from the days of Hayes, Harrison, and Cleveland. Core constitutional verities remain unchanged. Today, as in 1887, Congress may not tamper with basic state rules about the selection of presidential electors; it could not, for example, outlaw a state's


137. Compare these bills with H.R. 263, 107th Cong. § 102(c)(1)(A) (2001), which speaks only of "voluntary recommendations adopted by the Commission" that states would be encouraged to adopt through a federal grant program. Id.
138. See supra Part II.
139. See supra Part III.
140. See supra notes 77-78 and accompanying text.
choice of electors by legislative action, rather than popular vote.\textsuperscript{141} But how, under modern conditions, do we distinguish between those essential features of a state’s “Manner” of “appoint[ing] ... a Number of Electors”\textsuperscript{142} (with which Congress may not meddle) and lesser interferences (which Congress, if it can point to an authorizing power, may freely pursue)? And what are those authorizing powers on which Congress might rely to craft presidential-election rules? One thing is certain: Constitutional developments over the past 125 years have radically reshaped the landscape of congressional powers in ways that nineteenth-century political leaders could not begin to imagine.

There is another profound difference between the reform efforts of the post-1876 period and the reform efforts of today. The Electoral Counting Act of 1887 focused on intracongressional counting of electoral votes.\textsuperscript{143} The Act placed no duties on states; nor did it alter on-the-ground electoral processes. Instead, the Act, responding to the particular problems that had arisen in 1876, called on states to establish elector-selection rules in advance, whatever the substantive content of those rules might be.\textsuperscript{144} In addition, the Act encouraged timely electoral vote \textit{reporting} by the states without seeking to shape the content of any state electoral-vote-generating processes.\textsuperscript{145} Put simply, the Act, to the extent it concerned the states at all, dealt primarily with the subject of \textit{timing}; it addressed when selection rules were to be in place, when electors were to be identified, and when electoral votes were to be submitted.\textsuperscript{146}

Because contemporary proposals arise from a different set of problems, they have a different look. Today’s reform efforts focus directly on how vote casting and vote counting should unfold within the states.\textsuperscript{147} Proposed reforms deal with such matters as identifying permissible (and impermissible) voting equipment, legislating substantive standards for counting votes, defining who

\begin{itemize}
\item \textsuperscript{141} \textit{See infra} notes 271-74 and accompanying text.
\item \textsuperscript{142} U.S. \textit{Const.} art. II, § 1, cl. 2.
\item \textsuperscript{143} \textit{See supra} notes 33, 84-85 and accompanying text.
\item \textsuperscript{144} 3 U.S.C. § 5 (2000).
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} \textit{E.g.}, Tanner, \textit{supra} note 127 (describing various proposals to ameliorate voting problems raised in the 2000 election).  
\end{itemize}
may vote, and regulating when polls must close.\footnote{148}{See supra notes 122-37 and accompanying text.} In short, today's Congress faces a new set of proposed election reforms precipitated by a new set of problems that have come about in a sharply altered technological, political, and legal environment.\footnote{149}{See, e.g., Katherine Q. Seelye, County in California Touches Future of Voting, N.Y. TIMES, Feb. 12, 2001, at A1 (describing touchscreen voting devices). See generally supra notes 122-37 and accompanying text.} At the same time, the essential question Congress faces in 2001 is the same one it faced in 1887—the question of power.

Three matters complicate analysis of congressional power over presidential elections. First, as Part III reveals, many proposals for reform now sit on the legislative table. Some of these proposals would require constitutional amendments; some deal with highly particularized problems, such as the proper treatment of overseas absentee ballots; and some deal with important matters that have little relation to elections themselves, such as limiting federal court jurisdiction over presidential-election contexts. We deal with this complexity by focusing on proposals that target two key goals: (1) nationwide use of a uniform presidential ballot, and (2) nationwide use of federally approved voting equipment. In the remaining pages, we touch on other possible reforms, but we concentrate our attention on these two particularly significant and timely proposals.

Second, analysis of this subject must take account of the different techniques of regulation Congress might employ. Three techniques are of particular importance.\footnote{150}{More particularly, these three techniques are important to congressional efforts to regulate state electoral processes in an outright or traditional way. A fourth technique, which uses the carrot of federal financial support, is discussed infra notes 354-61 and accompanying text.} To begin with, Congress might prohibit or mandate specified conduct. (A statute might say, for example: "It shall be unlawful to use any ballot except the national ballot, and persons promulgating any other ballot shall be fined.") In addition, Congress might declare that it will not count a state's electoral votes unless a state satisfies certain requirements. (It might decree, for example: "Unless a state uses the national ballot, its electoral votes will not count.") Finally, following the model of the Electoral Counting Act of 1887, Congress might refuse the benefit of an electoral-vote “safe harbor” to states that fail to meet specified conditions. (Such a law might provide: “A state’s electoral
votes shall be counted if it complies with federal statutory rules, including use of the national ballot; otherwise its electoral votes may, or may not, be considered.") For purposes of constitutional analysis, we see no difference between the first approach (outright prohibition) and the second approach (refusal to count), for each form of regulation involves a direct and significant penalty. Nor would we distinguish the third approach from the other two. Critics might say that a “Maybe we won’t count your votes” rule is self-evidently different from a rule that says “Certainly we won’t count your votes.” Our response is that, as a practical matter, a “maybe” sanction may have no less of an impact than a parallel “certainly” sanction if the surrounding circumstances are right. In this context, because the stakes involve whether to count a state’s entire slate of electoral votes, we believe that safe-harbor laws “pass the point at which pressure turns into compulsion.”

For this reason, we would not distinguish (except perhaps in extraordinary circumstances) among the outright-prohibition, refusal-to-count, and safe-harbor approaches to congressional regulation of presidential elections.

151. South Dakota v. Dole, 483 U.S. 203, 211 (1987) (suggesting that conditional spending programs that, in practical effect, coerce state participation should be evaluated no differently than outright federal mandates) (internal quotation omitted); see also Anderson v. Celebrezze, 460 U.S. 780, 815-16 (1983) (Rehnquist, J., dissenting) (noting that the role of electoral college members “may be second to none in importance”). If there is need for further proof of this assertion, we believe it is supplied by the events surrounding the most recent presidential contest. This is so because, throughout the fray, attention continually focused on Florida’s compliance with the safe-harbor condition that its electors be determined “at least six days before the time fixed for the meeting of the electors.” 3 U.S.C. § 5 (2000). Indeed, in the end, a Supreme Court majority declared the presidential election over on the ground that “[t]he Supreme Court of Florida has said that the [Florida] legislature intended the State’s electors to ‘participat[e] fully in the federal electoral process,’ as provided in 3 U.S.C. § 5.” Bush v. Gore, 531 U.S. 98, 110 (2000) (quoting Palm Beach County Canvassing Bd. v. Harris, 772 So.2d 1220, 1237 (Fla. 2000)). More particularly, the Court noted that the determinative December 12 date set by section 5 “is upon us” and added that “[b]ecause it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.” Id.; see also id. at 120-21 (Rehnquist, C.J., concurring) (agreeing to discontinue recount because it “jeopardizes the ‘legislative wish’ to take advantage of the safe harbor provided by 3 U.S.C. § 5”) (quoting Bush v. Palm Beach County Canvassing Bd., 531 U.S. 98, 121 (2000)). Cut to the bone, the Court’s reasoning is essentially this: The State of Florida had so fervently signaled concerns about meeting the section 5 safe-harbor deadline, that the Court was prepared to declare on its own, as a matter of state law, the overriding controlling effect of this deadline even in the face of established statutory violations and uncured constitutional difficulties in the vote-counting process. See id. at 110.
Finally, any review of federal authority to regulate presidential elections must deal with each of the powers that Congress might invoke in this field. As it happens, there are six (or, depending on how one counts, seven) such powers, each of which requires its own extensive examination. Focusing on potential national-ballot and national-voting-equipment legislation, we turn now to that task.

A. The Commerce Power

In an earlier era, proponents of presidential-election reform in general, and of national-ballot and voting-equipment legislation in particular, would have raced to embrace the Commerce Clause of Article I, Section 8. These reformers would have argued that each ballot, each voting device, and each counting apparatus helps to determine who becomes President, that the President plays a key role in shaping national economic policy, and that national economic policy greatly affects the movement of goods, services, capital, and people across state lines. For this reason, supervising the process of voting for President would fall within the congressional power to "regulate commerce ... among the several States." Nonlawyers might view this reasoning as odd. But students of post-New Deal constitutional law would find it familiar. Cases like United States v. Darby established that Congress can regulate activities that "have a substantial effect on interstate commerce." Cases like Wickard v. Filburn and Perez v. United States clarified that a particular regulated act, like the casting of one ballot by one person, need not itself create a substantial impact; rather courts should look to the "class of activities" being regulated and consider their "total effect." On this analysis, claims of power to regulate presidential elections based on the

152. See infra note 193.
153. U.S. CONST. art. 1, § 8, cl. 3.
154. 312 U.S. 100 (1941).
155. Id. at 119.
156. 317 U.S. 111 (1942).
158. Id. at 152 (emphasis omitted).
159. Darby, 312 U.S. at 123.
Commerce Clause seem plausible. Our recent election proved, if nothing else, that poorly regulated individual acts of voting, in the aggregate, can determine both the presidency and resulting choices about the direction of national economic policy.

Recent decisions, however, pose two major obstacles to using this line of analysis to support national-ballot and federally specified machine laws. First, in *Lopez v. United States*, the Court signaled that Congress may not invoke the aggregation/substantial-effect technique when it regulates "noncommercial" activities. If any act should qualify as "noncommercial," it is the act of voting. For this reason, the falling-dominos line of reasoning available prior to *Lopez* (each vote helps pick the President, who shapes economic policy, which fixes the flow of interstate commerce) would seem unavailable in the post-*Lopez* world.

Second, in *Printz v. United States*, the Court held that Congress may not, under the commerce power, force state executive officials to "administer or enforce a federal regulatory program." The precise scope of this rule remains unsettled. But forcing state officials to use federally mandated ballots and voting equipment would seem on its face to breach the requirement that state officers not be "dragooned" into administering federal law.

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161. *Id.* at 566. *See generally id.* at 559-61 (invalidating congressional prohibition on possessing guns near schools because the noncommercial nature of this activity precluded considering its effect "in the aggregate"). The Court again applied this principle in *United States v. Morrison*, 529 U.S. 598 (2000), to invalidate a federal statutory cause of action for crimes of violence motivated by gender. The Court in *Morrison* noted that "we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases." *Id.* at 613. While the Court thus left open a small crack for advocating application of the aggregation technique in the vote-regulation context, we see no pressing reason why the Court would depart from the *Lopez* rule in this setting in that voting bears only the most attenuated relationship to purchase-and-sale or other commercial activity.


163. *Id.* at 935.

164. For example, ballot and equipment laws might offend a constitutional principle, closely related to the rule of *Printz*, that permits Congress to regulate states pursuant to the Commerce Clause only "by means of 'generally applicable' laws, or laws that apply to individuals as well as States." *Reno v. Condon*, 528 U.S. 141, 151 (2000). The Court, however, has not passed on whether such a rule exists. *Id.* We leave it to others to explore both that question and the question of whether such a rule, if it were in fact recognized, would take hold in this context.

165. *Printz*, 521 U.S. at 928 (citation omitted). It is possible to argue that ballot and equipment laws do not violate this principle because they do not call on state officials "to
These recent precedents render the Commerce Clause of limited utility in this field. Advocates of election reform must therefore look elsewhere for sources of congressional authority to regulate the mechanics of presidential elections. Among those sources is Section 5 of the Fourteenth Amendment.

B. The Fourteenth Amendment Enforcement Power

Section 1 of the Fourteenth Amendment specifies that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor ... 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." Section 5 adds that "Congress shall have power to enforce [this article] by appropriate legislation." In *City of Boerne v. Flores*, the Supreme Court held that this enforcement authority does not give Congress power to decree "the substance of the Fourteenth Amendment's restrictions on the States." Congress administer or enforce a federal regulatory program." See id. at 935 (emphasis added). On this argument, *Printz* is beside the point because it concerned forced state involvement in regulating private conduct with regard to gun ownership; in contrast, ballot and machine laws involve direct federal regulation of the state's own behavior in carrying out an aspect of its own nonregulatory work. See *Condon*, 528 U.S. at 150 (noting that in the earlier *South Carolina v. Baker* case, 485 U.S. 505 (1988), the Court "upheld a statute that prohibited States from issuing unregistered bonds because the law 'regulate[d] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties'). We are most doubtful the Court would buy this argument. Instead we suspect the Court would deem *Condon* and *Baker* inapplicable in this context on the ground that they involved federal regulation of "[s]tates acting purely as commercial sellers." Id. at 150 n.3. Indeed, it may well be argued that direct federal control of what might be called the state's own administrative functions (here in the form of conducting elections) is more of an affront to local sovereignty than calling on states to participate in otherwise concededly permissible federal regulatory work. Cf. *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (suggesting the unconstitutionality of federal efforts to force a state to relocate its capital). In any event, voting inescapably involves direct interaction between state officials and private citizens and concerns how private citizens must act to effectively exercise a legal right. The argument is strong that the "regulatory" shoe fits in this context, even assuming that it must.


168. Id. § 5.


170. Id. at 519.
could not, for example, simply declare that state employment of punch-card ballots is a violation of Section 1 and consequently invoke Section 5 to prohibit their use. The guiding principle is that Congress may adopt only "remedial and preventive measures [that] respond to the ... deprivation of constitutional rights" as defined by judicial rather than legislative authorities. Moreover, laws qualify as "remedial" or "preventive" only if they exhibit "congruence and proportionality" to identifiable violations of Section 1.

Despite City of Boerne's restraining definition of the Section 5 power, election-law reformers may gravitate to it for three reasons. First, the Printz anticommandeering principle does not logically apply to otherwise proper invocations of Section 5. Second, so long as Congress satisfies the "congruence and proportionality" test, "[l]egislation 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." Finally, the Court's recent equal protection ruling in Bush v. Gore expands the range of potential Section 5 legislation in the presidential-election area.

171. Id. at 526; accord Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999) (holding that Congress is limited to "remedying or preventing" forms of "conduct transgressing the Fourteenth Amendment's substantive provisions").

172. City of Boerne, 521 U.S. at 520.

173. The reason is that Section 1, by its terms, targets state action; thus exercises of Section 5 may (and at least normally must) target state action as well. See United States v. Morrison, 529 U.S. 598, 626 (2000) (faulting congressional invocation of Section 5 to enact a private cause of action for gender-based violence because it "visits no consequence whatever on any [state] public official" and "is, therefore, unlike any of the section 5 remedies that we have previously upheld"). Indeed, the main exercises of congressional powers under the Civil Rights Amendments that the Court has upheld in the past have concerned federal controls of state election rules. City of Rome v. United States, 446 U.S. 156 (1980); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966). See generally EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (reaffirming that, "when properly exercising its power under § 5, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers") (citation omitted), superseded by 29 U.S.C. § 623 (1994 & Supp. V 1999).

174. City of Boerne, 521 U.S. at 518.

175. Of course, reforms under Section 5 that build on Bush v. Gore need not be limited to voting for presidential electors because "there is nothing in the Court's opinion that suggests any reason the Equal Protection concerns it announces are limited to Presidential elections, nor is there any reason to think these concerns should be limited to that one electional
In *Bush v. Gore*, the Court focused on problems created by punch-card voting in finding that a lack of consistency in Florida's hand-recount standards violated Section 1 of the Fourteenth Amendment. The joint operation of Section 5 and *Bush v. Gore* thus would permit Congress to pass at least some forms of legislation concerning punch-card ballots, manual recounts, and perhaps other matters as well. In seeking to prevent future constitutional violations in hand-recount processes, could Congress go so far as to insist that states use specified modern voting techniques, not including punch-card ballots? In our view, such a law (while justifiable under other congressional powers) would probably violate Section 5's proportionality mandate. Three reasons indicate why.

First, such a law (unless it authorized all forms of voting except by way of punch-card ballots) would be significantly overinclusive with regard to the voting equipment it outlawed. If the federal law were to authorize only ATM-like computerized voting machines, for example, it would preclude use of punch-card-ballot and other methodologies as well. Problems in Florida arose, however, because of punch-card ballots. A de facto prohibition on a wider range of vote collection methods thus would seem to go well beyond remedying and preventing the constitutional problem that underlay *Bush v. Gore*.

Second, even assuming that the national law targeted only punch-card ballots, there is reason to doubt that this sort of ballot has routinely spawned constitutional problems outside Florida. In fact, the core problem in Florida—that is, the lack of "adequate statewide standards for determining what is a legal vote"—may not have surfaced in other states precisely because those states already have such standards in place. In addition, a universal prohibition on punch-card balloting would take hold even in those states where potentially troublesome hand recounts were either

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177. See supra note 128 and accompanying text.
179. Id. at 110.
unavailable or available only in unusual circumstances. An equipment rule that flatly banned all punch-card ballots thus would not seem to be geographically proportionate to any fairly identified constitutional wrong. 181

Finally, even in Florida itself, voting authorities could deal with the constitutional problems posed by punch-card manual recounts without requiring wholesale abandonment of punch-card balloting. To repeat: Constitutional problems arose in Florida because the state failed to establish "uniform rules to determine intent" in hand-recounting votes. 182 Solving this problem does not require wholesale elimination of punch-card ballots. Rather, it requires only that "uniform rules" be established. For this reason, a federal statute that in effect bars all use of punch-card ballots would (at least absent new and extensive supportive congressional findings) be "out of proportion" to the lack-of-standards constitutional problem that actually arose in the 2000 election. 183

There may be, however, a substantive Fourteenth Amendment violation, separate and apart from this lack-of-uniform-standards problem, which justifies sweeping congressional voting-equipment legislation. Drawing on Bush v. Gore and the one-person, one-vote jurisprudence on which it relied, 184 it might be argued that the

181. See United States v. Morrison, 529 U.S. 598, 616 (2000) (emphasizing in invalidating claimed use of Section 5 on proportionality grounds that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States").


183. See City of Boerne v. Flores, 521 U.S. 507, 532 (holding a federal statute unconstitutional for being "so out of proportion to a supposed remedial object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior"). Particularly informative in this regard is the Florida Prepaid case, Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999). There the Court reasoned that Congress could not make states generally liable for patent infringement to remedy or prevent state deprivations of patent property made without due process of law. Id. at 641-48. One reason given by the Court was that state infringements might well be negligent, even though a constitutional violation would require "intentional or reckless infringement." Id. at 645. Put another way, the statutory solution to the constitutional problem involved in Florida Prepaid simply reached too far. In light of the less-restrictive alternative available to counter the constitutional problem identified in Bush v. Gore (in the form of adoption of uniform recount rules), a wholesale statutory ban on punch-card ballots would be vulnerable to the same disproportionality attack.

184. See Bush, 531 U.S. at 105 (relying on Reynolds v. Sims, 377 U.S. 533 (1964)); id. at 107 (relying on Moore v. Ogilvie, 394 U.S. 814 (1969), and endorsing Moore's assertion that "[t]he idea that one group can be granted greater voting strength than another is hostile to
Equal Protection Clause prohibits "variations in voting machines" within any single state, at least if those variations produce significantly different uncounted ballot percentages.\(^\text{185}\) We doubt that such a constitutional rule exists.\(^\text{186}\) Even if it does, however, the proportionality limitation again would block a nationwide mandate to use only particular voting technologies (for example, optical scanners or computerized voting machines). After all, there is no Fourteenth Amendment mandate of equal treatment of voters on a nationwide basis.\(^\text{187}\) Moreover, Congress could address any intrastate discrimination problems that result from voting equipment variations simply by insisting upon intrastate uniformity in machine selection, without specifying which equipment states must use. Because such an obviously less restrictive tool for securing intrastate uniformity is available, our hypothetical computerized-voting-only law would seem to fail the "proportionality" test.\(^\text{188}\)

Just as surely as Section 5 would not support a congressional mandate that all states use specified voting equipment, Section 5 would not permit Congress to force states to use a uniform ballot for presidential and other national-office elections. Again, the Fourteenth Amendment does not require that voters in all states be

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\(^{185}\) See ISSACHAROFF ET AL., supra note 175, at 48.

\(^{186}\) The reason is that any such equal equipment rule would logically derive from the district-population-discrepancy principle that underlies the so-called "one person, one vote" principle to the extent it applies to presidential elections. Moore, 394 U.S. at 819. Yet we see a number of significant distinctions between the equipment-discrepancy and population-discrepancy cases. For example, vote dilution automatically occurs for each voter assigned to high-population voting districts, whereas no automatic dilution of any individual's vote occurs in "bad equipment" districts. (This is so because most voters in such districts cast votes that are counted fully and equally with those of other voters in the state. Moreover, voters presumably can ensure a full count of their votes in a bad equipment district by completing the ballot with care.) In addition, bad equipment problems are at least partially curable by way of manual recounts; there is no similar "fix," however, for residents of high-population districts. Cf. ISSACHAROFF ET AL., supra note 175, at 49 (suggesting distinctions between "differential equipment" cases and "differential vote counting" cases like Bush v. Gore).

\(^{187}\) The Fourteenth Amendment says only that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). See generally ISSACHAROFF ET AL., supra note 175, at 25 (noting that there is no constitutional requirement of "national uniformity in national elections").

\(^{188}\) See supra note 183 (discussing the Florida Prepaid case).
treated equally.\textsuperscript{189} Moreover, although some differences in disqualification of votes may result from the use of a variety of ballots within a state,\textsuperscript{190} the Supreme Court in \textit{Bush v. Gore} was careful to avoid drawing into question traditional practices whereby "local entities, in the exercise of their expertise, may develop different systems for implementing elections."\textsuperscript{191} Finally, even assuming that an equal protection violation might arise from use of nonuniform ballots within a single state, the specification of a nationwide ballot, once again, would not be a "proportional" remedy. Rather, Congress could solve any problem simply by requiring that each state formulate its own unitary ballot for state-wide use.\textsuperscript{192} In short, neither national-ballot nor national-equipment legislation seems to be sustainable under the Section 5 power.\textsuperscript{193}

\begin{itemize}
\item \textsuperscript{189} See supra note 187 and accompanying text.
\item \textsuperscript{190} The point is well-illustrated by Palm Beach County's use of the controversial "Butterfly Ballot" in the 2000 election. See supra notes 122-26 and accompanying text.
\item \textsuperscript{191} Bush v. Gore, 531 U.S. 98, 109 (2000).
\item \textsuperscript{192} See supra note 183 and accompanying text.
\item \textsuperscript{193} Advocates of presidential-election law reforms might invoke the Fourteenth Amendment in another way that has little connection to \textit{Bush v. Gore}. The argument turns on the thought that, wholly apart from the Equal Protection Clause, "[t]he right to vote for national officers is a privilege and immunity of national citizenship" under Section 1, \textit{Oregon v. Mitchell}, 400 U.S. 112, 149 (1970) (Douglas, J., concurring) (emphasis added), superseded by U.S. Const. amend. XXVI, and thus is subject to congressional enforcement both under and apart from Section 5. See I LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-18, at 964 (3d ed. 2000). To be sure, the Court indicated in \textit{Breedlove v. Suttles}, 302 U.S. 277, 283 (1937), that a state poll tax did not abridge "any privilege or immunity protected by the Fourteenth Amendment" because the voting right "is not derived from the United States, but is conferred by the State." However, \textit{Breedlove} was overruled (albeit on other grounds) in \textit{Harper v. Virginia Board of Elections}, 383 U.S. 663 (1966), and \textit{United States v. Classic}, 313 U.S. 299, 315 (1941) signaled that the right to vote for federal legislators (even in primaries) is a privilege and immunity of national citizenship. See \textit{Oregon}, 400 U.S. at 213 (Harlan, J., dissenting) (reading \textit{Classic} to establish that "the right of qualified electors to cast their ballots and to have their votes counted" is "a privilege of citizenship").
\end{itemize}

Even if the privileges and immunities of national citizenship extend to the right to vote for presidential electors, however, it does not follow that Congress can pass any legislation whatsoever on that subject. In particular, it is one thing to outlaw the sort of willful and blatant interferences with the votes that were involved in \textit{Ex parte Yarbrough}, 110 U.S. 651 (1884), and \textit{Classic} and quite another thing to regulate voting ballots and equipment regardless of whether they were consciously put in place to impede the right to have one's vote count. See, e.g., \textit{United States v. Guest}, 333 U.S. 745, 759-60 (1966) (allowing federal prosecution under 18 U.S.C. § 241 for interference with "the constitutional right of interstate travel" only if that interference was undertaken with "[a] specific intent to interfere with the federal right"). We recognize that any power to protect the "right of qualified electors to cast their ballots and to have their votes counted," \textit{Oregon}, 400 U.S. at 213 (Harlan, J.,
The question thus arises whether there is some source of power apart from Section 5 that authorizes Congress to adopt a law that requires a uniform national ballot or requires uniform voting equipment. At least one distinguished commentator has indicated that there is not.\footnote{194} We are more sanguine and turn now to explaining why.

C. The Implied Congressional Power to Regulate Presidential Elections

There is a tectonic tension built into the Constitution's treatment of presidential elections. This tension arises because Article II gives each state the power to fix the "Manner" for appointing its presidential electors.\footnote{195} Yet the business being regulated is the election of federal officials—indeed, the highest-ranking officials of the Republic. Does this latter fact give rise to some measure of power in the national legislature to regulate the processes of selecting presidential electors?

The Court planted the seed for recognizing such a power in \textit{Ex parte Yarbrough},\footnote{196} which involved a federal prosecution under Reconstruction-era legislation for impeding the exercise of voting rights in connection with a federal election. Although the dissenting), might be broadly conceived. Cf. \textit{id.} at 286 (Stewart, J., dissenting) (noting that congressional power to implement "privileges of United States citizenship" exists apart from Section 5 and embraces "all of [Congress's] power under the Necessary and Proper Clause"); endorsing congressional override of state durational residency requirements for voting in presidential elections on ground that their imposition "burdens and sanctions" the federal right to move from state to state); \textit{id.} at 292 (Stewart, J., dissenting) (speaking of Congress's "power to facilitate the citizen's exercise of his constitutional privilege"); \textit{id.} at 150 (Douglas, J., concurring) (stating that "choice of means" to protect such a privilege [of national citizenship] presents 'a question primarily addressed to the judgment of Congress"). Beyond this, however, we leave it to others to consider what congressional powers might flow from any national citizenship-based "privilege and immunity" to vote in presidential elections. We note only that such a power, if it exists at all, most likely would not reach beyond Congress's power under \textit{Burroughs v. United States}, 290 U.S. 534 (1934), to regulate presidential elections to the extent suggested below. Cf. Oregon, 400 U.S. at 286 (Stewart, J., dissenting) (citing \textit{Burroughs} in discussing Congress's power to safeguard the "privileges of United States citizenship"); \textit{id.} at 150 (Douglas, J., concurring) (same).

\footnote{194} See Sullivan, \textit{supra} note 127, at A29 (noting that "we could readily nationalize our election procedures without abolishing the Electoral College," but that this step "would require a constitutional amendment").
\footnote{195} U.S. CONST. art. II, § 1, cl. 2.
\footnote{196} 110 U.S. 651 (1884).
indictment in *Yarbrough* concerned only a congressional (rather than a presidential) election, the Court spoke broadly of the federal government’s “power to protect the elections on which its existence depends from violence and corruption,” as well as its “duty” to ensure that federal office holders are in fact “the free and uncorrupted choice of those who have the right to take part in that choice.”

Drawing on this structural reasoning, the Court in *Burroughs v. United States* invoked the federal government’s inherent “power of self-protection” to uphold a congressional act that mandated public disclosures by multistate organizations that accepted contributions or made expenditures with the purpose of influencing presidential elections.

As the Court explained:

> The congressional act under review seeks to preserve the purity of presidential and vice presidential elections .... It deals with political committees organized for the purpose of influencing elections in two or more states ... and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately.

The Court continued:

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197. Id. at 655-57; see also *Burroughs*, 290 U.S. at 546 (noting this point).


199. Id. at 662; see id. at 665 (citing “the power of Congress” to protect “the right to vote in general” as well as “the right to be protected against discrimination”); see also United States v. Original Knights of the KKK, 250 F. Supp. 330, 353 (E.D. La. 1965) (stating that the power implied in *Ex parte Yarbrough* arises out of “necessity” that the federal government has power to safeguard elections of its officers). *Yarbrough*’s reasoning extended fully to elections of both the “executive head and legislative body.” *Yarbrough*, 110 U.S. at 657; see also Rosenthal, supra note 30, at 33 (noting that “[w]hile the indictment in *Yarbrough* involved only a congressional election and was based on intimidation of Negro voters—undoubtedly a special case under the fifteenth amendment—the reasoning of the Court went much further”).


The 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.\textsuperscript{203}

After quoting extensively from \textit{Yarbrough} (including its expressions of worry that "the very sources of [federal] power may be poisoned by corruption or controlled by violence and outrage" absent any congressional oversight of national elections\textsuperscript{204}) the Court ruled that "[t]hese excerpts are enough to control the present case."\textsuperscript{205} It concluded:

The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone. Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. ... It seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption.\textsuperscript{206}

\textsuperscript{203} \textit{Id.} at 545.
\textsuperscript{204} \textit{Id.} at 547 (quoting \textit{Yarbrough}, 110 U.S. at 667).
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.} at 547-48 (citation omitted).
Does the implied election supervisory power recognized almost eighty years ago in Burroughs support national-ballot and national-voting-equipment laws today? Four separate arguments suggest that the answer to this question is no. We believe, however, that the answer is yes and turn now to explaining why.

1. The Active-Cheating Distinction

One way of attempting to distinguish a would-be national-ballot/national-voting-equipment case from Burroughs derives from the Court's repeated references in that case to concerns about "violence," "corruption," and "fraud." The argument for distinguishing the cases rests on a simple syllogism that draws upon the Court's focus on these forms of willful obstruction and abuse:

   Major Premise: The Burroughs power authorizes federal regulation only of active cheating in the presidential selection process.⁴⁰⁸

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⁴⁰⁷ Id. at 546.

⁴⁰⁸ See, e.g., Igartua de la Rosa v. United States, 113 F. Supp. 2d 228, 239 & n.4 (D.P.R. 2000) (suggesting that Burroughs power does not reach further than authorizing control of "fraud and corruption"), rev'd on other grounds, 229 F.3d 80 (1st Cir. 2000); Victor Williams & Alison M. MacDonald, Rethinking Article II, Section 1 and its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems, 77 MARQ. L. REV. 201, 247 n.276 (1994) (citing Burroughs as creating "power of Congress to ensure that the process of choosing electors is not fraudulent or corrupt"); Elisabeth M. Gillooly, Comment, Larouche v. Kezer: A Cursory Look at Connecticut's Hopelessly Vague Media Recognition Statute, 15 QUINNIPAC L. REV. 269, 274 n.28 (1995) (reading Burroughs to permit Congress "to prevent destruction in its institutions"); Developments in the Law: Elections, 88 HARV. L. REV. 1111, 1243-44 (1975) (reading Burroughs as permitting "the federal government to preserve its elections from impairment by force or by corruption"); noting that Burroughs focused on "vote buying, which was likened to physical coercion at the polls"). Rhetoric in some Supreme Court authorities may be read to support this narrower view. See, e.g., Yarbrough, 110 U.S. at 661 ("Can it be doubted that Congress can, by law, protect the act of voting ... from corruption and fraud"); id. at 662 (insisting that the federal government should guard against "the adverse influence of force and fraud"); id. at 666 (noting "the temptations to control these elections by violence and by corruption" and expressing fear that unless Congress has "authority to provide against these evils... the very sources of power may be poisoned by corruption or controlled by violence and outrage"); see also Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 95 (1982) (asserting that campaign finance disclosure laws "ten[d] to 'prevent the corrupt use of money to affect elections.'") (quoting Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) and Burroughs v. United States, 290 U.S. 534 (1934)). Particularly suggestive along these
Minor Premise: National ballot and equipment legislation would have no real connection to addressing active cheating.
Conclusion: The Burroughs power does not support national ballot and equipment legislation.

Put another way, an ability to regulate interference with elections by way of active cheating inheres in the federal polity's "power of self protection." But any right of "self protection" does not readily support a government power to counter mere voter confusion and mechanical-counting errors. These are the goals (so the argument goes) that drive proposed national-ballot and voting-equipment enhancement reforms. Because these reforms do not "protect the election of President and Vice President from corruption" (so the argument continues), they fall outside the Burroughs power.

One response to this claimed distinction would build on post-Burroughs authorities. In particular, both courts and legal writers have suggested that the Burroughs power is fully coextensive with Congress's sweeping authority to regulate in any way the "Manner" of House and Senate elections. If this parallel in fact

209. Burroughs, 290 U.S. at 545.
210. Id. at 547 (emphasis added).
211. See generally infra notes 264-87 and accompanying text.
212. Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1414 (9th Cir. 1995) (citing Burroughs in stating that "[t]he broad power given to Congress over congressional elections has been extended to presidential elections"); Association of Cmty. Orgs. for Reform Now v. Edgar, 56 F.3d 791, 793 (7th Cir. 1995); Bruce D. Brown, Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System, 15 YALE L. & POLY REV. 503, 524-25 n.98 (1997) (citing Burroughs for proposition that congressional-elections and presidential-elections powers are "coextensive"); Eugene Gressman, Uniform Timing of Presidential Primaries, 65 N.C. L. REV. 351, 355 (1987) (noting that the "Court employs the same ... broad treatment of vested congressional power" with respect to congressional control of both congressional and presidential elections); Matthew M. Hoffman, The Illegitimate President: Minority Vote Dilution and the Electoral College, 105 YALE L.J. 935, 973 n.177 (1996) (noting that courts in both Association of Community Organizations for Reform Now and Voting Rights Coalition "specifically held that congressional power to regulate presidential elections is coextensive with its power to regulate congressional elections under Article I"); Green, supra note 201, at 70 (asserting "that where not specifically constrained by the Constitution,
exists, national-ballot and voting-equipment controlling legislation clearly is permissible because the way in which votes are cast and counted indubitably involves "the ... Manner" of conducting a popular election. 213

We are not at all sure, however, that these authorities are correct in concluding that Burroughs recognizes a power with respect to presidential elections that reaches as far as Congress's broad textual authority to control the "Manner" of House and Senate elections. Neither Burroughs nor any later Supreme Court case made such a pronouncement, 214 and it may well be that a specific and express grant of power to control the manner of legislative elections is in logic more robust than an implied grant that flows from an ill-defined right of national "self-protection." 215 For two separate reasons, however, we believe the Burroughs power—even if less far-reaching than Congress's authority under Article I, Section 4—is broad enough to support national-ballot and voting-equipment legislation.

First, in our view, such legislation could be sustained even under the narrow "active cheating" reading of Burroughs because it would...

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213. See generally infra notes 264-87 and accompanying text.

214. Hoffman, supra note 212, at 973 n.177 (noting that "Burroughs ... does not appear to provide any strong support" for coextensive treatment of "congressional power to regulate presidential ... [and] congressional elections"). To be sure, Justice Black stated in Oregon v. Mitchell, 400 U.S. 112, 124 (1970), superseded by U.S. Const. amend XXVI, that "[i]t cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." Justice Black, however, was the sole member of the Court to make this claim because his opinion expressed only "his own view of the cases." Id. at 117. But cf. O'Brien v. Brown, 409 U.S. 1, 15 (1972) (Marshall, J., joined by Douglas, J., dissenting) (quoting this passage from Justice Black's opinion with approval; noting that Justice Black supported it by relying on Burroughs; and describing "Justice Black's analysis" as "decisive" in the Oregon case). Notably, commentators sometimes incorrectly attribute the views of Justice Black in Oregon v. Mitchell to the entire Court. See Leonard P. Stark, Note, The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?, 15 YALE L. & POL'Y REV. 331, 376 (1996).

215. Hoffman, supra note 212, at 973 n.177 (suggesting that Burroughs power does not reach to the full scope of Congress's power over House and Senate elections).
help guard against corruption by local election officials. A national ballot, for example, might well frustrate efforts to construct local ballots designed (1) to advantage one candidate over others for impermissible reasons, (2) to facilitate favoritism in the counting or recounting process, or (3) to confound double-checking conducted to discover fraud. Equipment laws likewise could provide useful tools to guard against electoral chicanery. The clear and accurate counting of ballots in the first instance will always reduce later opportunities to "fudge" returns. And Congress could readily find that certain types of equipment deter fraud by facilitating effective audits. 216

To be sure, ballot and equipment laws do not target fraud and corruption directly. They need not do so, however, because Burroughs requires only that these laws provide meaningful prophylaxes. After all, in Burroughs itself, the Court did not confront an outright congressional ban on vote-buying or bribery. 217 Rather, the law upheld in that case indirectly guarded against these evils by mandating campaign-contribution and campaign-

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216. See, e.g., Bruce Ackerman, Anatomy of a Constitutional Coup, LONDON REV. OF BOOKS, Feb. 8, 2001, at 3. Professor Ackerman notes, for example, that the "selection of equipment is delegated to local election boards" in all but eight states, and adds that "the dangers of partisan appointment to election boards are ... real." Id. Speaking of the recent election battle in Florida, Professor Ackerman asserts that Florida’s Secretary of State, who "suffer[ed] from an obvious conflict of interest," acted "to block, delay or nullify any manual recounts that threatened Bush’s diminishing lead." Id. at 5. He also asserts that, as Miami’s "election board prepared for a manual recount, a Republican mob successfully intimidated them into calling it quits." Id. at 3, 5. Whatever one might think about the accuracy of these claims, one thing is certain—to the extent that the potential for mischief existed in Florida, it was primarily the result of uncertainty generating ballots and machines. See, e.g., Gore v. Harris, 773 So.2d 524, 530 (Fla. 2000) (Shaw, J., concurring) (noting that "we routinely installed outdated and defective voting systems and tabulating equipment at our polls prior to the present election"); Ackerman, supra, at 3 (noting that more than 10,000 ballots were rejected in Miami "by the city’s pathetically inadequate voting technology"). It is also worth recalling that the difficulties created by the failings of such electoral systems may affect the outcome of no small number of presidential elections. See Rosenthal, supra note 30, at 1 n.3 & 7 (noting the razor-thin closeness of popular votes in election determining states in 1884, 1888, 1948, and 1960; noting also that "an infinitesimal shift of votes would have reversed the result" in "five successive elections from 1876 through 1892").

217. United States v. Original Knights of the KKK, 250 F. Supp. 330, 353 (E.D. La. 1965) (noting that "Burroughs is one of a number of cases dealing with corrupt election practices which go far beyond the act of voting in an election").
expenditure disclosures.\textsuperscript{218} Ballot and equipment laws are constitutional because, in a similarly causative way, they operate to discourage, deter, and disclose active wrongdoing in the electoral process.\textsuperscript{219} At least the Court could not dismiss this assertion as farfetched; it should therefore uphold these laws because "the relationship between the means adopted and the end to be attained, are matters for congressional determination alone."\textsuperscript{220}

Even assuming that our active-cheating-control arguments do not carry the day, we would uphold ballot-and-equipment legislation under \textit{Burroughs} because we believe that the power recognized in that case should be more broadly conceived.\textsuperscript{221} \textit{Burroughs} by its terms suggests that federal legislation should stand if it genuinely "seeks to preserve the purity of presidential and vice presidential elections."\textsuperscript{222} In \textit{Oregon v. Mitchell},\textsuperscript{223} Justice Black drew on such passages to recognize "a residual power in Congress to insure that [the highest federal] officers represent their national constituency as responsively as possible."\textsuperscript{224} Such a power logically reaches beyond prevention and punishment of outright corruption.\textsuperscript{225} Indeed, ensuring that the President represents the national constituency "as responsively as possible" requires, at its core, an

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\textsuperscript{218} \textit{Burroughs} v. United States, 290 U.S. 534, 542 (1934) (citing pertinent sections of the Federal Corrupt Practices Act).

\textsuperscript{219} \textit{See supra} note 216 and accompanying text.

\textsuperscript{220} \textit{Burroughs}, 290 U.S. at 548 (emphasis added).

\textsuperscript{221} \textit{See}, e.g., Joseph R. Biden, Jr., \textit{Public Financing of Elections: Legislative Proposals and Constitutional Questions}, 69 NW. U. L. Rev. 1, 46-47 (1974) (describing language of \textit{Burroughs} as "broad" and adding that "constitutional provisions dealing with the regulation of elections have ... been broadly construed").

\textsuperscript{222} \textit{Burroughs}, 290 U.S. at 544 (emphasis added); \textit{see also} \textit{Original Knights of KKK}, 250 F. Supp. at 353 (suggesting that \textit{Yarbrough} rests on "the transcendent interest of the federal government" to legislate against activities that have "alloyed the purity of the federal political process"); Gressman, \textit{supra} note 212, at 356 (concluding that \textit{Burroughs} vested Congress with broad power to preserve the purity of the presidential elections).

\textsuperscript{223} 400 U.S. 112 (1970).

\textsuperscript{224} \textit{Id.} at 124 n.7; \textit{see id.} at 134 (reiterating that the national government has "power ... to insure that the officials who fill [federal elective] offices are as responsive as possible to the will of the people whom they represent"; thus "the Federal Government... [has] the final control of the elections of its own officers").

\textsuperscript{225} \textit{See id.} at 291 (Stewart, J., dissenting) (suggesting that \textit{Burroughs} gives Congress power to assure both that presidential elections are "free from corruption" and that they are "orderly"); Stark, \textit{supra} note 214, at 376 (asserting that "Congress's broad authority" under \textit{Burroughs} would permit it to regulate the timing of presidential primaries and caucuses because of "problems associated with the disproportionate influence of early states").
assurance that the candidate who actually won the election be declared the winner. Federal office holders simply cannot be trusted to represent constituents “responsively” if they are placed in office by a process that frustrates the wishes of the governing electorate. And a person’s sacred vote is no more a vote if it is excluded from fair consideration by dysfunctional equipment than by dishonorable vote counters. We thus read Burroughs to authorize meaningful congressional efforts to ensure the basic accuracy, and thus the essential integrity, of vote counting in presidential elections. Put another way, if “[i]t is ... essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people,” it is no less essential that those representatives should be the actual choice of the people.

Is there modern judicial authority that supports this view of the Burroughs power? There is. In 1993, Congress adopted the National Voter Registration Act, more commonly known as the “Motor Voter Law,” and thereby forced states to broaden opportunities for voters to register for federal elections. In upholding this enactment, lower courts drew no distinction between registration

226. See, e.g., Original Knights of the KKK, 250 F. Supp. at 355 (“The foundation of our form of government is the consent of the governed.”) (quoting United States v. Wood, 295 F.2d 772 (5th Cir. 1961)).

227. E.g., Rosenthal, supra note 30, at 35 (suggesting that the Burroughs power centers on “effectuation of the voters’ wishes”).

228. Id. (“But of what avail is it to be able to protect a voter against interference with the casting or counting of his ballot in the first stage of the process—the choosing of electors—if Congress cannot ensure that his vote will be effective in the election of the President?”); see also United States v. Mosley, 238 U.S. 383, 386 (1915) (noting that “[w]e regard it as equally unquestionable that the right to have one’s vote counted is as open to protection by Congress as the right to put a ballot in a box”). See generally Reynolds v. Sims, 377 U.S. 533, 555 (1964) (“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 representative government.”).

229. Ex parte Yarbrough, 110 U.S. 651, 666 (1884).

230. See Oregon, 400 U.S. at 134 (finding congressional legislation with respect to absentee ballots for presidential and other federal elections permissible because “Congress was attempting to insure a fully effective voice to all citizens in national elections”).

231. E.g., Buckley v. Valeo, 519 F.2d 821, 926 (D.C. Cir. 1975) (asserting that “Burroughs ... holds that the congressional power to protect the sanctity of elections extends to the selection of presidential electors”), aff’d in part and rev’d in part, 424 U.S. 1 (1976) (per curiam).

for congressional and presidential races.\textsuperscript{233} Nor did they require Congress to show that the Motor Voter Law countered corruption and active fraud. Thus the argument from authority is made. If Congress has power under \textit{Burroughs} to regulate state registration practices to facilitate, broaden, and ease full voter participation in presidential elections, it should likewise possess power to adopt a national-ballot law and an election-equipment mandate to achieve precisely those same ends.

2. \textit{The Printz Problem}

This discussion suggests that the \textit{Burroughs} power is broad enough to support national-ballot and voting-equipment legislation. Whenever Congress exercises one of its powers, however, the question arises whether its action offends an "external restraint" that emanates from other provisions of the Constitution.\textsuperscript{234} We identified one such restraint, the anticommandeering principle of \textit{Printz v. United States},\textsuperscript{235} in our earlier discussion of the Commerce Clause.\textsuperscript{236} The argument is predictable that the \textit{Printz} rule should trump not only exercises of the commerce power, but also any claim of authority to enact ballot or equipment legislation under the principle of \textit{Burroughs}. According to this argument, one can distinguish any ballot-and-equipment law from the law at issue in \textit{Burroughs} itself because the latter law involved only a requirement that private citizens file disclosure forms with federal authorities. Forcing state election officials to use national ballots and specified voting equipment does not involve a regulation of the conduct of private citizens. Rather, the very purpose and essential effect of such regulation is "to direct the functioning of the state executive," despite the teachings of \textit{Printz}.\textsuperscript{237}

Does the principle of \textit{Printz} apply in this context? One argument for its application is straightforward: If the \textit{Printz} rule trump

\textsuperscript{233} See supra note 212 (citing leading cases).
234. \textit{E.g.}, \textit{Buckley}, 424 U.S. at 135 (noting the constraint based on presidential appointment authority that may override congressional attempts to regulate federal elections under the Necessary and Proper Clause).
236. See supra notes 162-65 and accompanying text.
congressional exercises of its expressly granted Commerce Clause power (as it plainly does), then it a fortiori should trump exercises of an implied power to regulate presidential elections. Moreover, some passages in Printz (and in the historical record said to support it) bolster the contention that its rule applies (at least in the absence of a textual exception) to exercises of congressional power as a general matter.

Do these arguments and materials mean that the Printz rule preempts otherwise proper exercises of the Burroughs power that take the form of mandates to the states? We think not. To begin with, Printz (like its doctrinal predecessor, New York v. United States) focused on the constitutionality of federal legislation enacted under the Commerce Clause. The results in these cases were thus explicable in terms of history and policy: they reflected the understandable efforts of no small number of earlier decisions to confine the distinctively (if not infinitely) elastic power to regulate any activities of any kind that, in the aggregate, affect interstate commerce. The broad potential such a power holds for stripping away state authority, however, simply is not presented by a power that focuses solely and narrowly on federal control of federal elections. In addition, it seems reasonable on the face of things to say that exercises of the commerce power should focus on those individuals or groups who actually engage in commerce; the regulation of elections, in contrast, inescapably involves placing duties on government officials because they conduct elections.

238. See supra note 201 (discussing implied nature of the Burroughs power). In Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), the Court provided some support for this position, declaring that "the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments ... to carry into effect all the rights and duties imposed upon it by the constitution." Id. at 616 (emphasis added).

239. See, e.g., Green, supra note 201, at 78 ("Nowhere is the [Printz] holding explicitly limited to the Commerce Clause. Nor should it be: the underlying rationale of the case is no less applicable to most other grants of federal power.").


243. See supra notes 154-59 and accompanying text.

244. See Ex parte Siebold, 100 U.S. 371 (1879) (rejecting anticommandeering argument directed at federal law that controlled state election officials); Green, supra note 201, at 68.
Finally, the power of "self-protection" that gave rise to the Burroughs decision constitutes (at least in substantial measure) a power to safeguard the nation from the risk of disruption and power-grabbing by the states; it logically follows that the exercise of that power must operate not just on private citizens, but on the states themselves.

There is a final argument against applying Printz in this context. In New York v. United States, the Court explained that the anti-commandeering principle exists in part to foster policymaker accountability by disentangling the lines of government authority. If a state implements a policy, it should in fact be a state policy, so that state officials will be fairly rewarded or punished for that policy at the polls. Thus, federal officials should be unable to force state officials to adopt federal policies, lest voters hold state officials responsible for policies not of their own making.

When it comes to national election rules, however, the problem of blurred accountability cannot be avoided. This is so because a "unique legal architecture ... envisions a complex interlacing of federal and state interests in matters of voting, elections, and

(noting that, after Siebold, state officials "of course" may "be conscripted to execute federal law" under the Times, Places, and Manner Clause); see also id. at 79 (noting that "elections are one of the few activities government must carry out"; observing that "their administration [could not] be privatized").

245. E.g., Green, supra note 201, at 51-52, 55 (noting concerns of the Framers in the area of elections for federal office "that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience and prejudices"); see also Oregon v. Mitchell, 400 U.S. 112, 120 n.2 (1971) (quoting comments in the framing period, including a Massachusetts delegate who stated: "If the state legislatures are suffered to regulate conclusively the elections of the democratic branch, they may ... finally annihilate that control of the general government, which the people ought always to have"), superseded by U.S. CONST. amend XXVI; United States v. Original Knights of the KKK, 250 F. Supp. 350, 355 (1965) (suggesting that federal power to protect integrity of federal elections authorizes regulation of "public officials or private persons").

246. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 432 (1819) (noting that "the American people ... did not design to make their government dependent on the states").


248. Id. (asserting preference that Congress encourage rather than mandate state legislation so state officials remain fairly accountable for implementing federally initiated policy choices).

political participation.”\textsuperscript{250} In such a setting, citizens are not likely to assume, for example, that a national ballot emanates solely from the state. A national ballot, after all, is a \textit{national} ballot. It follows that citizens neither logically should, nor blithely would, hold state policymakers accountable for all rules and procedures that govern federal elections. For this reason too, the principle of \textit{Printz} should not apply in the distinctive context of federal vote-process regulation.

3. The Negative-Implication Argument from the “Times, Places and Manner” Clause

There is a separate, text-driven argument against congressional invocation of an implied power to pass national-ballot and voting-equipment laws. Article I, Section 4 and the Seventeenth Amendment expressly grant Congress the power to regulate the “Times, Places and Manner of holding Elections for Senators and Representatives.”\textsuperscript{251} At the same time, Article II gives Congress power to regulate only “the Time” of the selecting and the gathering of electoral college members.\textsuperscript{252} The argument that arises is one from negative implication. If Congress may govern the “Times, Places and Manner” of congressional elections, but only the “Time” of presidential elections, then Congress should not be able to control the “Manner” of presidential elections, including the manner in which citizens cast their votes.\textsuperscript{253}

The first difficulty with this argument is that it was “squarely rejected” in \textit{Burroughs}.\textsuperscript{254} Nor can \textit{Burroughs} be pushed aside as an old and misbegotten aberration in the law of presidential elections.

\textsuperscript{250} Issacharoff et al., supra note 175, at 6.
\textsuperscript{251} U.S. Const. art. I, § 4, cl. 1; U.S. Const. amend. XVII.
\textsuperscript{252} U.S. Const. art II, § 1, cl. 4.
\textsuperscript{254} Gardner, supra note 253, at 984; see also Burroughs v. United States, 290 U.S. 534, 544-45 (1934).
For example, in *Buckley v. Valeo*\(^{255}\) the Court noted that there is "broad congressional power to legislate in connection with the elections of the President and Vice President."\(^{256}\) But it makes no sense to say that Congress has "broad ... power" over presidential elections if it cannot in any way regulate the "Manner" of such elections. This point takes on added, even irresistible, force when one recognizes that Congress's power to regulate the "Manner" of House and Senate elections entails a "general supervisory power over the whole subject" of such elections.\(^{257}\) It is simply a non sequitur to say that Congress has meaningful authority over

\(^{255}\) 424 U.S. 1 (1976) (per curiam).

\(^{256}\) Id. at 14 n.16. Such pronouncements strongly undermine reliance on the Court's decision in *McPherson v. Blacker*, 146 U.S. 1 (1892), to claim a lack of congressional power in this area. In that case, the Court observed that:

> Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes ... but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded.

*Id.* at 35; *see also id.* (asserting that "the appointment and mode of appointment of electors belong exclusively to the States"); *id.* at 27 (indicating that Article II "convey[s] the broadest power of determination" and "leaves it to the [state] legislature exclusively to define the method" of appointment of presidential electors).

These statements must be read in context. The sole issue in *McPherson* was whether a state could adopt a district-based system of choosing presidential electors. *Id.* The Court's decision that it could is entirely consistent with the argument made here, for there can be no doubt that Article II committed this sort of basic decision as to the elector-selection process to the state legislature's discretion. *See infra* notes 271-74 and accompanying text. More to the point, the import of *McPherson* is clarified by the Court's later decisions in *Burroughs* and *Buckley*, which unmistakably held that Congress does have power to regulate aspects of presidential elections that extend well beyond the time-related questions expressly mentioned in Article II, Section 1. Recognizing this congressional authority is not, of course, inconsistent with the idea "that the State legislature's power to select the manner for appointing electors is plenary." *Bush v. Gore*, 531 U.S. 98, 104 (2000); *see also Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (alluding to states' "extensive power" under the Article II Manner Clause). That power is, in fact, plenary in the critical sense that state legislatures alone possess it. But that fact does not mean that Congress cannot invoke its own other powers (including, but not limited to, the *Burroughs* power), which, if exercised within their proper limits, generate federal laws that override contrary state laws pursuant to the Article VI Supremacy Clause. *Cf.* *Ray v. Blair*, 343 U.S. 214, 227 (1952) (noting that states' manner-of-appointment power is "subject to possible constitutional limitations").

\(^{257}\) *Smiley v. Holm*, 285 U.S. 355, 366, 387 (1932) (noting that "times, places and manner" language is "comprehensive" and provides "authority to provide a complete code for congressional elections" and authorizes, among other things, "prevention of fraud and corrupt practices" and regulation of the "counting of votes"). *See generally Green*, *supra* note 201, at 63 (asserting that this "power of Congress to regulate federal elections is vast").
presidential elections if it cannot (because of the negative implications of Article I, Section 4) enact a single law that would fall within the “general supervisory power” over such elections.

An illustration helps make the point. All agree that Congress’s power to regulate the “Manner” of congressional elections permits it to criminalize ballot-box stuffing in connection with such elections. Yet if Congress (as the negative-implication argument indicates) cannot control in any way the “Manner” of presidential elections, it follows that Congress cannot pass an anti-ballot-box-stuffing measure applicable to presidential races. Such a conclusion, however, would stand Burroughs on its head because that case (even on the very narrowest reading) holds that Congress may enact just this sort of legislation to counter “corruption” and “fraud” in the presidential election process. In short, the “Times, Places and Manner Clause” negative-implication argument proves too much. Embracing that argument would not fairly narrow the Burroughs power; it would blow Burroughs away.

The negative-implication argument also fails to take account of important considerations of constitutional history. Why? Because the Framers who forged the text of Article II had good reason not to give Congress a power to control the “Manner” of choosing presidential electors in light of their expectation that many states would assign the task of elector-choosing to the state legislature, rather than to the general electorate. Even the most nationalist-

258. See United States v. Classic, 313 U.S. 299, 330 (1941) (Douglas, J., dissenting) (stating that Congress has the power “to protect Congressional elections from any and all forms of pollution”); Ex parte Siebold, 100 U.S. 371 (1879) (upholding federal conviction for such behavior).

259. See generally supra notes 207-10 and accompanying text.

260. See supra notes 17-28 and accompanying text. As explained by Professor Ackerman:

[Under the Framers' plan,] legislatures were even free to name their state's electors without referring the matter to the larger voting public, and many legislatures availed themselves of this privilege during the early decades. The prevailing ideology regarded political parties as dangerous, and it seemed risky to allow them to engage in demagogic campaigns in support of their Presidential favourites. Why not trust the legislature to select men of probity who might wisely cast the state's electoral votes without populist pandering?

Ackerman, supra note 216, at 3; see also Gray v. Sanders, 372 U.S. 368, 376 n.8 (1963) (“The electoral college was designed by men who did not want the election of the President to be left to the people.”); Dougherty, supra note 22, at 1 (“The tendency in this democratic age is to overlook the fact that the fathers of the Constitution were not believers in the rule of the people and that it was not until after 1800 that manhood suffrage was adopted in any of
minded Framers would have balked at letting the newly formed government of the United States control in detail the "Manner" in which state legislatures conducted their own internal business. Put another way, the negative implication argument rests on a faulty effort to compare constitutional apples and oranges. An Article I clause that concerns "[the Times, Places and Manner of holding Elections]" simply creates no fair implications about an Article II clause that deals not with electing, but with "appoint[ing]," presidential electors. At least this is the case when those who crafted these clauses well understood that "appointing" often would be done without "holding elections" at all.

4. The Article II "Manner" Argument

Even if unsuccessful in making a negative-implication argument based on Article I, opponents of congressional-ballot and equipment-law reforms might advance a separate text-based line of analysis. On this view, such legislation would clash with each state's express authority under Article II, Section 1 to choose electors "in such Manner" as its legislature dictates. According to this argument, Burroughs is beside the point in assessing ballot-and-equipment laws because the campaign finance measures at issue in that case did not involve the actual "Manner" of "appoint[ing]" electors. In contrast, the argument continues, ballot-and-equipment laws do concern the "Manner" of appointment because they concern critical features of the vote-rendering and vote-collecting process itself. Advocates of the Article II "Manner" argument can also point to In re Green. The Court in that case, while specifically discussing the

the States."). See generally Rosenthal, supra note 30, at 4 ("[T]he manner of presidential selection evolved very quickly into a form which would have been unrecognizable to the Framers. With ... the advance of democracy, each state eventually directed that its electors be chosen by universal suffrage.").

261. See FERC v. Mississippi, 456 U.S. 742, 769 (1982); id. at 792-95 (O'Connor, J., dissenting).


263. See, e.g., Paul Carman, Comment, Cousins and La Follette: An Anomaly Created by a Choice Between Freedom of Association and the Right to Vote, 80 NW. U. L. REV. 666, 674 (1985) (noting that "article II, section 1, clause 2 provides for the appointment of the electors rather than their election").

264. U.S. CONST. art. II, § 1, cl. 2.

265. 134 U.S. 377 (1890).
states' Article II manner-of-appointment power, observed that "where ... the mode of appointment prescribed by the law of the State is election by the people," Congress "has never undertaken ... to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States." 266

This passage, however, describes only what Congress had done (or, more accurately, what it had not done), not what it could do if it chose to act. 267 The Article II "Manner" argument, like the negative-implication argument from Article I, 268 also suffers greatly from the vice of proving too much. Under Burroughs, for example, Congress clearly can punish fraud in voting for electors accomplished through state officials' intentional use of deceptive, or even flatly inaccurate, ballots. 269 Yet if states, and states alone, have power to control every aspect of the "Manner" of voting, even this starkly permissible exercise of the Burroughs power would become unconstitutional. 270

Most important of all, permitting Congress to invoke Burroughs to mandate use of a national ballot and specified voting technologies would not encroach on the protected core of state prerogatives in the field of presidential elector selection. Even if such a law were held constitutional, it would remain exclusively within the control of each state to assign the elector-selection function to its legislature, its executive, or any subgroup of its electorate it wishes to empower. 271 It also would remain open to those states that choose

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266. Id. at 380.
267. See, e.g., Ex parte Yarbrough, 110 U.S. 651, 659-61 (1884) (noting that Congress's delay in legislating to protect federal officials in the exercise of their duties did not bespeak a lack of the power; it showed only that "no occasion had arisen which required such legislation").
268. See supra notes 258-59 and accompanying text.
270. See Oregon v. Mitchell, 400 U.S. 112, 124 n.7 (1971) (noting that the Court "in Burroughs ... specifically reject[ed] a construction of Art. II, § 1, that would have curtailed the power of Congress to regulate [presidential] elections"), superceded by U.S. CONST. amend XXVI. See generally Biden, supra note 221, at 45 (asserting that the proposition "that the states possessed exclusive authority over the 'manner' of presidential elections was put to rest in Burroughs").
271. Yarbrough, 110 U.S. at 651 (noting that implied federal authority to safeguard federal elections "is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes"); Green, supra note 201, at 56 (noting
an elective system to allocate electoral votes, without any federal interference, by way of a proportionate-representation, quasi-proportionate-representation, or a winner-take-all system. Ballot-and-equipment laws simply do not control systems for selecting electors, substantive selection criteria, or candidates who might qualify as proper electors. Rather such laws concern only the implementing procedures to be used if one available substantive manner of selection—that is, the election manner—is chosen by the state. For these reasons, on the better view, ballot-and-equipment laws do not unduly undermine state control of the “manner” in which states “appoint” electors in the relevant constitutional sense.

272. See Hoffman, supra note 212, at 973 (stating that “[p]roper respect for principles of federalism would dictate that, while Congress might place restrictions on the electoral system, neither Congress nor the federal courts could dictate that all states employ a particular system”); Michael J. O’Sullivan, Artificial Unit Voting and the Electoral College, 65 S. Cal. L. Rev. 2421, 2437 n.114 (1992) (emphasizing that Burroughs reserves choices about the method of selecting presidential electors to the states).

273. Ray v. Blair, 343 U.S. 214, 227 (1952) (suggesting that conditioning elector eligibility on a pledge to support particular candidates, if elected, may be a proper “exercise of the state’s right to appoint electors in such manner ... as it may choose”); id. at 231 (Jackson, J., dissenting) (indicating that “personal qualifications” for electors are to be prescribed by the state).

274. Of course, in this area, as in others, the difference between “substance” and “procedure” is not always stark. See, e.g., Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) (considering the difference between “substance” and “procedure” for purposes of the Rules Enabling Act). The difference between selecting an electoral system and fixing the mere form of the ballot used in that system, however, seems stark enough to us.

275. See United States v. Original Knights of the KKK, 250 F. Supp. 330, 354 (E.D. La. 1965) (“Burroughs holds that Congress has the implied power to protect the integrity of the processes of popular election of presidential electors once that mode of selection has been chosen by the state”) (internal quotation omitted). Lest we be accused of rendering federal authority in this area free of any practical restraints, we note that we would stop well short of recognizing the scope of federal congressional power endorsed by even the great constitutional textualist, Justice Black. In particular, Justice Black found in Burroughs an endorsement of congressional power to control the qualifications of voters in presidential elections. Oregon v. Mitchell, 400 U.S. 112, 122-24 (1970) (recognizing authority of Congress to establish nationwide entitlement of eighteen-year-olds to vote in such elections), superseded by U.S. Const. amend. XXVI. We disagree. In our view, the Framers gave the states free rein (subject to restrictions later laid down in the Fourteenth, Fifteenth, and other amendments) to put in place whatever body of selectors of presidential electors the state might choose. Put another way, just as surely as a state could delegate this selection task to state legislators, state judges, or state executive officials, see supra note 31 and accompanying text, the state could delegate the task to some other body of state citizens, defined in whatever way the state legislature might choose, free of federal legislative (albeit
This reading of the Article II Manner Clause jibes with themes of structure and history sounded in modern Supreme Court precedents. To begin with, in Anderson v. Celebrezze, the Court emphasized that state restrictions on presidential elections “implicate a uniquely important national interest” because “the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation.” The Court added that “the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State’s boundaries.”


277. Id. at 795; accord Bush v. Gore, 531 U.S. 48, 112 (2000) (Rehnquist, C.J., concurring) (quoting and relying on this language to help justify federal court intervention in the presidential-election case even though “[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law”); see also Mitchell, 400 U.S. at 148 (Douglas, J., concurring) (“In presidential elections no parochial interests of the State, county, or city are involved.”).

278. Anderson, 460 U.S. at 795. To be sure, there is dicta in Blitz v. United States, 153 U.S. 308 (1894), that might be read to say that Congress has no greater power to regulate presidential elections than elections for ordinary state offices. See id. at 313 (distinguishing between votes at election “for a Representative in Congress,” on the one hand, and “for state officers, including Presidential electors” on the other, adding that, under the operative statutes, if a voter committed fraud in voting for a state officer, “it was an offence [sic] against the State, punishable alone by the State”); id. at 314-15 (noting that “[v]oting, in the name of another, for a state officer” is a matter with which “the national government has no concern” so that indictment under relevant federal statutes “should clearly show that the accused actually voted for a Representative in Congress”). In Burroughs and its progeny, however, the Court plainly repudiated any such view of governing constitutional doctrine. If more is needed, it is provided by an appropriately holistic reading of the Constitution’s text, particularly in its present-day form. For example, Section 1 of the Twenty-Fourth Amendment outlawed poll taxes, but only “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.” U.S. CONST. amend. XXIV, § 1. The obvious implication is that there is a significant constitutional divide between what are functionally state elections and what are functionally federal elections, that is, congressional and presidential elections. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 & n.17 (1995) (noting that “the Constitution treats both the President and Members of Congress as federal officers”; characterizing elections of electoral college members as “federal elections”; and indicating that states “reserve” power over state-officer, but not presidential-elector, elections under the Tenth Amendment); id. at 844 (Kennedy, J., concurring) (noting salience of federal interests when dealing with electoral “rights that do not derive from the state power in the first instance but that belong to the voter in his or her capacity as a citizen of the United States”); supra note 193 (indicating that the Fourteenth Amendment’s protection of “privileges or immunities of citizens of the United States” extends to presidential-elector, but not state-officer, elections).
claims of control over presidential elections are logically weaker than claims of control over other elections bolsters the argument for equating the scope of federal power over presidential and congressional elections. Even if courts do not push the implied self-protection power this far, however, the reasoning of Anderson at least supports a more modest conclusion: Courts should not give the ambiguous Article II, Section 1 “Manner” Clause such an ambitious interpretation that the Burroughs power all but disappears.

This conclusion finds even greater support in historical considerations highlighted by the Court in U.S. Term Limits, Inc. v. Thornton. There, in striking down state-imposed term limits for federal legislators, the Court noted that the Framers had sought in a variety of ways “to minimize the possibility of state interference with federal elections.” More importantly, this tendency reflected a deep theoretical stance: the Framers saw American citizens as forging a “direct link” with the new federal government they had formed in their distinctive capacity as “citizens of the United States.” As Justice Kennedy explained in his concurring opinion:

The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

279. See supra notes 211-12 and accompanying text.
281. Id. at 808.
282. Id. at 803.
284. U.S. Term Limits, 514 U.S. at 838 (Kennedy, J., concurring).
It is true that, as part of this "unprecedented" system, states received power to determine the "Manner" of selecting presidential electors. But it also is true that the function of those electors was to select a national president. In the end, courts might give the "Manner" Clause a sweeping reading that precludes almost all federal lawmaking with regard to presidential elections, including in the form of "procedural" rules that concern matters like the selection of ballots and equipment. Alternatively, courts might give the clause a more moderate but still expansive scope by targeting its preclusive effect on "substantive" matters like who is eligible to vote for electors. The "direct link" logic of the U.S. Term Limits case strongly favors this latter reading and the consequent conclusion that congressional enactment of ballot-and-equipment laws is permissible.


286. See supra notes 271-73 and accompanying text.

287. See Green, supra note 201, at 75 (arguing that the Motor Voter Act is consistent with U.S. Term Limits in that it improves the link between national citizens and the national government). It bears emphasis that the themes struck in these recent decisions are not merely self-serving modern rationalizations, divorced from constitutional history, for stripping away state powers. Indeed, they fit squarely both with observations made more than a century ago in Ex parte Yarbrough, see supra notes 196-99 and accompanying text, and with the even earlier remarks of Justice Joseph Story. As he explained in 1833:

What would be said of a clause introduced into the national constitution to regulate the state elections of the members of the state legislatures? It would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments. It would be deemed so flagrant a violation of principle, as to require no comment. It would be said, and justly, that the state governments ought to possess the power of self-existence and self-organization, independent of the pleasure of the national government. Why does not the same reasoning apply to the national government? What reason is there to suppose, that the state governments will be more true to the Union, than the national government will be to the state governments?

2 STORY, supra note 28, § 817 (emphasis added) (quoted in Oregon v. Mitchell, 400 U.S. 112, 135 n.17 (1971), superceded by U.S. CONST. amend. XXVI). To be sure, Justice Story's remarks came in a discussion of recognizing unrestrained state power over federal congressional elections. Id. § 818. But their logic, as later recognized by the Court in both Yarbrough and Burroughs, fully carries over to unrestrained state control of elections that determine the nation's President. See supra notes 196-207 and accompanying text.
5. Further Problems with the Burroughs Power

In the end, we believe the Burroughs power has a wide enough reach to embrace national-ballot and voting-equipment legislation. As we have noted, however, four separate arguments, each of which is credible in its own right, cut against our conclusion. Some justices might mount a fifth line of attack, rooted in language from Burroughs that emphasizes the inherently multistate nature of the activities controlled by the legislation at issue in that case.\(^{288}\) Still other justices might claim that the nontextual nature of the Burroughs power warrants its full and outright repudiation.\(^{289}\) Given the resulting vulnerability of a Burroughs-based defense of congressional election reforms, it behooves proponents of reform to look for express grants of power that might support national ballot and equipment laws. One such grant may rest in the clause that

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288. In particular, Burroughs might be read to apply only "to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately." See supra note 202 and accompanying text (quoting Burroughs). On this reading, the result in Burroughs was supportable only because the law at issue in that case involved organizations operating in multiple states. It might follow (according to this reading) that Congress may not intervene to correct problems with ballots and election machines because states could "adequately" deal with those problems internally, even if they choose not to do so. See Stark, supra note 214, at 375 (suggesting possibility of limiting federal regulation of presidential elections to situations in which states cannot adequately handle the regulated problem on their own); The Supreme Court, 1970 Term, supra note 285, at 155 n.19 (asserting that Burroughs "relied explicitly on the inability of any one state" to deal with "corruption that ... interstate committees might spawn" and that fixing voting qualifications "poses no parallel problem"). We would reject this narrow conception of the Burroughs power because (1) it ignores most of the reasoning of Burroughs itself; (2) it is inconsistent with later expansive characterizations of the Burroughs power in cases like Buckley v. Valeo, see supra note 256 and accompanying text; and (3) it misses the key point that threats to national interests in this area can come as easily from the actions or omissions of states themselves as from private entities more readily subject to federal, rather than state, control. See supra notes 244-46 and accompanying text. Indeed, it seems fair to say that if any problems with regard to presidential elections are "beyond the power of the state ... to deal with adequately," Burroughs v. United States, 290 U.S. 534, 544-45 (1934), those problems are ones created by a state's own willful choices to compromise the integrity of national elections, including through use of antiquated ballots and voting machines.

289. E.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting) (advocating repudiation of so-called dormant Commerce Clause in part because of its nontextual nature); cf. Carman, supra note 263, at 675 (arguing that Yarbrough "properly read" is a Fifteenth Amendment case so that its invocation in Burroughs reflected a "misreading"). But see Ex parte Yarbrough, 110 U.S. 651, 658 (1884) (noting that power over federal elections may exist even though an "advocate of the power" is not "able to place his finger on words which expressly grant it").
vests power to count electoral votes in federal, rather than state, authorities.

D. The Congressional Counting Power

The Twelfth Amendment, in conformance with the original Constitution, specifies that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates [submitted by presidential electors] and the votes shall then be counted." The federal authority to count votes submitted by state-appointed electors clearly does not, of its own force, permit Congress to compel state use of a national ballot or specified equipment when ordinary citizens go to the polls. (After all, it is one thing to count; it is a very different thing to vote.) But, as leading legislators were quick to observe in the wake of the Hayes-Tilden election debacle, Congress's power to count electoral votes does not stand alone. It is supplemented by Congress's authority under Article I, Section 8 to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."  

The counting power argument for national-ballot and equipment laws thus proceeds in two steps. First, Congress may pass laws that are "necessary and proper," that is "convenient" or "useful," for carrying into execution the counting power. Second, mandated state use of a national ballot and of high-quality equipment is conducive to a proper count because it eliminates difficulties in counting that might otherwise arise. This two-step logic has an appealing

290. U.S. Const. amend. XII.  
291. See supra notes 93-96 and accompanying text.  
294. See id. at 413-15.  
295. A concrete example helps make the point. Had the Supreme Court not injected itself into the election of 2000, Congress would have had to sort out disputes about electoral votes from Florida. Any such dispute might have focused on the confusing "butterfly ballot" used in Palm Beach County. Litigation over this ballot could have delayed Florida's final certification of its electors beyond the "safe harbor" deadline established by 3 U.S.C. § 5 (2000). Even if a timely certification had occurred, use of this ballot might have caused a
simplicity and comports with the broad construction of the Necessary and Proper Clause developed in other contexts.\textsuperscript{296} For three separate reasons, however, this line of analysis is subject to attack, though in the end we find that none of these challenges carries the day.

First, the Necessary and Proper Clause by its own terms vests authority in Congress to carry into effect only "the foregoing Powers, and all other Powers" vested by the Constitution in the federal government.\textsuperscript{297} There is not, however, a congressional \textit{power} to count votes; there is a congressional \textit{duty}.\textsuperscript{298} Thus (so the argument goes), the Necessary and Proper Clause does not apply at all in this distinctive context.

We would reject this first argument on the theory that the vesting of a duty, particularly one as important as determining the identity of our President, inescapably carries with it the grant of a "power" in the sense that that word is used in the Necessary and Proper Clause.\textsuperscript{299} Indeed, we think there is a strong \textit{a fortiori} argument to be made here. If Congress can do anything appropriate to carry into effect powers it may (but need not) exercise, does it not logically follow that it can do anything appropriate to carry out those powers it has no choice but to wield? The recognition of the existence of less urgently needed powers logically dictates the recognition of more urgently needed powers as well.\textsuperscript{300}

\textsuperscript{296} E.g., United States v. Classic, 313 U.S. 299, 320 (1941) (asserting that the Clause has been "liberally applied").
\textsuperscript{297} U.S. CONST. art. 1, \S 8, cl. 18.
\textsuperscript{298} U.S. CONST. amend. XII (stating that "the votes shall then be counted") (emphasis added).
\textsuperscript{299} The thought is not a new one. \textit{See supra} notes 91, 95 and accompanying text (discussing commentary made in the wake of the Hayes-Tilden election, referring to the Counting Clause "power").
\textsuperscript{300} Notably, the Court's seminal decision in \textit{McCulloch v. Maryland} helped undermine any suggestion that the duty imposed on Congress to count votes negates or diminishes the operation of the Necessary and Proper Clause in this context. \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 409-10 (1819) ("The government which has a right to do an act, and has
A second argument against recognizing a broad counting power draws on the proposition that the policies that led to the Court's historically broad application of the Necessary and Proper Clause do not apply in this context. In giving a far-reaching interpretation to the so-called "Sweeping Clause," the Court in *McCulloch v. Maryland* focused on Congress's powers to shape the primary activities of government: the powers to wage war, to tax, to borrow, to spend, to regulate commerce.\(^{301}\) Faced with the need to ensure the "beneficial execution"\(^{302}\) of these "great powers,"\(^{303}\) the Court embraced a construction of the Necessary and Proper Clause that would best permit Congress to respond to the various "crises of human affairs"\(^{304}\) destined to arise over "ages to come."\(^{305}\) Such reasoning, according to this second argument, does not carry over to the narrow, even quasi-ministerial, task of simply counting electoral votes.\(^{306}\)

In our view, this argument fails for a simple reason. If the Counting Clause creates a power, then the Necessary and Proper Clause attaches, and so does the long-settled any-means-that-are-useful interpretation of the Clause first adopted in *McCulloch*.\(^{307}\) This straightforward "necessary means necessary" logic seems controlling to us. But if more is needed, it can be supplied. This is so because the practical problems that crop up in applying the counting power are not different in kind from the problems that arise in implementing other constitutional powers. The rich variety of counting-related problems that might arise in a future of computers, cyberspace, mass enfranchisement, and hanging chads were, after all, "exigencies which, if foreseen at all, must have been

\(^{301}\) Id. at 407-08.
\(^{302}\) Id. at 415.
\(^{303}\) Id. at 407.
\(^{304}\) Id. at 415 (emphasis omitted).
\(^{305}\) Id.
\(^{306}\) Buckley v. Valeo, 424 U.S. 1, 133-34 (1976) (per curiam) (characterizing Counting Clause "as conferring upon [the] two Houses the same sort of power 'judicial in character' ... as was conferred upon each House by Art. I, § 5 with respect to elections of its own members" and noting that this is "not a general legislative power") (quoting Barry v. United States, 279 U.S. 597, 613 (1929)).
\(^{307}\) *McCulloch*, 17 U.S. at 413.
seen dimly” by the Framers more than two centuries ago.\textsuperscript{308} Thus, the same flexibility-is-needed argument that drove \textit{McCulloch’s} broad reading of the Necessary and Proper Clause carries over to the task of implying “convenient means” for implementing the counting power.\textsuperscript{309}

There is a final argument for rejecting congressional authority to pass ballot and equipment legislation under the Counting and Necessary and Proper Clauses. This argument does not question the proposition that the Necessary and Proper Clause applies fully in this context. It posits, however, that ballot and equipment laws simply are not necessary and proper means for carrying the counting power into effect. On this view, Congress may invoke the Necessary and Proper Clause to legislate only those means that advance an “end” or “purpose” of the enumerated power.\textsuperscript{310} For example, the purpose of the power to create post offices and post roads is the proper delivery of the mail. It follows that Congress may outlaw theft of the mail as a means to the end of ensuring mail delivery.\textsuperscript{311}

Under this approach, questions of congressional authority ultimately hinge on how one characterizes the purpose of the relevant enumerated power, in this case the power granted by the Counting Clause. For example, one might characterize the purpose of this power at such a high level of generality (as being, for example, the production of sound electoral outcomes) that Congress readily could enact any arguably progressive election-related reform.\textsuperscript{312} If, however, one characterizes the Clause’s purpose very narrowly (as being, for example, to record accurately those votes submitted by electoral college members identified, free of any

\textsuperscript{308} Id. at 415.

\textsuperscript{309} Id. at 409; see also Green, \textit{supra} note 201, at 71 (discussing the appropriately broad role of the Necessary and Proper Clause when invoked in conjunction with Article I, Section 4).


\textsuperscript{311} Id.

\textsuperscript{312} \textit{See infra} note 327 (suggesting that the purpose of the counting power is to “protect the integrity and efficiency of the Presidential election process”) (quoting Grossman, \textit{supra} note 212, at 356-57); \textit{cf.} United States v. Classic, 313 U.S. 299, 320 (1941) (suggesting that the purpose of the Article I Counting Clause is to safeguard the “right of choice by the people of representatives in Congress”).
federal intervention, in a selection process established exclusively by state legislatures), then the Necessary and Proper Clause might not permit national-ballot and national-voting-equipment legislation.

There is one key difficulty with the narrow-characterization line of argument in this context. The problem is that, however narrowly one attempts to describe the purpose of Congress's counting power, it must include at least the authority to resolve disputes between contesting slates of electors. Yet once one recognizes this umpire-of-the-fight purpose of the counting power, it logically follows that Congress may pass laws designed to help it resolve competing slate contests if and when they arise. Moreover, precisely because a logical source of electoral slate contests will be disputes over which slate received the most popular votes, federal measures that help clarify that determination, as ballot and equipment laws surely could, should be held constitutional. In short, if the Necessary and Proper Clause applies to the counting power (as we believe it does), then ballot and equipment laws should hold up under even a very narrow conception of the ends encompassed within that power.

One might respond that a purpose of resolving elector-slate contests should vest Congress with no more power than to resolve such contests if and when they occur. But as Professor Rosenthal urged: "Legislation injected into so delicate an area as the choice of the President would be much more salutary if enacted to provide for future eventualities rather than directed to an existing election

313. See Rosenthal, supra note 30, at 32 (suggesting that counting power at least implies authority for “determining which of two contending slates of electors was validly chosen”); cf. Ackerman, supra note 216, at 5 (noting that Florida “could well have sent sets of votes from two different groups of electors to Washington” if “the United States Supreme Court had stayed on the sidelines”).

314. See supra notes 297-309 and accompanying text.

315. The argument might go something like this: The purpose of the counting power is solely to determine which candidate received what number of votes. To achieve this purpose Congress can and must decide between competing slates of electors. But that is all Congress can do. In other words, deciding between competing slates is not a purpose of the counting power; it is only a means to the end of determining final vote totals pursuant to state-prescribed processes and rules. Dictating the use of federally specified ballots and equipment is not, on this view, a means designed to achieve this objective; indeed, such a means would frustrate this end by displacing state vote-generating procedures with federally specified ones.
Drawing on the lessons of 1876 and 2000, we would be even more blunt: It is far preferable to lay out election rules in advance, rather than making on-the-fly (and predictably partisan) post hoc judgments.\(^{317}\)

We recognize that others might disfavor a broad application of the Necessary and Proper Clause in this setting.\(^{318}\) They might say that carrying out the counting power was meant, from all appearances, to be merely a mechanical exercise.\(^{319}\) They might add that the subtle architecture of the Constitution supports this state-authority-maximizing position because it surrounds the Counting Clause with grants of authority to persons outside the federal government. (Thus, Article II vests primary power in state legislatures;\(^{320}\) state legislatures in turn designate a body of selectors;\(^{321}\) it falls solely to this body of selectors to choose the state's members of the electoral college;\(^{322}\) and these electors, who themselves "are not federal officers or agents,"\(^{323}\) then tender ballots for congressional counting after convening in their own states.\(^{324}\))

Let us assume, based on these considerations, that Congress may not pass any law of any kind merely because it is "conducive" to effective counting.\(^{325}\) Forced to draw some other line, we would nonetheless conclude that Congress, at a minimum, may go as far in enacting prospective legislation pursuant to its counting power as it might go with its *Burroughs* power as outlined in the preceding section of this Article.\(^{326}\)

Indeed, one way of conceiving the "implied" *Burroughs* power is to say that it is in fact an *express* power that flows from the

\(^{316}\) Rosenthal, *supra* note 30, at 36.

\(^{317}\) See William Josephson & Beverly S. Ross, *Repairing the Electoral College*, 22 J.LEGIS 145, 148 n.21 (1996) (arguing that the House of Representatives should adopt rules related to presidential selection without "waiting for a specific, politically charged context").

\(^{318}\) See *supra* note 78 and accompanying text (noting congressional misgivings about the constitutionality of the Electoral Count Act of 1887).

\(^{319}\) See *supra* note 306 and accompanying text.

\(^{320}\) U.S. CONST. art. II, § 1, cl. 2.

\(^{321}\) See *supra* note 271 and accompanying text.

\(^{322}\) *In re Green*, 134 U.S. 377, 379 (1890).


\(^{324}\) U.S. CONST. amend. XII.


\(^{326}\) See *supra* notes 196-233 and accompanying text.
Counting and the Necessary and Proper Clauses. We have doubts about whether the power inferable from the Counting Clause reaches only as far as the power that flows from the federal government's "power of self protection." But, in the end, we are comfortable saying that the counting power goes at least this far.

We add only that the history spawned by the election of 1876 confirms our conclusion that the Counting and Necessary and Proper Clauses, operating in tandem, permit Congress to do more than resolve disputes between competing elector slates after they arise. In passing the Act of 1887, after all, Congress adopted a law specifically designed to establish rules for prospectively deciding competing-slate election contests. It also asserted a power to reject, in some circumstances, votes "of electors whose appointments have been lawfully certified by proper state authority" even in the absence of an elector-slate contest.

327. Rosenthal, supra note 30, at 31-36 (discussing Burroughs in the context of exploring the reach of the counting power); see also Grossman, supra note 211, at 356-57 (citing Burroughs in asserting that Congress has "vested powers under article II, section 1 and under the necessary and proper clause to preserve and protect the integrity and efficiency of the Presidential election process"). Another possibility is to say that Burroughs reflects the joint operation of the Necessary and Proper Clause and the express powers bestowed on the President to execute the laws, serve as Commander in Chief, and the like. U.S. CONST. art. II, § 1, cl. 1; § 2. On this view, a fair and accurate counting of the vote is critical to ensuring the legitimacy of the presidency, which in turn is critical to the effective exercise of the President's powers. See generally 1 TRIBE, supra note 193, § 5-3, at 805 (noting that Necessary and Proper Clause applies to noncongressional, as well as congressional, powers created by the Constitution). Some language in Burroughs suggests the Court's own receptivity to this approach. Burroughs v. United States, 290 U.S. 534, 545 (1934) ("The 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.").

328. Burroughs, 290 U.S. at 545.

329. See Ray v. Blair, 343 U.S. 214, 229-30 (1952) (stating that a "long-continued practical interpretation ... weighs heavily in considering the constitutionality" of a government practice).


331. Rosenthal, supra note 30, at 28 n.114; see also 3 U.S.C. §§ 5, 15 (2000); Dougherty, supra note 22, at 235 ("No definition of 'regularly given' is provided, and while Congress has thus far always recorded the electoral votes as actually cast, it might at some time treat this [statute] as authorizing it to reject votes cast contrary to pledge or expectation."); Rosenthal, supra note 30, at 27-38 (arguing that, although the Twelfth Amendment "is not definitely a final commitment to Congress of the power to resolve disputed votes,... it has some of the hallmarks of one"; adding that "Congress itself established the procedures whereby the Hayes-Tilden imbroglio was decided and has since enacted permanent legislation purporting to regulate future disputes").
short, for 125 years, Congress has deemed itself empowered to protect "the integrity of the electoral process,"\textsuperscript{332} including by fixing useful rules that operate prospectively to deal with potential electoral-vote contests. We share the view of Congress that such a power exists. We also believe that such a power should support national-ballot and voting-equipment legislation precisely because the essential purpose of such legislation is to clarify electoral-vote results in a way that ensures that the real winner really wins.

Having set forth our view of the counting power, we acknowledge that the Court (and especially the federalism-minded current Court) may well reject it. We also recognize that, even if the \textit{Burroughs} principle maps the boundary of the counting power, the Court could read \textit{Burroughs} narrowly and deem national-ballot or voting-equipment legislation as falling outside its authorizing reach. Might Congress nonetheless successfully deploy the Necessary and Proper Clause to accomplish national-ballot and mandated-voting equipment reforms? We think so and now turn to demonstrating why.

\textbf{E. Regulatory Authority Under the Article I "Times, Places and Manner" Clause}

Under Article I, Section 4, "[t]he 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."\textsuperscript{333} Under this grant of power there can be no doubt that Congress could establish a uniform national ballot for congressional and senatorial elections. Nothing could be more central to the "Manner of holding elections," after all, than stipulating the way in which citizens actually cast their votes.\textsuperscript{334}

If Congress may establish a uniform national ballot for representatives and senators, may it also spell out how, on that same ballot, the vote for presidential candidates should take place? The Necessary and Proper Clause suggests that it may do so as a

\textsuperscript{332} Biden, \textit{supra} note 221, at 47.

\textsuperscript{333} U.S. CONST. art. I, § 4 (emphasis added).

\textsuperscript{334} See \textit{supra} notes 253, 264-65 and accompanying text.
It is a common and logical practice to list presidential candidates at the top of ballots presented to the voter. Particularly in these circumstances, the argument goes, if the manner of presenting candidates for President were to differ from the federally specified manner of presenting candidates for the Senate and the House, a risk of voter confusion would arise. For this reason, it seems "conducive to" establishing a workable uniform ballot for national senators and representatives that the ballot for President be presented to voters as part of an integrated menu of voting choices for federal offices. Such a ballot would carry with it advantages directly related to ensuring the fair, sound, and well-informed selection of senators and representatives. A uniform ballot, for example, would identify and differentiate among, and thus direct attention to, all federal offices at stake in any election. A uniform ballot could specify in a clear and consistent manner all candidates' party affiliations, so as to inform the voter of each Senate and House candidate's party alignment or nonalignment with contemporaneously running presidential candidates. A uniform ballot would avoid the risk that a separate state-produced presidential election ballot would signify the lesser importance of Senate and House races and divert attention away from them. Indeed, inclusion of the presidential ballot on the Senate and House ballot might well induce a higher level of voter participation in Senate and House races, a salutary goal that Congress should be able to pursue under its Article I, Section 4 power. In all these ways, an integrated national ballot would be helpful to "carrying into execution" the congressional power to control the manner of electing senators and representatives.

It is noteworthy that potential barriers to using other powers to enact national ballot and equipment legislation are inapplicable to Article I, Section 4. Why? Because:

335. See generally supra notes 291-96, 304-11 and accompanying text (discussing Necessary and Proper Clause).
In contrast to exercises of the Fourteenth Amendment, Section 5 power, laws passed under Article I and the Necessary and Proper Clause need not be remedial, and may be far less “proportionate” to rectifying some judicially determinable constitutional wrong. It is, instead, enough that the law be “conducive” to carrying into effect Congress’s election-regulation power. Because presidential elections and congressional elections are in actual experience so functionally intertwined, regulating the manner of the former seems plainly related to successfully regulating the manner of the latter.

The most problematic aspects of relying on the “implied” Burroughs power are also inapplicable in this setting. Any misgivings about implied powers in general do not apply to the “Times, Places and Manner” Clause precisely because it is a clause. The anticommandeering principle of Printz clearly does not operate in this context. And any rule that might limit the Burroughs power to countering only active corruption (which rule springs from the implied sovereign right of “self-protection”) falls out of the picture when the express Times, Places, and Manner Clause provides the basis for congressional intervention.

See supra notes 168-72 and accompanying text (describing Section 5 enforcement power).


See supra note 289 and accompanying text.

See supra notes 234-50 and accompanying text.

See Association of Cmty. Orgs. for Reform Now v. Miller, 129 F.3d 833, 837 (6th Cir. 1997) (stating that “Article I section 4 explicitly grants Congress the authority to force states to alter their regulations regarding federal regulations, and does not condition its grant of authority on federal reimbursement”); Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995) (stating that, under Article I, Congress may conscript state agencies to carry out voter registration for the election of representatives and senators); Jason P.W. Halperin, A Winner at the Polls: A Proposal for Mandatory Voter Registration, 3 N.Y.U. J. LEG. & PUB. POL’Y, 69, 115-16 (1999) (arguing that the limits of Printz are inapplicable to congressional regulation of voter registration because of the explicit grant of authority to Congress to make or alter federal election laws); Green, supra note 201 at 67 (endorsing results in Association of Community Organizations for Reform Now and Voting Rights Coalition cases).

Moreover, even assuming that the Times, Places, and Manner Clause precludes, by negative implication, a freestanding implied Burroughs’ power to regulate the “Manner” of presidential elections, see supra notes 251-63 and accompanying text, this negative implication argument would not easily extend to otherwise permissible extrapolations from the “Times, Places, and Manner” power itself. It is one thing to say that Article II, Section 1’s failure to mention the “Manner” of presidential elections precludes discovering such a
(3) Finally, the main arguments against employing the Necessary and Proper Clause in conjunction with congressional authority to count electoral votes do not apply to the sweeping power of Congress to control "the Manner" of congressional elections. Most important, this broad power resembles other grants of authority subject to the full-bore operation of the Necessary and Proper Clause. It does not, as might be said of the Counting Clause, place on Congress only a narrow mandate to act in a context dominated by grants of exclusive power to nonfederal officials. For these reasons, the Necessary and Proper Clause has an all-out force in this setting that it might lack when attached solely to the counting "duty."

There are, of course, limits on Congress's ability to rely on the joint operation of the Times, Places and Manner and Necessary and Proper Clauses. It might well be, for example, that Congress could not invoke the Sweeping Clause to regulate ballots for state office-holders in an effort to avoid confusion in voting for House and Senate offices. But the root of such a limitation would lie in the

power within the deep recesses of the Constitution's architecture and extrapolated presuppositions. It is quite another thing to say that this drafting omission somehow trumps a straightforward application of the Necessary and Proper Clause to carry out the express grant of congressional power in Article I, Section 2.

345. See supra notes 297-326 and accompanying text.

346. See Smiley v. Holm, 285 U.S. 355, 366-67 (1932) (noting that Congress has a "general supervisory power" over congressional elections and can provide a "complete code" for them) (quoting Ex parte Siebold, 100 U.S. 371, 387 (1880)); Association of Cmty. Orgs. for Reform Now, 56 F.3d at 796 (noting that "Congress has passed a large number of laws altering state regulations of federal elections"); United States v. Munford, 16 F. 223 (E.D. Va. 1883) ("There is little regarding an election that is not included in the terms, time, place, and manner...."); Jonathan E. Davis, Comment, The National Voter Registration Act of 1993: Debunking States' Rights Resistance and the Pretense of Voter Fraud, 6 TEMP. POL. & CIV. RTS. L. REV. 117, 124 (1997) (citing case law for proposition that Congress has authority over "the entire electoral process from the first step of registering to the verification of the state's return").

347. See supra notes 300-01 and accompanying text (discussing McCulloch's treatment of taxing, commerce, and other powers).

348. See supra notes 302-24 and accompanying text.

349. See supra notes 297-98 and accompanying text.

350. Oregon v. Mitchell, 400 U.S. 112, 124-25 (1971) (emphasizing states' retention of broad power over state elections, in contrast to federal elections), superseded by U.S. CONST. amend. XXVI; Blitz v. United States, 153 U.S. 308, 314 (1894) (same); United States v. Reese, 92 U.S. 214, 218 (1875) (holding that Congress has no general power over state and local elections); see also Ex parte Siebold, 100 U.S. at 393 (distinguishing congressional regulation of federal and state elections); Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995) (emphasizing that Congress did not seek to regulate elections of state
overwhelming primacy of state control over state elections, a consideration that simply does not carry over to voting for presidential electors.\textsuperscript{351} We see no reason, then, why Congress lacks broad authority to regulate presidential elections (including by creating a national ballot) to optimize accuracy, information, and participation in voting for House and Senate races.

We again recognize, however, that we may lose this argument. Courts might declare that it involves too long a leap to say that Congress may regulate presidential elections because doing so is "Necessary and Proper" to governing the election of senators and representatives. Courts might also extract from the contrasting texts of Article I and Article II a principle that bars Congress from regulating the "Manner" of voting for presidential electors, including through ballot and equipment laws, regardless of the power that Congress invokes.\textsuperscript{352} Even if these constricting interpretations take hold, however, we suspect that the "Times, Places and Manner" power would give Congress the \textit{practical} capacity to secure universal (or at least nearly universal) use of a nationally prescribed presidential ballot. Consider a future in which Congress mandated a nationally applicable ballot layout for House and Senate elections and simultaneously encouraged states to follow companion "guidelines" for the presidential race. In our view, if such a law were passed and such an invitation were issued, states would probably go along. We simply have a hard time seeing why they would not.\textsuperscript{353}

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officials in passing the "Motor Voter" law); Halperin, \textit{supra} note 342, at 116 (stating that "a strong argument could be made that Congress does not have the power to regulate state elections because the Tenth Amendment would reserve this power to the states"); Note, \textit{Statutory Regulation of Political Campaign Funds}, 66 HARV. L. REV. 1259, 1261 (1953) (noting that "[d]irect congressional regulation of non-federal elections raises serious constitutional problems").

\textsuperscript{351} See \textit{supra} notes 277-78 and accompanying text (noting argument that state interest is distinctively limited with regard to presidential elections).

\textsuperscript{352} See \textit{supra} notes 264-66 and accompanying text.

\textsuperscript{353} See Fischer, \textit{supra} note 337, at 441 (noting that most states tend to coordinate the dates for state elections and federal elections); \textit{see also} Halperin, \textit{supra} note 342, at 116 (noting that, after Congress legislatively enfranchised eighteen-year-olds in federal elections, state legislatures became willing to enfranchise them in state elections as well to avoid the "confusion and expense of running elections with two separate electorates").
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Let us assume, however, that our prediction proves inaccurate. Do patrons of national ballot and equipment legislation have one last arrow in their quiver? Indeed, they do.

**F. The Conditional Spending Power**

We have identified a variety of possible sources of congressional power for legislating national ballot and election-equipment measures. Assume, however, that all these sources of power fail. There always remains the last, great hope of congressional intervention: the so-called "conditional spending" power. 354

Suppose that Congress enacts a spending law that makes federal funds available to states with the goal of increasing fairness and accuracy in presidential elections. Assume, in addition, that Congress makes each state's access to these funds conditional on the state's agreement to use only certain election equipment and a uniform ballot designed by federal authorities. Present-day spending-power doctrine strongly suggests that this law would be constitutional. First, Congress is permitted to implement conduct-shaping programs by way of the conditional spending technique that it could not directly impose under its enumerated non-spending powers. 355 Second, any Printz-based limitation on the national conscription of state authorities would not take hold in this setting. No "conscription" can occur, after all, when a state freely chooses to opt into a federal spending program. 356 Third, any condition to the effect that the state shall use a national ballot and voting equipment would be (as it must be) "germane" to the spending program's goal of heightening accuracy and fairness in elections; 357 indeed, the essential purpose behind these reforms is

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354. See id. at 117 (noting that early versions of what became the "Motor Voter" law included federal spending conditions).

355. South Dakota v. Dole, 483 U.S. 203, 206 (1987) (stating that Congress can regulate drinking ages through use of its Spending Power even if it cannot do so directly); Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (per curiam) (holding that spending power "is not limited by the direct grants of legislative power found in the Constitution") (quoting United States v. Butler, 297 U.S. 1, 66 (1936)).


357. Id.; accord, Dole, 483 U.S. at 207-08 & n.3.
to mitigate voter confusion and opportunities for error. Finally, no “independent constitutional bar” under the First Amendment or otherwise would block Congress from conditioning these funds on state use of a national ballot or federally favored equipment.\textsuperscript{358}

This is the case because such a law would in no way “induce the States to engage in activities that would themselves be unconstitutional.”\textsuperscript{359} After all, every state would be free, under governing constitutional doctrine, to use such ballots or equipment if that were its wish.

In light of these principles, we believe Congress could attach even more far-reaching conditions to releasing presidential-election-improvement funds to states. Consistent with the program’s purpose of ensuring fairness and accuracy, for example, we might well (were we judges) uphold a conditional insistence that states abandon winner-take-all systems because of the crudely unrepresentative results they produce. It is important to recognize, however, that the farther conditions go in the direction of impinging on traditional areas of state authority (for example, by disallowing winner-take-all systems) the less likely it is that those conditions will be incorporated into federal spending programs in the first instance. Because structural features of the Constitution cause federal authorities to be watchful of state interests, federal decision makers are likely to act with caution in pushing states away from controlling electoral prerogatives they historically have exercised.\textsuperscript{360}

Even if Congress did impose aggressive conditions on the release of federal funds, however, there is no assurance Congress would achieve its aim of having its policy preferences implemented by the states. Indeed, the more intrusive Congress’s conditions become on state prerogatives, the more likely it is that they will be rejected when state authorities are given a choice whether to accept or reject them. This point is of particular significance in assessing the prospects of any conditional spending program that requires abandonment of the winner-take-all approach. Why? Because, even if only a few states initially decline federal funds, so as to retain their winner-take-all systems, it is probable that other states would

\textsuperscript{358} Dole, 483 U.S. at 208.
\textsuperscript{359} Id. at 210.
soon follow suit. The same “arm’s race” for electoral power that led to all-but-universal embrace of winner-take-all systems in the early nineteenth century would likely induce a similar migration away from participating in a spending program that imposed this same condition. The bottom line is that Congress in theory can use its conditional spending power to undo the winner-take-all system. It is doubtful, however, whether Congress in fact could succeed in achieving this reform by way of a conditional-spending approach.

V. A CALL FOR ACTION

Even if our analysis and others like it persuade a majority in Congress that it has the constitutional power to impose more uniform procedures on the way states conduct federal elections, there is no assurance that it will do so. As events following the Hayes-Tilden election illustrate, there is a powerful political inertia in the field of election reform. Once elected under any given system, incumbent office holders are naturally reluctant to change it for a simple reason: it worked for them. Dominant political parties and interest groups display a similar attachment to the status quo. Before they take action, they will always carefully consider how that action might impact their political fortunes. That is one reason why the electoral college persists and fundamental campaign-finance reform is unlikely to become law. And if lawmakers plausibly can maintain that the Constitution bars them from taking action incompatible with their perceived self-interest, so much the better for them.

Notwithstanding the forces of stasis, it remains our hope that a bipartisan consensus can be forged for uniform voting procedures in federal elections. A consensus for uniform electoral-vote-counting rules did emerge in the wake of the Hayes-Tilden election.

361. E.g., Rosenthal, supra note 30, at 4-5 (noting that, when some states adopted winner-take-all systems, they secured “an influence far greater than a state whose electoral vote was divided” so that “by a sort of Gresham’s Law, the states in the latter group felt obliged, in self-defense, to follow suit”; thus the “general ticket’ method became universal”). See generally supra notes 16-23 and accompanying text.
362. See supra Part II.
363. Fish, supra note 119, at A29.
365. See Fish, supra note 119, at A29.
Constitutional concerns about states' rights, then so much stronger than today, ultimately evaporated. In today's political environment, marked by less partisan bitterness and far less regional strife, why should our lawmakers not be able to gather a similar will for action?

Incumbent office holders and dominant political parties have a profound interest in public perceptions about the legitimacy of the election process. They should have an even keener interest in the reality of procedural fairness and accuracy in the choice of our nation's chief executive officer. These considerations, which spurred the 1887 reforms, are at stake once again. The 2000 presidential election in Florida pushed them into bold relief. Now, more than ever, voters are calling for basic reforms to insure that their votes count. Unlike abolishing the electoral college or implementing fundamental campaign-finance reform, putting in place accurate voting equipment and uniform ballots need not benefit any one candidate or party. Indeed, both major parties may well benefit from sound reforms by diminishing general disillusionment and the resulting emergence of third-party competitors. A logical way to proceed is through a bipartisan election-reform commission as proposed in various bills currently before Congress. If such a commission can agree on standardized voting procedures that insure a fairer presidential election without favoring candidates of either party, Congress should rise above partisan divisions to implement them.

Some local officials will vigorously oppose mandatory standardized voting procedures for federal elections. They may
have an interest in maintaining the way they do things in their states or in simply maintaining authority over choices to be made down the road. Local officials will make the case for voluntary federal grants for state-initiated election reforms. Even if those grants go only to fund federally approved reforms, however, they cannot insure uniformity. Not all states will rise to the bait, and even those states that take it may differ in what changes they choose to implement. Needed reforms require a congressional fiat. As Part IV indicates, we believe Congress has the power to prescribe procedures for conducting federal elections. We urge it to do so. Such legislative reforms succeeded in 1887 and can succeed again.

CONCLUSION

The American people dodged disaster as the year 2000 drew to a close. As our nation sorted through the uncertainties generated by an extraordinarily close presidential election, it was not at war. There were no riots in urban centers, at work sites, or on college campuses. Unemployment was low. Optimism was high.

Such conditions do not mark every presidential election year. In times of war or economic crisis, the uncertainty and contentiousness that followed last year's November balloting could trigger partisan enmity, class- or race-based division, loss of faith in our system, episodes of violence, or worse. Under the conditions that

when this country was founded." Tanner, supra note 127 (quoting Wilkey).

371. Greenberg, supra note 370, at A4; accord Murray, supra note 131, at 3722.

372. Even Florida officials seem to have backed off from committing significant resources to election reform. Dana Canedy, Less Talk of Florida Voting Reform as Jeb Bush Unveils Plan, N.Y. TIMES, Mar. 7, 2001, at 1; see also Election Reform Act of 2001, H.R. 263, 107th Cong. (2001) (establishing a national Election Administration Commission to study voting procedures, to develop "voluntary" election standards, and to award matching grants to encourage states to implement qualifying reforms). Proposing such an approach, Senator Charles E. Schumer of New York stated:

The point isn't to simply pick one method and go with it. ... We should look at all of them, see what works best, figure out how to fix what doesn't work, and then provide the states with the know-how and funds they need to implement new systems.

Murray, supra note 131, at 3722. Given the "election mess in Florida," however, reform proponent Peter DeFazio, a House member from Oregon, counters: "We can do it better in 21st-century America. ... If the federal government has to come on in and step on some states' toes, then so be it." Id.
prevailed at the time of the Hayes-Tilden election dispute, there were genuine worries that the Nation might come apart at the seams. There can be no assurance that similar conditions will not recur in the future.

We have laid out in this Article arguments in support of Congress's extensive power to regulate the processes of presidential elections. To be sure, there are limits on what Congress can do, and no set of new laws will eliminate all chance of future controversy in races for the presidency. There can be no doubt, however, that federal establishment of a uniform ballot and minimum requisites for election equipment would take us far down the pathway of positive reform. The 107th Congress, following the example of the 49th Congress, should adopt these measures. The power to do so exists; popular support for such action is great; the recent election reveals its wisdom; and the potential dangers of failing to act are too grave for our nation's lawmakers to leave them unaddressed.