

Election Law “Federalism” and the Limits of the Antidiscrimination Framework

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ELECTION LAW “FEDERALISM” AND THE LIMITS OF THE
ANTIDISCRIMINATION FRAMEWORK

FRANITA TOLSON*

ABSTRACT

If the United States Supreme Court conceived of the right to vote as an active entitlement that safeguards other fundamental rights rather than as a passive privilege that permits courts to prioritize state sovereignty over broad enfranchisement, then many of the errors that have become commonplace in our system of elections would not occur. It is unlikely, however, that the Court will take the steps necessary to extend the constitutional protections afforded to the right to vote. In recent years, the Court has sharply circumscribed Congress’s ability to protect the right to vote under the Fourteenth and Fifteenth Amendments, rejecting any new conceptual framework that would more properly allocate authority over voting rights between the states and the federal government.

Nonetheless, both scholars and voting rights advocates can take advantage of the existing framework, by using the Elections Clause to supplement the Reconstruction Amendments in an effort to protect voting rights and defend the scope of federal antidiscrimination legislation. Under the Clause, states set procedural regulations that govern federal elections, but Congress can also enact its own laws and, more importantly, veto state regulations at will. This provision

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has been significantly underutilized in the two-centuries-long battle over the regulation of federal elections.

Despite this unique structure that places final policy-making authority in the hands of Congress, both the Supreme Court and legal scholars tend to discuss the Clause in federalism terms, characterizing the exercise of federal power as a rare and somewhat unwelcome intrusion on the states' relatively broad authority to legislate with respect to federal elections. Contrary to this view, this Article argues that Congress and the courts can disregard state sovereignty in enacting, enforcing, and resolving the constitutionality of legislation passed pursuant to the Elections Clause. Close examination reveals that the Clause's structure does not fit comfortably within any of the prevailing theories of federalism, which deploy notions of state sovereignty in ways that are inconsistent with the Clause's text, purpose, and history.

Descriptively, federalism doctrine fails to explain the regulatory dynamic between the states and Congress over federal elections because the Clause embodies values other than those that our federalist system safeguards. Traditional federalism doctrine emphasizes objectives such as increased citizen involvement, experimentation, and innovation in state government. In contrast, the touchstone of the Elections Clause is the continued existence and political legitimacy of federal elections: that a winner be chosen from an electoral process—implemented by the states at the sufferance of Congress—that is legitimized by clear rules and a definitive outcome. This focus makes it difficult to embrace the state-centric approach of traditional federalism, or the flexibility and nationalism that is the hallmark of the “new” federalism. This insight has significant implications as we approach the 2020 redistricting cycle, in which states will seek to defend discriminatory redistricting plans, enact more restrictive voting laws, and challenge the constitutionality of federal voting rights legislation on federalism grounds.

TABLE OF CONTENTS

INTRODUCTION 2214

I. THE SPECTER OF STATE SOVEREIGNTY IN RECENT VOTING RIGHTS CASES 2221

 A. *Whither Discriminatory Intent? Legal Challenges to Restrictive Voting Laws in the Lower Courts* 2222

 B. *Whither Shaw Claim? The Federalism Implications of the Race or Party Question in the Supreme Court* 2229

II. THE ELECTIONS CLAUSE AND THE IMPRUDENT FEDERALISM OF THE ARIZONA CASES 2237

III. PRESERVING THE LEGITIMACY OF FEDERAL ELECTIONS THROUGH ELECTIONS CLAUSE VALUES 2247

 A. *Elections Clause Value: Preserving the Legitimacy of Federal Elections Through Respect for Popular Sovereignty* 2248

 B. *Elections Clause Value: Preserving the Legitimacy of Federal Elections Through Predictable and Competent Election Administration* 2255

 C. *Elections Clause Value: Preserving the Legitimacy of Federal Elections Through Congressional Sovereignty* 2265

 1. *Federalism “Lite”: State Sovereignty and Congress’s Independent Authority to Legislate* 2270

 2. *The Incidents of Congressional Sovereignty: Commandeering State Offices, State Law, and State Officials* 2278

CONCLUSION 2283

INTRODUCTION

During the oral argument for *Shelby County v. Holder*, which involved a constitutional challenge to sections 4(b) and 5 of the Voting Rights Act (VRA) of 1965,¹ Justice Antonin Scalia surprised onlookers by arguing that section 5's unanimous reauthorization by the Senate in 2006 weighed against, rather than in favor of, the constitutionality of these provisions.² He contended that section 5 was part of a grand scheme of "racial entitlements" that are very difficult to reverse through the legislative process;³ thus, the unanimous vote in favor of reauthorizing the Act was indicative, not of public preference, but of the desire of special interest groups to insulate the VRA from ever being legislatively overturned.⁴ Other members of the Supreme Court may not have framed the problems surrounding the VRA in those terms, but they agreed with Justice Scalia's basic insight that the statute impermissibly gave minority groups an advantage in the legislative process over the majority at the expense of state sovereignty.⁵

The Court's attempt to strike a balance between these competing, and sometimes conflicting, principles has led to a jurisprudence that is inconsistent, insufficiently protective of minority rights, and over-values the states' sovereignty over elections.⁶ One of the most nefarious examples of this problematic approach is in the area of

1. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 4-5, 120 Stat. 577, 580-81 (2006) (codified as amended in scattered sections of 52 U.S.C.).

2. See Transcript of Oral Argument at 16-17, 47-48, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

3. *Id.* at 47.

4. See *id.* at 47-48. Justice Scalia further observed that this is not the kind of a question you can leave to Congress. There are certain districts in the House that are black districts by law just about now. And even the Virginia Senators, they have no interest in voting against this. The State government is not their government, and they are going to lose—they are going to lose votes if they do not reenact the Voting Rights Act.

Even the name of it is wonderful: The Voting Rights Act. Who is going to vote against that in the future?

Id.

5. See *Shelby County*, 133 S. Ct. at 2618-19, 2623-24, 2631.

6. See Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1196-98, 1200 (2012).

legislative redistricting. Here, the Justices have breathed new life into racial gerrymandering claims as a means of policing state redistricting plans that infringe on minority rights,⁷ while simultaneously permitting partisan justifications in the name of state sovereignty that could otherwise legitimize regressive and problematic plans.⁸ But there are also other cases in which the Court shows undue solicitude to the states, such as those involving voter identification laws and other restrictive voting laws that make it significantly more difficult to cast a ballot,⁹ illustrating that the storied position of state sovereignty as the focal point of our federalist system holds steady even when unwarranted.¹⁰

Along the same lines, *Shelby County* invalidated section 4(b) of the VRA for infringing on the “equal sovereignty” of the states through a formula that used forty-year-old data to single out certain jurisdictions for voting rights violations.¹¹ Indicative of recent case law limiting the reach of the Fourteenth and Fifteenth Amendments because of federalism concerns, the Court focused its attention on “rediscovering” the arbitrary divide between the states and the federal government over election regulation more generally.¹² In *Arizona v. Inter Tribal Council of Arizona (Arizona Inter Tribal)*, for example, the Court held that Congress’s authority under the Elections Clause over the “Times, Places and Manner”¹³ of federal elections “is paramount,”¹⁴ but does not extend to regulating voter qualification standards, which fall firmly within the province of the

7. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

8. See *Vieth v. Jubelirer*, 541 U.S. 267, 305-06 (2004) (plurality opinion). *But see Gill v. Whitford*, 137 S. Ct. 2289, 2289 (2017) (mem.) (enjoining enforcement of Wisconsin redistricting plan as impermissible political gerrymandering, pending disposition on appeal to the Supreme Court), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

9. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

10. See *Tolson*, *supra* note 6, at 1196-98, 1200.

11. *Shelby County v. Holder*, 133 S. Ct. 2612, 2621-24, 2630-31 (2013).

12. Compare *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 341 (2000) (finding that a redistricting plan enacted with discriminatory intent should be precleared under section 5 if the plan is nonretrogressive), with *Shelby County*, 133 S. Ct. at 2621, 2632 (criticizing Congress’s decision to legislatively overturn *Reno v. Bossier Parish* by amending section 5 “to prohibit more conduct than before,” including “voting changes with ‘any discriminatory purpose’” (quoting 42 U.S.C. § 1973c(c) (current version at 52 U.S.C. § 10304(c) (Supp. III 2016)))).

13. 133 S. Ct. 2247, 2253 (2013) (quoting U.S. CONST. art. I, § 4, cl. 1).

14. *Id.* (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

states.¹⁵ Similarly, in *Arizona State Legislature v. Arizona Independent Redistricting Commission (Arizona IRC)*, the Court held that Arizona voters, acting through a state ballot initiative, can delegate the legislature's redistricting authority to an independent commission because the Elections Clause's use of the term "legislature" embodied whatever prescriptions for lawmaking that the state established in its constitution.¹⁶ Like *Shelby County*, the *Arizona* cases recognize, first, that the federal government's interference with laws that fall firmly within the province of state authority trigger significant constitutional issues;¹⁷ and second, the presumptive constitutionality of state law to which the Court will generally defer, even when interpreting federal constitutional provisions.¹⁸ All of these cases have contributed to the view that election law is federalism based, with clearly delineated spheres of authority for the state and federal governments, respectively.

This Article challenges the prevailing view that federalism best explains our system of elections, and argues that, unlike the antidiscrimination framework of the Fourteenth and Fifteenth Amendments, Congress and the courts can disregard state sovereignty in enacting, enforcing, and resolving the constitutionality of legislation passed pursuant to the Elections Clause. The Clause gives states control over the "Times, Places and Manner" of federal elections, but it also empowers Congress to "make or alter" these regulations at will.¹⁹ Once one examines the text and structure of the Elections

15. *See id.* at 2258-59 (observing that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications").

16. 135 S. Ct. 2652, 2671, 2677 (2015). This Article does not challenge the state's ability to delegate its redistricting authority to an independent commission. Rather, the issue is the Court's failure to treat congressional approval as dispositive of the issue, and its reliance instead on the presumptive validity of state law. *See infra* Part II. This conception is at odds with the notion of congressional sovereignty.

17. *See Shelby County*, 133 S. Ct. at 2623-27 (describing the states' broad power regarding elections, the exceptional circumstances under which Congress first passed the Voting Rights Act, and the significant constitutional issues that developed over time from this federal action); *see also Arizona IRC*, 135 S. Ct. at 2666-67; *Arizona Inter Tribal*, 133 S. Ct. at 2254-57.

18. *See Arizona IRC*, 135 S. Ct. at 2673; *Arizona Inter Tribal*, 133 S. Ct. at 2257-58.

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

Clause, it is clear that this provision does not fit comfortably within any of the prevailing theories of federalism.²⁰ This insight is particularly powerful in the redistricting context, in which states rely on their authority under the Clause to draw congressional districts and have traditionally enjoyed wide berth in constructing these districts, largely subject only to the constraints of the once powerful, but recently more limited Fourteenth and Fifteenth Amendments.²¹

As this Article shows, Congress’s authority under the Elections Clause is significantly broader than the Court has acknowledged, and can be a powerful bulwark against discriminatory state laws that are usually defended on the grounds of state sovereignty against Fourteenth and Fifteenth Amendment challenges.²² The breadth of congressional power under the Clause lies in Congress’s ability to veto state law at will, a feature that is at odds with most of the prevailing views of federalism.²³ Traditional federalism doctrine prioritizes experimentation in governance dispersed among the fifty states—a variation that emerges, in part, from limiting the reach of the federal government.²⁴

In contrast, the Elections Clause has its own unique set of values that place a premium on congressional sovereignty. When it comes to federal elections, Congress rarely intervenes to increase cooperation between the states and federal government in order to—for example—encourage a regulatory partnership that allows Congress to influence policy areas beyond the scope of its enumerated powers.²⁵ Congress’s authority over setting the “Times, Places and

20. See *infra* Part III.

21. Compare *City of Rome v. United States*, 446 U.S. 156, 173, 175-76, 179 (1980) (describing broad and expansive congressional authority to enforce the Fourteenth and Fifteenth Amendments), *abrogated by Shelby County*, 133 S. Ct. 2621, with *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997) (limiting Congress’s enforcement powers to remedial fixes).

22. See *infra* Part I.

23. See *infra* Part II.

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

25. See Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 U. COLO. L. REV. 1003, 1012 (2014) (arguing that the Clean Water Act is a use of Congress’s authority under the Spending Clause that “enables Congress to bargain with states for access to policymaking arenas that are beyond the reach of its other enumerated powers”); cf. *Clean Water Act*, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1387 (2012)).

Manner”²⁶ of federal elections “is paramount,”²⁷ and this body has, on occasion, imposed substantive requirements that states must follow when structuring federal elections.²⁸ Nor is the Clause frequently invoked in order to nationalize election administration or to limit state power to a particular substantive area;²⁹ Congress assumes that well-functioning states will fill in most of the blanks with respect to the nuts and bolts of federal elections,³⁰ but has been willing to impose uniformity if the need arises.³¹ Indeed, the Clause’s overarching purpose is to ensure the continued existence and legitimacy of federal elections,³² so the text empowers Congress to engage in the quintessentially “anti-”federalism action of displacing state law and commandeering state officials toward achieving this end.³³ Yet the federalism label still persists as its animating theory, even though the Clause is not concerned with protecting the sovereignty of the states.³⁴

This Article is divided into three Parts. Part I argues that disenfranchisement has become the norm in American elections, not only because of the invalidation of portions of the VRA, but also because of the Court’s reluctance to create a robust framework that places positive obligations on states to ensure broad enfranchisement. Part of the difficulty is structural—the text of the United

26. U.S. CONST. art. I, § 4, cl. 1.

27. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2253 (2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

28. *See infra* note 44.

29. *Cf.* Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2012 (2012); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 207 (1983) (noting that the Atomic Energy Act gave the Atomic Energy Commission “exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials. Upon these subjects, no role was left for the States” (citations omitted)).

30. Well-functioning should not be confused with the idea that states are sovereign over federal elections. *See Tolson, supra* note 6, at 1244-45.

31. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (plurality opinion) (describing the Apportionment Acts of 1842, 1862, and 1901, which required, at various points, that members of the House be elected from single-member districts that are compact, contiguous, or have equal populations).

32. *Cf. Arizona IRC*, 135 S. Ct. 2652, 2672 (2015).

33. *See id.*

34. Recent scholarship has contributed to the view that the Elections Clause is about federalism. *See, e.g.,* Michael T. Morley, *The Intratextual Independent “Legislature” and the Elections Clause*, 109 NW. U. L. REV. 847, 849-51 (2015); Derek T. Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310, 310-12 (2014); Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 753 (2016).

States Constitution does not contain an explicit and affirmative right to vote, and gives the states considerable authority over the electoral process.³⁵ The other problem lies with the constraints that the Court has imposed on the Fourteenth and Fifteenth Amendments, including, but not limited to, the onerous discriminatory purpose requirement when states enact facially neutral, but restrictive voting legislation; the Court’s overly deferential posture toward the state’s justification for the disputed law; and the limited remedies that the Court accords to prevailing plaintiffs in voting rights litigation.³⁶

Oddly, as the Court has restricted the scope of the Fourteenth and Fifteenth Amendments, recent cases have read the Elections Clause quite expansively.³⁷ However, as Part II shows, the Court applies the same federalism assumptions to the Clause that animate its jurisprudence under the Reconstruction Amendments and, as a result, has not read the Clause’s terms broadly enough. Part II discusses the Court’s most recent Elections Clause cases, *Arizona Inter Tribal* and *Arizona IRC*, to show how the Court has misconstrued and undertheorized Congress’s authority under the Elections Clause while purporting to vindicate federal power. Any theoretical framework should emphasize that, not only does Congress have broad authority under its mandates, but Congress also can act in complete disregard of state sovereignty in exercising this authority.³⁸ Yet, these decisions do the exact opposite. The Court’s contention in *Arizona Inter Tribal* that Congress has no control over voter qualifications pursuant to the Clause, for example, is an effort to enforce a strict dichotomy of dual sovereignty.³⁹ Likewise, in

35. See *Arizona Inter Tribal*, 133 S. Ct. 2247, 2253 (2013) (“The Clause’s substantive scope is broad. ‘Times, Places, and Manner,’ we have written, are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections.’” (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932))).

36. See Franita Tolson, *Setting a Voting Rights Agenda in an Era of “Legal” Disenfranchisement*, in WHAT’S THE BIG IDEA? RECOMMENDATIONS FOR IMPROVING LAW AND POLICY IN THE NEXT ADMINISTRATION 1.1, 1.1, 1.6 (2016), <https://www.acslaw.org/sites/default/files/Whats%20the%20Big%20Idea.pdf> [<https://perma.cc/4C4V-P24E>].

37. See *infra* Part II.

38. See *infra* Part III.C.2.

39. See Franita Tolson, *The Spectrum of Congressional Authority over Elections* (Dec. 4, 2017) (unpublished manuscript) (on file with author) (arguing that Congress can regulate voter qualifications pursuant to the Elections Clause in certain limited circumstances).

Arizona IRC, the Court allowed Arizona to adopt fairly flexible lawmaking procedures in implementing the times, places, and manner of federal elections, but its failure to make Congress's endorsement of the full range of these procedures through federal statute indispensable to the holding shows that the Court is analyzing these issues within a federalism framework in which states retain sovereign authority.⁴⁰

At least some of the Court's mischaracterization of congressional power under the Elections Clause can be laid at the feet of federalism theory. As Part III argues, much of the doctrine—without passing judgment on the merits of each theory—is an ill fit as a potential theoretical framework for the Clause, which is about decentralization, not federalism.⁴¹ This Part shows how, descriptively, federalism doctrine fails to explain the dynamics between the states and federal government because the Clause's text, structure, and purpose embody values other than those that are traditionally safeguarded by our federalist system. These values include: (1) preserving the legitimacy of federal elections through respect for popular sovereignty; (2) ensuring finality of outcome and ease of administration with respect to federal elections; and (3) reinforcing the primacy of congressional sovereignty which—in this context—is embodied by Congress's independent authority to make legislation, alter state law, and commandeer state officials to implement federal law.⁴²

This Article concludes that the Elections Clause is not only an affirmative grant of power to the federal government that allows Congress to legislate irrespective of state sovereignty, but also one that empowers courts to aggressively police state action to protect the fundamental right to vote, particularly when states use their Elections Clause authority to shut otherwise legitimate voters out

40. See *Arizona IRC*, 135 S. Ct. 2652, 2671-73, 2677 (2015).

41. See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 20-21 (2008) (“[F]ederalism grants subunits of government a final say in certain areas of governance,” whereas in a decentralized regime “the central government decides how decision-making authority will be divided between itself and the geographical subunits”); Tolson, *supra* note 6, at 1242-58 (noting that the decentralization of the Elections Clause is often confused with federalism, despite the fact that Congress has the final say in how authority is delegated under the Clause).

42. See *infra* Part III.

of the political process. To effectively prevent states from enacting laws that undermine the right to vote, litigation under the Reconstruction Amendments must become part of the strategy and can no longer be the whole strategy.⁴³ Instead, voting rights advocates can rely on the Elections Clause by: (1) vigorously enforcing statutory provisions such as the Help America Vote Act (HAVA) and the National Voter Registration Act (NVRA), both of which Congress enacted pursuant to the Elections Clause to ensure broad registration and participation in federal elections;⁴⁴ (2) seeking new legislation based on broad authority that the federal government retains under the Elections Clause post-*Shelby County*; and (3) defending current antidiscrimination laws based on some combination of the Elections Clause and the Fourteenth and Fifteenth Amendments.⁴⁵ Because of the Election Clause’s overarching emphasis on preserving the legitimacy of federal elections, this approach will help voting rights advocates build on the successes of this decade and challenge disenfranchising state laws in the post-2020 round of redistricting.

I. THE SPECTER OF STATE SOVEREIGNTY IN RECENT VOTING RIGHTS CASES

2016 was a banner year for voting rights advocates, who successfully challenged numerous restrictive laws under the Fourteenth and Fifteenth Amendments. Yet many of these court decisions, which were huge accomplishments by any metric, also revealed the weaknesses of these constitutional provisions in ways that raise red flags for the path forward. These limitations emerged because of the

43. See Tolson, *supra* note 36, at 1.1-1.3, 1.5-1.6.

44. Congress enacted the Help America Vote Act (HAVA) of 2002, 42 U.S.C. §§ 15301-15545 (2012) (current version at 52 U.S.C. §§ 20901-21145 (Supp. III 2016)), in response to the controversy over the 2000 election. Leonard Shambon & Keith Abouchar, *Trapped by Precincts? The Help America Vote Act’s Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 133, 134 (2006). HAVA sets minimum standards for election administration, primarily dealing with upgrades for voting technology. See, e.g., 52 U.S.C. §§ 20141-20143, 20151-20153 (Supp. III 2016). The National Voter Registration Act (NVRA) of 1993, 42 U.S.C. § 1973gg (2012) (current version at 52 U.S.C. §§ 20501-20511), governs voter registration for federal elections, making it easier for individuals to register at certain state offices including DMVs (which is why the statute is referred to as the “motor-voter” law). Weinstein-Tull, *supra* note 34, at 755.

45. See Tolson, *supra* note 6, at 1200-01 (making this argument with respect to section 5 of the VRA).

courts' reasoning, and also because some of these decisions were significantly limited on appeal in ways that affected the ability of those participating in the 2016 elections to cast a meaningful ballot.⁴⁶ While these cases do not directly discuss the Elections Clause, they reveal that the Clause's increasing importance is best reflected, not only by recent Supreme Court cases recognizing its scope, but also in recent case law that, while invalidating restrictive state voting legislation under the Fourteenth and Fifteenth Amendments, indicates that additional tools may be necessary to supplement these efforts in the voting rights battles ahead.⁴⁷

A. Whither Discriminatory Intent? Legal Challenges to Restrictive Voting Laws in the Lower Courts

In *Shelby County v. Holder*, decided in 2013, and *NAMUDNO v. Holder*, decided four years earlier, the Supreme Court criticized the preclearance provisions of sections 4(b) and 5 of the VRA for—among other things—forcing states to solicit permission from the federal government to enact laws that they would otherwise have the authority to implement.⁴⁸ This imposed a significant and, in the Court's view, unwarranted federalism cost.⁴⁹ Federalism concerns also played a role in recent cases, although in less obvious ways. In the lower courts, federalism has manifested in the courts' overly deferential posture toward state justifications for the disputed law; refusal to resolve an otherwise meritorious claim (otherwise known as the abuse of the constitutional avoidance canon); or alternatively, in the limited remedies accorded to plaintiffs despite winning on the merits.⁵⁰

46. See, e.g., *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (allowing Texas to “soften” its voter identification law while the district court, Fifth Circuit panel, and en banc Fifth Circuit, volleyed back and forth on the question of discriminatory intent), *aff'd in part, vacated in part sub nom.* *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *aff'd in part, rev'd in part, vacated in part en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

47. See Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 100, 107-13 (2013).

48. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2618, 2621, 2626-27 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 202-03 (2009).

49. See *Shelby County*, 133 S. Ct. at 2618, 2621, 2626-27.

50. See generally Tolson, *supra* note 36 (discussing these cases at length).

For example, in *Frank v. Walker*, the Seventh Circuit stayed an injunction requiring Wisconsin officials to accept an affidavit instead of photo identification from voters at the polls.⁵¹ The court allowed Wisconsin to amend its voter identification law to permit individuals to fill out paperwork at the state’s department of motor vehicles and receive a free ID in the mail, without having to provide photo evidence of their identity.⁵² The Seventh Circuit sustained the revised free identification process,⁵³ even though it did not ameliorate the burdens of the law on the disproportionate number of minorities without transportation.⁵⁴ The court also ignored that allowing individuals to obtain a free ID without proof of identification undermined the state’s concerns about fraud, and completely disregarded the findings of several district court judges that the voter identification law violated some combination of the First, Fourteenth, and Fifteenth Amendments as well as the VRA.⁵⁵ In a prior opinion, the Seventh Circuit rejected these claims, adopting a reading of the relevant case law that increased the plaintiff’s evidentiary burden.⁵⁶ Noticeably absent from the Seventh Circuit’s

51. Nos. 16-3003 & 16-3052, 2016 WL 4224616, at *1 (7th Cir. Aug. 10, 2016). In February 2017, the Seventh Circuit heard oral arguments challenging Wisconsin’s refusal to let people vote using an affidavit if they could not get identification, but the court has not issued its decision on the merits yet.

52. *See id.*

53. *See id.*; *see also* League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302, 305-06 (Wis. 2014) (upholding the voter identification law without an affidavit option in parallel state proceeding).

54. *See* JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN (2006), http://dc.uwm.edu/cgi/viewcontent.cgi?article=1067&context=eti_pubs [<https://perma.cc/5C2N-8T93>].

55. *See* One Wis. Inst., Inc. v. Thomsen, No. 15-cv-324-jdp (W.D. Wis. Aug. 1, 2016) (order entering judgment in favor of plaintiffs); *Frank v. Walker*, 196 F. Supp. 3d 893, 897-98 (E.D. Wis. 2016) (order granting plaintiffs’ motion for preliminary injunction) (citing *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014)). The case before the Eastern District of Wisconsin adopted the affidavit requirement. *See Walker*, 196 F. Supp. 3d at 898. The Western District declined to impose this requirement and instead required the State to refine the manner in which individuals can obtain free IDs. *See* One Wis. Inst., Inc. v. Thomsen, No. 15-cv-324-jdp, at 2-3 (W.D. Wis. Aug. 1, 2016) (order entering judgment in favor of plaintiff). The Seventh Circuit denied the State’s motion to stay the Western District’s order. *See* One Wis. Inst., Inc. v. Thomsen, Nos. 16-3083 & 16-3091 (7th Cir. Aug. 22, 2016) (order denying defendants’ motion to stay injunction).

56. *See* *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014); *see also* Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 480 (2015) (“[T]he Seventh Circuit, in resolving *Frank v. Walker* on appeal, adopted a reading of section 2 [of the VRA] that raised the evidentiary burden to one that would require plaintiffs to show that the

analysis of the preliminary injunction was any assessment of whether the law imposed a burden that was unjustifiable in light of the state's asserted justifications for its adoption, and why, given this burden, it was inappropriate to relax the requirements of an otherwise impermissible law.⁵⁷

The Seventh Circuit's approach has become commonplace for three reasons. First, courts start from the baseline that states retain sovereignty over voter qualifications when analyzing claims pursuant to the Fourteenth and Fifteenth Amendments, making them less likely to accuse the state of acting in a discriminatory manner. In *Veasey v. Abbott*, for example, a panel of the Fifth Circuit invalidated Texas's voter identification law pursuant to section 2 of the VRA,⁵⁸ which examines how "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."⁵⁹ The court relied on an effects analysis, in part, because it was uncomfortable with finding that the state (especially in its sovereign capacity) engaged in intentional discrimination.⁶⁰ But in rejecting the district court's analysis of the constitutional claim, the appeals court parsed the evidence in a very formalistic manner, relying on older instances of discrimination to validate the statutory claim that the law had a discriminatory effect,⁶¹ while disregarding this evidence with respect

voter-identification law amounts to what is essentially an absolute barrier to voting.").

57. Instead, the court cites to *Crawford v. Marion County Election Board* as a blanket endorsement of voter identification laws subject to challenge only if there is proof that a voter has been unduly burdened, and not by an absence of evidence as to the law's utility. *See* Frank v. Walker, Nos. 16-3003 & 16-3052, 2016 WL 4224616, at *1 (7th Cir. Aug. 10, 2016) (order staying injunction) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008)). In refusing to hear the case en banc, the court also credited the state's representations without any thorough analysis of the groups that would be burdened by the amended law. *See* Frank v. Walker, 835 F.3d 649, 651-52 (7th Cir. 2016) (per curiam) (denying petitions for initial hearing en banc).

58. 796 F.3d 487, 493 (5th Cir. 2015), *aff'd in part, vacated in part, rev'd in part en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

59. *Id.* at 504 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)); *see also* 52 U.S.C. § 10301(a) (Supp. III 2016).

60. *Cf. Veasey*, 796 F.3d at 501-02 (discussing the difficulty of establishing discriminatory intent on the part of an entire legislative body).

61. *See id.* at 504-05, 509-11.

to whether the state acted with discriminatory intent and violated the Constitution.⁶²

This discomfort with the discriminatory intent analysis is directly tied to the second point—the assumption that states retain sovereignty over elections drastically reduces the weight that courts place on evidence of discriminatory intent. The Fifth Circuit panel was especially troubled by what it viewed as the lack of contemporary evidence of discrimination but, as the Supreme Court recognized in *McCleskey v. Kemp*, older evidence of discrimination is still probative, just less probative than more recent examples.⁶³

McCleskey rejected instances of discrimination that were almost one hundred years older than the contested practice (the racially discriminatory application of the death penalty) before the Court.⁶⁴ In contrast, the district court relied on official decisions and case law from the last thirty to forty years to support its discriminatory intent finding, including voting rights case law that found the state acted with racially discriminatory intent.⁶⁵ Indeed, in one such case that the Fifth Circuit tried to discount, *League of United Latin American Citizens (LULAC) v. Perry*, the Supreme Court argued that Texas’s actions in crafting its legislative district lines to dilute the votes of Latinos “[bore] the mark” of the discriminatory intent that might violate the Equal Protection Clause of the Fourteenth Amendment.⁶⁶ It took the entire Fifth Circuit, sitting en banc, to

62. *See id.* at 500.

63. *See* 481 U.S. 279, 298 n.20 (1987).

64. *See Veasey*, 796 F.3d at 500 (describing *McCleskey* as “resolving that laws in force during and just after the Civil War were not probative of the legislature’s intent in 1972”).

65. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 636 & n.23 (S.D. Tex. 2014), *aff’d in part, vacated in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *aff’d in part, vacated in part, rev’d in part en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017); *see also id.* at 636 (discussing the contemporary evidence in the record, including the fact that “[i]n every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially gerrymandered districts”).

66. 548 U.S. 399, 440 (2006); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (citing *LULAC* favorably, noting that “[t]he *LULAC* Court addressed a claim of vote dilution, but its recognition that racially polarized voting may motivate politicians to entrench themselves through discriminatory election laws applies with equal force in the vote denial context”); *cf. Veasey*, 796 F.3d at 501 (discussing *LULAC* and stating that, “Although citing discussions of the historic discrimination against Hispanics in Texas, the Court did not base its decision on a conclusion that the legislature intentionally discriminated based on ethnicity”). The Fourth Circuit also credited recent North Carolina redistricting litigation in its discriminatory intent analysis. *See McCrory*, 831 F.3d at 225 (“And only a few

recognize that there was sufficient evidence before the district court to support a finding of discriminatory intent.⁶⁷ Notably, the en banc court made this determination without crediting all of the evidence before the district court,⁶⁸ which, on remand, sustained the original discriminatory intent finding despite the excluded evidence.⁶⁹

Other courts have been more willing to establish discriminatory intent based on an appropriate weighing of the evidence. The Fourth Circuit, in invalidating North Carolina's restrictive voting laws in *North Carolina State Conference of the NAACP v. McCrory*, found that the incidence of section 2 litigation, preclearance denials by the Department of Justice, and its prior case law illustrating discriminatory actions on the part of the state were all relevant to the discriminatory intent analysis.⁷⁰ The court acknowledged the limited probative value of North Carolina's pre-1965 history of racial discrimination in voting.⁷¹ Nonetheless, the court used this history to provide context and show how unprecedented and extreme these new barriers—which included a strict voter identification requirement, the elimination of same-day voter registration, and a reduction in early voting days⁷²—were with respect to ballot access.⁷³ A better approach to resolving intertwining statutory and constitutional claims is for courts to limit their reliance on older

months ago ... a three-judge court addressed a redistricting plan adopted by the same General Assembly that enacted SL 2013-381.... [A] holding that a legislature impermissibly relied on race certainly provides relevant evidence as to whether race motivated other election legislation passed by the same legislature.”)

67. See *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2016) (en banc) (plurality opinion), *cert. denied*, 137 S. Ct. 612 (2017).

68. *Id.*

69. See *Veasey v. Abbott*, 249 F. Supp. 3d 868, 871-72 (S.D. Tex. 2017). However, the district court did not rescuscitate the constitutional claim despite finding discriminatory purpose sufficient to violate the Constitution. See *id.* (finding that the plaintiffs met the requirements of *Village of Arlington Heights* and *Personnel Administrator of Massachusetts v. Feeney*, two Fourteenth Amendment cases). Once again, this illustrates the limitations of the antidiscrimination framework.

70. See *McCrory*, 831 F.3d at 223-25.

71. *Id.* at 223.

72. *Id.* at 219.

73. See *id.* at 223 (criticizing the district court for disregarding North Carolina's history of discrimination and noting that, “[w]hile it is of course true that ‘history did not end in 1965,’ it is equally true that SL 2013-381 imposes the first meaningful restrictions on voting access since that date Due to this fact, and because the legislation came into being literally within days of North Carolina's release from the preclearance requirements of the Voting Rights Act, that long-ago history bears more heavily here than it might otherwise” (citation omitted)).

evidence rather than reject the evidence altogether.⁷⁴ As these cases show, however, the courts are wildly inconsistent when it comes to critiquing whether plaintiffs have presented evidence sufficient to establish the purposeful discrimination necessary to establish the constitutional claim.

Third, the remedies available to plaintiffs are significantly hampered by the antidiscrimination framework because of federalism concerns. Had the initial *Veasey* panel found that Texas engaged in intentional discrimination,⁷⁵ for example, the court could have bailed the jurisdiction back into preclearance under section 3 of the VRA.⁷⁶ Although the Fifth Circuit, sitting en banc, agreed with the original panel that some of the intent evidence was infirm,⁷⁷ it was clear at the time of the original *Veasey* decision that there was evidence of intent on the part of the Texas legislature that fell squarely within the intentional discrimination paradigm outlined in the Supreme Court decision of *Village of Arlington Heights v. Metropolitan Housing Development Corp.* This evidence included departures from normal procedures; questionable statements and omissions from legislators who supported the bill; the tenuousness of the legislature’s stated purpose for passing the bill; and contemporary examples of state-sponsored discrimination.⁷⁸

The decision of the original panel to punt on the question of discriminatory intent led to a “softening” of the Texas voter

74. See, e.g., *Veasey v. Abbott*, 830 F.3d 216, 229-32 (5th Cir. 2016) (en banc) (plurality opinion) (stating that the district court placed too much weight on evidence that is not that probative of discriminatory intent, but also referring to the evidence as “infirm” and suggesting that the district court should not have relied on it at all (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982))), *cert. denied*, 137 S. Ct. 612 (2017).

75. Note that the court remanded, and did not reverse in favor of the state, because there was circumstantial evidence of discriminatory intent. See *Veasey v. Abbott*, 796 F.3d 487, 493 (5th Cir. 2015), *aff’d in part, vacated in part, rev’d in part en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

76. Section 3 of the VRA allows a judge, upon a finding of discriminatory intent, to bail a jurisdiction back into the preclearance regime. 52 U.S.C. § 10302(c) (Supp. III 2016). It was not until the subsequent en banc and district court opinions that the discriminatory purpose holding was reinstated. See *supra* notes 68-69. On June 7, 2017, the district court held a hearing on remedies, the outcome of which is still pending.

77. See *Veasey*, 830 F.3d at 230-31, 241.

78. See *Veasey v. Perry*, 71 F. Supp. 3d 627, 698-702 (S.D. Tex. 2014), *aff’d in part, vacated in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *aff’d in part, vacated in part, rev’d in part*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977).

identification law, which added an affidavit option to the list of acceptable identification, as opposed to invalidating the law in its entirety.⁷⁹ Invalidation of the law was more appropriate given the intent evidence before the court, especially because the Department of Justice filed a motion indicating that Texas had failed to adhere to its promise to soften the law. Though softening might be appropriate to address a claim that centers on discriminatory effects, it is arguably inappropriate when a law was passed with the intent to discriminate, as is the case with the North Carolina law (and arguably with respect to the Texas law as well). This insight is especially pertinent now, given that the Department of Justice changed its official position and filed a motion dismissing its claim that Texas acted with discriminatory intent.⁸⁰ A court's reluctance to label the state as a discriminator, as well as the setbacks that can come from a change in presidential administrations, only add to the difficulties of providing the proper remedy for Fourteenth and Fifteenth Amendment violations.

Despite their vastly different outcomes, both the Fourth and Fifth Circuits purported that they were each following the standard established by the Supreme Court in *Pullman-Standard v. Swint* in analyzing the discriminatory purpose analysis from the lower court.⁸¹ Yet both applied a very different weighing of the facts (and in the case of the Fifth Circuit, it confused errors of law with those of fact) that ultimately led to different remedies in each case.⁸² Much

79. *Veasey*, 796 F.3d at 519-20.

80. United States's Motion for Voluntary Dismissal of Discriminatory Purpose Claim Without Prejudice at 2, *Veasey v. Abbott*, No. 2:13-cv-193 (NGR) (S.D. Tex. Feb. 27, 2017).

81. 456 U.S. 273 (1982).

82. In *Veasey*, both the concurrence and the dissent criticized the plurality opinion for impermissibly reweighing the evidence in trying to determine whether discriminatory intent was present. *See Veasey*, 830 F.3d at 319 (Dennis, J., concurring in part, dissenting in part, and concurring in the judgment) (noting that “[t]he majority opinion erroneously assigns legal errors to the district court and, in disturbing the district court’s finding of discriminatory purpose, fails to adhere to the proper standard of review and engages in an improper reweighing of the evidence”); *id.* at 320 (“The majority does not contend that the district court’s finding of discriminatory purpose is implausible in light of the record as a whole. Indeed, the majority opinion itself appears to acknowledge that there is a considerable amount of evidence to support this finding. Nevertheless, the majority reverses the district court because of purported legal errors, specifically, the district court’s reliance on evidence that, in the majority’s view, is ‘infirm.’” (citation omitted)). *Compare id.* at 322 (Clement, J., dissenting in part) (arguing that the plurality “discredits ‘much of the evidence’ relied on by the district court” but remands even though the “Supreme Court has instructed that when a

of the back and forth in these cases, even those in which the plaintiffs successfully showed that the state law violated a constitutional or statutory provision, stems from a fundamental misunderstanding about the scope of Congress’s authority over elections and the role of the states in organizing the machinery of federal elections.

The Elections Clause escapes the complex factual questions that accompany any analysis of discriminatory intent, and voter identification laws that do not violate the Fourteenth and Fifteenth Amendments could still exceed the scope of state authority under the Elections Clause.⁸³ Congress’s authority under the Clause is also unencumbered by any requirement that the remedy be congruent and proportional to the problem addressed, displacing contrary state laws regardless of fit or the legislature’s motivations.⁸⁴ As the next Section shows, recent Supreme Court cases have been hobbled by unwarranted deference to state law, much like the lower courts, and this has had implications for racial redistricting claims under the Reconstruction Amendments.

B. Whither Shaw Claim? The Federalism Implications of the Race or Party Question in the Supreme Court

In recent racial redistricting cases, the Court has been especially cautious in refuting the legitimacy of partisan justifications because of its concerns about infringing on the states’ authority over

district court’s findings as to discriminatory purpose are ‘infirm’ and ‘the record permits only one resolution of the factual issue,’” the case should be reversed), *with* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 220 (4th Cir. 2016) (finding that discriminatory intent is present on a totality of the facts because “[c]hallengers need not show that discriminatory purpose was the ‘sole[]’ or even a ‘primary’ motive for the legislation, just that it was ‘a motivating factor.’ Discriminatory purpose ‘may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another” (alteration in original) (citation omitted) (quoting *Washington v. Davis*, 426 U.S. 229, 265-66 (1976))).

83. It is not entirely clear whether a voter identification law is a voter qualification standard that falls within the scope of the state’s authority under Article I, Section 2, or a “manner” regulation that implicates the Elections Clause. *See* Franita Tolson, *Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal*, 13 *ELECTION L.J.* 322, 323 n.6 (2014). Nonetheless, enacting an overly broad voter identification law could exceed the scope of the state’s authority under the Elections Clause. *See* Tolson, *supra* note 39.

84. *See* *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997).

elections, a failure that further highlights the constraints of the antidiscrimination framework of the Fourteenth and Fifteenth Amendments. As a long-term strategy, the “politics, not race” justification, though unsuccessful in recent cases, could see a resurgence during the 2020 round of redistricting. The likelihood of this resurgence increases substantially if the Court fails to invalidate partisan gerrymandering this term in *Gill v. Whitford*,⁸⁵ or if the Court permits states to rely on partisan justifications so long as the level of partisanship falls below some inchoate and unascertainable threshold.

The potential for partisanship to legitimize an otherwise pernicious racial gerrymander could have deleterious effects on minority voting rights and, perversely, render the recently resuscitated *Shaw* claim toothless just as it finally stands to aid minority groups in their quest for equal voting rights.⁸⁶ In *Shaw v. Reno*, the Court recognized a new cause of action under the Equal Protection Clause of the Fourteenth Amendment for legislative districts that had been racially gerrymandered.⁸⁷ *Miller v. Johnson* clarified the scope of the Court’s inquiry, holding that plaintiffs must prove “that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”⁸⁸

Throughout the 1990s and 2000s, *Shaw* did not lead to the wide-scale invalidation of majority-minority districts as most scholars feared, because the correlation between race and partisan affiliation—particularly with respect to African Americans who overwhelmingly align with the Democratic Party’s political interests—inadvertently created a safe harbor for legislative districts that would otherwise run afoul of *Shaw*’s limit on race-conscious redistricting.⁸⁹ In *Easley v. Cromartie*, the Supreme Court reversed a district court finding that race, rather than politics, was a

85. See *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (mem.) (granting stay pending the Court’s hearing of the case), *argued*, No. 16-1161 (U.S. Oct. 3, 2017).

86. The *Shaw* claim has long been criticized as a cause of action created to enhance the political power of white voters at the expense of minority voting power. See Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 69-70 (2014).

87. See *Shaw v. Reno*, 509 U.S. 630, 642-44 (1993).

88. 515 U.S. 900, 916 (1995).

89. See *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 251-52 (2001); see also Hasen, *supra* note 86, at 68-70.

predominant factor in the state’s legislative redistricting plan because the district court ignored that voting behavior, rather than voter registration, was a better indicator of whether the legislature acted in a racially motivated manner in drawing the contested district.⁹⁰ The Court determined that predominantly African American precincts were more reliably Democratic than predominantly white precincts;⁹¹ thus, the plaintiffs did not refute the state’s argument that the legislature was driven primarily by political considerations in drawing the district.⁹² This approach marked a departure from an earlier decision, *Bush v. Vera*, which rejected the idea that the legislature’s desire to advance partisan goals can excuse an impermissible reliance on race.⁹³

Other decisions the Supreme Court handed down that decade reinforced *Easley’s* “partisan” safe harbor. In *Vieth v. Jubelirer*, for example, a plurality of the Court held that partisan gerrymandering claims are nonjusticiable because the Framers of the Constitution anticipated that political entities would structure the districts and, presumably, that the manipulation of district lines would take place in our democracy.⁹⁴ Although five Justices disagreed with the idea that partisan gerrymandering claims should be nonjusticiable, eight Justices agreed that partisan gerrymandering is unconstitutional only if used excessively.⁹⁵ This equivocation with respect to partisanship reinforced *Easley’s* partisan safe harbor for race-based redistricting, undermining the Court’s ability to address the abridgment of minority rights that happened to coincide with a shared political ideology.

The Court’s approach in these cases reflected uncertainty in the case law that alternated between condoning and condemning the use of partisanship in redistricting. In *LULAC v. Perry*, the Court held that, while the state’s decision to redistrict mid-decade was not *prima facie* evidence of an unlawful partisan gerrymander, the state’s desire to protect incumbents can, in some circumstances, run

90. 532 U.S. at 243-44.

91. *See id.* at 251-52.

92. *See id.* at 258.

93. 517 U.S. 952, 968 (1996) (plurality opinion).

94. *See Vieth v. Jubelirer*, 541 U.S. 267, 274-77 (2004) (plurality opinion).

95. *See Cox v. Larios*, 542 U.S. 947, 949-51 (2004) (Stevens, J., concurring).

afoul of section 2 of the VRA.⁹⁶ A majority of the Justices condoned the naked partisan purpose underlying the mid-decade redistricting, while a different majority penalized the State for taking partisanship too far, holding that the dismantling of a majority-Latino district violated section 2 of the VRA because it deprived Latinos in the district of their political power just as they were set to exercise it.⁹⁷ Section 2 of the VRA prohibits abridgments of the right to vote only on the basis of race, but Justice Kennedy created substantial doctrinal confusion by failing to distinguish between the racial or partisan motivations underlying the State's decision to dismantle the district.⁹⁸

While the partisan safe harbor curbed much of the *Shaw* litigation in the early 2000s, *LULAC v. Perry* illustrated that the Court was willing to rely on related doctrines to bypass *Vieth* and police behavior it viewed as too partisan.⁹⁹ It was not until the post-2010 round of redistricting that courts began to see a reemergence of the *Shaw* claim in a meaningful way. Instead of white plaintiffs complaining about being “fillers” in majority African American districts, plaintiffs now argued that states violated the mandates of *Shaw* by packing African Americans into majority-minority districts to limit their influence and, by implication, the influence of the Democratic

96. See 548 U.S. 399, 409-10 (2006). Justice Anthony Kennedy, writing for himself, argued that a state's decision to redistrict so that its House delegation reflects the political party's share of the statewide vote is also legitimate. See *id.* at 419 (Kennedy, J.). Chief Justice John Roberts and Justice Samuel Alito agreed that there was no partisan gerrymander, but it is not clear if they endorsed Justice Kennedy's reasoning. See *id.* at 492-93 (Roberts, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 511-12 (Scalia, J., concurring in the judgment in part and dissenting in part). Justices David Souter and Ruth Bader Ginsburg rejected these portions of Justice Kennedy's opinion, although they agreed with Justice Kennedy “that a legislature's decision to override a valid, court-drawn plan mid-decade is [not] sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders” that run afoul of the rule of one person, one vote. *Id.* at 423 (plurality opinion).

97. *Id.* at 428-35 (majority opinion).

98. See Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1207 (2007) (“[O]ne possible interpretation of the Court's holding in *LULAC v. Perry* is that the State intentionally discriminates against voters (of color?) where the State intentionally deprives them of an electoral benefit to which they would otherwise be entitled for reasons that are not constitutionally permissible.”).

99. See, e.g., Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 866-67.

Party.¹⁰⁰ Whereas early *Shaw* cases struggled with conceptualizing the harm from racial gerrymandering,¹⁰¹ these recent cases have forced the Supreme Court to more directly confront the “race or party” question.

The reemergence of the *Shaw* claim forces the Court to confront the question it skirted for far too long: Why dance around the race or partisanship question for almost two decades instead of directly addressing the issues that emerge when the two categories overlap? Not surprisingly, the answer lies in the creation of the *Shaw* claim itself, which has never resolved the problem of racial gerrymandering because the Court has been unwilling to circumscribe the states’ authority over elections by first, fully vindicating antidiscrimination norms, and second, by treating partisanship as inherently suspect. After all, partisanship that harms a racial group cannot be valid simply because the legislature’s reasons are more partisan than racial.¹⁰²

On the first point, *Shaw* and its progeny failed to definitively resolve whether compliance with federal antidiscrimination laws was sufficient to justify such districting.¹⁰³ This failure has exacerbated the conflict between the mandates of the VRA, which sometimes require the creation of majority-minority districts as a remedy, and the requirements of the Equal Protection Clause, which eschews race consciousness in legislative redistricting.

In *Bethune-Hill v. Virginia*, for example, the Supreme Court rejected the lower court’s argument that there must be a conflict between traditional redistricting criteria and race “that leads to a subordination of the former” in order to prevail on a *Shaw* claim.¹⁰⁴ But the Court sustained the lines drawn for District 75 against a racial gerrymandering challenge, a district that was 55 percent African American, despite dubious evidence that the district needed this many voters of color to elect their candidate of choice.¹⁰⁵ This approach created tension with an earlier decision, *Alabama Legislative Black Caucus v. Alabama*, which rejected a reading of

100. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1472-73, 1477-78 (2017).

101. See *supra* notes 87-95 and accompanying text.

102. Tolson, *supra* note 99, at 867-71.

103. See *supra* notes 89-93 and accompanying text.

104. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 796, 797-99 (2017).

105. See *id.* at 800-02.

section 5 that would facilitate this type of packing in majority-minority districts.¹⁰⁶ Instead, the Court was more concerned about intruding on the state's authority over elections: "The law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population § 5 demands'.... Holding otherwise would afford state legislatures too little breathing room."¹⁰⁷

This need to give the states "breathing room" has likewise rendered it unlikely that the Court will prevent the state from relying on partisan justifications in redistricting. In *Cooper v. Harris*, the Court once again dealt with the constitutionality of congressional Districts 1 and 12—the very same districts that were at issue in the *Shaw v. Reno* round of litigation.¹⁰⁸ Prior to the 2010 round of redistricting, neither district was a majority-minority district, and District 1, in particular, was substantially underpopulated.¹⁰⁹ Post-2010, both districts became majority African American, with the State claiming that District 1 was reconfigured in order to avoid liability under section 2 of the VRA and that the District 12 lines were altered for partisan reasons.¹¹⁰ The Court rejected these arguments, noting that, with respect to District 1, any potential section 2 plaintiffs could not establish the racial bloc voting necessary to sustain the statutory claim.¹¹¹ This position is understandable, given that the State's interpretation would force it to draw majority-minority districts wherever possible, even in the absence of racial bloc voting, which would put section 2 on a collision course with the Equal Protection Clause of the Fourteenth Amendment.¹¹²

106. 135 S. Ct. 1257, 1272-74 (2015) (holding that section 5 of the VRA did not require states to maintain the same percentage of African Americans in majority-minority districts as had existed in the prior plan).

107. *Bethune-Hill*, 137 S. Ct. at 802 (quoting *Ala. Legislative Black Caucus*, 135 S. Ct. at 1273) ("The question is whether the State had 'good reasons' to believe a 55% BVAP floor was necessary to avoid liability.").

108. *Cooper v. Harris*, 137 S. Ct. 1455, 1465-66 (2017).

109. *Id.* at 1466.

110. *See id.* at 1470-73.

111. *See id.* at 1470.

112. Unlike the effectively defunct provisions of section 5, the Court's position that compliance with section 2 triggers strict scrutiny ultimately could prove to be harmful to section 2's constitutionality, but that is an issue for another day. *See Bartlett v. Strickland*, 556 U.S. 1, 23-25 (2009).

The State’s arguments concerning District 12 were much more difficult for the Court to resolve, ultimately leaving in place much of *Easley v. Cromartie*’s partisan safe harbor. In *Cooper*, the State argued that its decision to reconfigure District 12 was strictly partisan¹¹³—a contention that the Court rejected because of the direct evidence of racial motivation, including statements by state legislators that District 12 was designed to avoid retrogression under section 5 of the VRA,¹¹⁴ conflicting testimony by the State’s expert witness, Dr. Hofeller, about whether he ignored race in crafting the district,¹¹⁵ and an expert report by Dr. Ansolabehere that found “a black voter was three to four times more likely than a white voter to cast his ballot within District 12’s borders.”¹¹⁶

Nonetheless, the *Cooper* majority did not firmly and unequivocally refute that states can assert a partisan-based defense to racial gerrymandering. Because the evidence of racial motivation was substantial, the Court rejected arguments by dissenters that the plaintiffs, in order to prevail in a redistricting dispute where race and partisan affiliation correlate, must produce an alternative map that allows the state to achieve its partisan objectives without the same reliance on race.¹¹⁷ In cases based on circumstantial instead of direct evidence of racial considerations, however, the Court implied that the legislature could prevail, distinguishing the present case on the grounds that “the plaintiffs’ introduction of mostly direct and some circumstantial evidence ... gave the District Court a sufficient basis, sans any map, to resolve the race-or-politics question.”¹¹⁸ Absent such direct evidence, partisanship, no matter how toxic or how pervasive, can be a legitimate motivation for a redistricting plan, such that plaintiffs have to come forward with an alternate map in cases of circumstantial evidence. *Cooper* importantly ignores that, just as the use of race can be a facial classification that runs

113. *Cooper*, 137 S. Ct. at 1473 (“According to the State’s version of events, Senator Rucho, Representative Lewis, and Dr. Hofeller moved voters in and out of the district as part of a ‘strictly’ political gerrymander, without regard to race.”).

114. *Id.* at 1475.

115. *Id.*

116. *Id.* at 1476-77.

117. *See id.* at 1478-81.

118. *Id.* at 1479.

afoul of the Equal Protection Clause, so too can the excessive use of partisanship “abridge or deny” the right to vote.¹¹⁹

Given this reasoning, the majority is not too far off from Justice Alito’s separate concurrence and dissent, which embraced the notion that the state can be partisan in its sovereign capacity, and therefore can legitimately enact a plan that has a negative impact on people of color who vote for the opposition.¹²⁰ Instead, the disagreement between the majority and the dissenters in this case really boils down to an evidentiary issue: When must plaintiffs produce an alternate map to prevail on a racial gerrymandering claim? As Justice Alito argued in *Cooper*, the alternative map requirement has an important institutional and federalism dimension that effectively trumps the rights of minority voters: “[I]f a court mistakes a political gerrymander for a racial gerrymander, it illegitimately invades a traditional domain of state authority, usurping the role of a State’s elected representatives. This does harm to both the proper role of the Judiciary and the powers reserved to the States under the Constitution.”¹²¹

Unlike the Fourteenth and Fifteenth Amendments, there is no requirement under the Elections Clause that plaintiffs disentangle the myriad motivations for why a plan was enacted. A state, for example, can exceed the scope of its redistricting authority under the Clause by adopting rules that unduly influence the outcome of an election, regardless if enacted for racial or partisan reason.¹²² In

119. Tolson, *supra* note 56, at 476-77 (arguing that partisanship can abridge the right to vote under Section 2 of the Fourteenth Amendment); *see also* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351 (2017).

120. *See Cooper*, 137 S. Ct. at 1487-88 (Alito, J., concurring in the judgment in part and dissenting in part). As Justice Alito explicitly acknowledges,

[I]t is well known that state legislative majorities very often attempt to gain an electoral advantage through [partisan gerrymandering.] ... and while some might find it distasteful, “[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of the fact.”

Id. at 1488 (citing *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Bush v. Vera*, 517 U.S. 952 (1996)).

121. *Id.* at 1490.

122. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-35 (1995); *see also* Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1028-30 (2005).

addition, Congress does not have to yield to concerns over the sovereign authority of the states when regulating the times, places, and manner of federal elections. Yet recent Supreme Court case law has failed to fully theorize the Elections Clause as a provision that eschews state sovereignty, limiting the Clause’s ability to supplement federal power under the Reconstruction Amendments. As the next Part shows, this failure potentially subjects the Elections Clause to the same federalism limitations as the Fourteenth and Fifteenth Amendments.

II. THE ELECTIONS CLAUSE AND THE IMPRUDENT FEDERALISM OF THE ARIZONA CASES

As I have argued in prior work, the Elections Clause stands as an additional source of authority for federal antidiscrimination laws, especially the VRA.¹²³ The Clause, although it explicitly applies to procedural regulations that govern federal elections, can, in some circumstances, limit the states’ ability to enact legislation that abridges the right to vote.¹²⁴ Congress also has enacted legislation pursuant to the Clause that likely would be unconstitutional had that body relied on the Fourteenth and Fifteenth Amendments alone.¹²⁵ The Elections Clause historically has been important in supplementing the Reconstruction Amendments as a source of authority to combat racial discrimination in voting.¹²⁶ But using these sources concurrently has increased the risk that the Clause would be similarly limited by the federalism concerns that have hobbled enforcement of the Amendments. Both the courts and scholars often confuse the decentralized nature of the Elections Clause with federalism, even though the Clause is incompatible with the concept of “dual sovereignty” upon which the United States system of federalism is based.¹²⁷ While the authority that the states exercise

123. See generally Tolson, *supra* note 6, at 1197-1202.

124. See *id.* at 1212.

125. See *id.* at 1238-40.

126. See *id.* at 1197-1202.

127. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819) (“In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.”). Of course, this is not the only

pursuant to the Clause can arguably further important federalism end goals,¹²⁸ state authority under the Clause is best characterized not as sovereign, but as decentralized and autonomous. Under this characterization, states “may be immune from certain norms but are not exempt from all intervention from the federal government.”¹²⁹ As

definition of federalism. Edward Purcell has persuasively argued that federalism is dynamic in “that the Constitution neither gave the federal structure any single proper shape as an operating system of government nor mandated any particular and timeless balance among its components.” EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 7 (2007). Thus, new theories of federalism emerge “as the social and cultural dynamics of American politics ... change drastically.” *Id.* at 179; *see also id.* at 178-81 (discussing theories of dual, cooperative, and competitive federalism, all of which “reflected the dominant needs, values, practices, and politics of the respective centuries that embraced them most fully”); FEELEY & RUBIN, *supra* note 41, at 22 (defining “true federalism” as a structure in which “geographical subunits are allowed to establish their own goals and maintain their own values”). In addition, not all of the new theories of federalism treat sovereignty as their focal point. *See, e.g.*, Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 455-56, 458-59 (2010) (viewing “federalism’s central ideas” as “multilayered authority, a substantive (as opposed to territorial or personal) approach to jurisdiction, a central government with a brief and identity distinct from the combined wills of the component states,” which necessitated the creation of “another institution—the judiciary—to mediate [disputes] between state and general governments”). But to the extent that the Court has, in accordance with its “federalism revival,” tried to reinvigorate conceptions of “dual federalism” and “state sovereignty,” then the Elections Clause is in tension with the sovereignty-based narrative underlying our system of federalism as advocated by eighteenth- and nineteenth-century politicians. *See* Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 41-42 (finding among the tenants of “dual federalism” advocated by politicians of this era was “that each of these governments had a complete, independent structure [confirmed by the Tenth Amendment] with which to exercise its powers and could not require the other to administer its laws”). The Supreme Court still protects this conception of “state sovereignty.” *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 924-25 (1997) (holding that Congress cannot commandeer state officials without undermining residual state sovereignty); *New York v. United States*, 505 U.S. 144, 169 (1992).

128. *See* Tolson, *supra* note 99, 862-64; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543-44 (1954) (describing the states’ role “in the composition and selection of the central government” as an important device that “serve[s] the ends of federalism”).

129. Tolson, *supra* note 6, at 1248. Compare Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 3-4 (2004) (defining sovereignty “as the notion that state governments should be unaccountable for violations of federal norms” and autonomy “as the ability of states to govern”), with Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 816 (1998) (defining autonomy as immunity from federal norms). One such norm that has developed is the presumptive validity of state law under Elections Clause, but this norm has erroneously contributed to a view of the Clause as embracing a federalist structure in which states exercise sovereign authority. This norm emerged due to the absence of

Bernard Bailyn observed almost fifty years ago, sovereignty is “the notion that there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself.”¹³⁰ States are not sovereign when legislating pursuant to the Clause because they govern entirely at the pleasure of Congress, depriving states of the final policy-making authority that is the hallmark of sovereign power.¹³¹

In theory, dual federalism assumes that both federal and state governments retain final policy-making authority in their respective spheres, but the not-so-background assumption in the Supreme Court’s case law is that the states need protection from an overly aggressive and imperialistic federal government.¹³² In the Court’s view, post-New Deal developments negated the states’ properly ordained role in the national political process, prompting the Court to adopt a series of federalism principles to protect state sovereignty.¹³³

uniform federal legislation governing federal elections for the first half century of the country’s existence, and not from a reluctance to displace state law once Congress has made the decision to act (such that a clear statement rule or a presumption against preemption would be warranted). See Tolson, *supra* note 99, at 885-88.

130. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 198 (50th Anniversary ed. 2017).

131. Tolson, *supra* note 6, at 1248 (“Decentralization is the best way of describing a policy area in which states are autonomous rather than sovereign As such, the ability of Congress to preempt state regulatory regimes reflects that the founders were not overly concerned with protecting state sovereignty in this respect because, if this had been a concern, state authority would be final.”); cf. FEELEY & RUBIN, *supra* note 41, at 23 (“[A] common—if not essential—feature of federalism is that there are significant constraints on the national government’s ability to interfere with subunit policies for managing and controlling the local governments within their borders.”); Andrew C. McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215, 215 (1918) (“By federalism is meant, of course, that system of political order in which powers of government are separated and distinguished and in which these powers are distributed among governments, each government having its quota of authority and each its distinct sphere of activity.”).

132. See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2024-25 (2009) (reading the Court’s federalism cases as enforcing a general federalism norm that recognizes “implied limitations in federal power that are traceable to some form of historically reconstructed original understanding of the appropriate federal-state balance”).

133. See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (noting that the Supreme Court’s jurisprudence during the New Deal is in tension with “certain postulates or axioms of constitutional interpretation closely touching the Federal System,” including the postulate that “[w]ithin their respective spheres the two centers of government are ‘sovereign’ and hence ‘equal’”).

For example, the Court does not automatically assume that Congress intends to apply federal law to the states in areas of concurrent regulation, utilizing a clear statement rule even though Congress could subject states to federal regulation if it so chooses.¹³⁴ Similarly, the presumption against preemption does not confront the issue of whether Congress can preempt the relevant state law; instead, the presumption treats state law as valid absent evidence to the contrary.¹³⁵ In both scenarios, the Court concedes that Congress could act, but refuses to subject state actors to federal regulation or displace state law absent explicit congressional intent.¹³⁶ And other federalism principles, such as the anticommandeering doctrine,¹³⁷ the constitutional avoidance canon,¹³⁸ and, more recently, the equal sovereignty principle,¹³⁹ insulate the states from federal authority. But there has not been much sustained effort to protect federal power and prevent overreaching by the states using similar principles.¹⁴⁰ This oversight is noticeable with respect to the

134. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458-61 (1991).

135. See *Arizona Inter Tribal*, 133 S. Ct. 2247, 2271 (2013) (Alito, J., dissenting) (“The presumption against pre-emption applies with full force when Congress legislates in a ‘field which States have traditionally occupied.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

136. See *id.* at 2272 (“[W]hen Congress believes that some overriding national interest justifies federal regulation, it has the power to ‘make or alter’ state laws specifying ‘Times, Places and Manner’ of federal elections.” (quoting U.S. CONST. art. I, § 4, cl. 1)).

137. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2181-83 (1998) (arguing that the constitutional text and history supports a ban on the commandeering of state legislatures, but suggesting that there should be a more nuanced approach to the commandeering of the state executive).

138. One of the Court’s most recent efforts to preserve a federal statute using the constitutional avoidance canon led to the statute’s invalidation a short four years later, suggesting that the Court will not give Congress much time to correct perceived constitutional defects in federal statutory schemes where state sovereignty is at issue. Compare *NAMUDNO*, 557 U.S. 193, 203-06 (2009), with *Shelby County v. Holder*, 133 S. Ct. 2612, 2621-27 (2013).

139. See *Shelby County*, 133 S.Ct. at 2623-24.

140. See Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 541-42, 624 (2012) (describing the anticommandeering rule as “establish[ing] jurisdictional limits on the state and federal sovereigns by prohibiting the phenomena of commandeering” and arguing that “[t]he state takeover of federal immigration database screening protocols effectually commandeers federal resources to serve state ends ... [and] enables another form of reverse-commandeering: the usurpation of federal enforcement discretion because state authorities can now make competing choices about where, when, and how vigorously to enforce the federal laws mirrored in their state statutes” (emphasis added)). One notable exception is where issues of field preemption arise, and the Court protects federal authority from state

Elections Clause, in which Congress, by virtue of its authority to “make or alter” state regulations, determines the scope of state power but—with few exceptions—still must battle against norms that implicitly favor state regulation.¹⁴¹

Despite the distinction between the sovereign authority the Clause delegates to Congress and the autonomy the states retain over structuring the procedures of federal elections, the Court has not exempted the Clause from its tendency to enforce federalism at all costs, with little regard for the Clause’s text, structure, and purpose. An initial read of recent case law might give the opposite impression, however. In *Arizona Inter Tribal*, the Court held that the NVRA, which requires that individuals affirm their citizenship status in order to register to vote in federal elections, preempted an Arizona voter registration law that required documentary proof of citizenship—instead of affirmation—to register to vote in both state and federal elections.¹⁴² The Court rejected Arizona’s argument that the presumption against preemption applied to congressional legislation, like the NVRA, passed pursuant to the Elections Clause.¹⁴³ Any congressional power exercised under the Clause, in the Court’s view, is a preemption of state legislation, making the presumption unnecessary.¹⁴⁴

The Elections Clause’s division of authority was once again front and center two years later in *Arizona IRC*, but this time the Arizona legislature and voters were at odds over which entity was the

encroachment by prohibiting states from regulating in a particular substantive area. *See, e.g.*, *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 474 (4th Cir. 2014), *aff’d sub nom.* *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016). Even in cases involving issues of field preemption, there is still substantial concern about preserving the vitality of state sovereignty. *See generally* Matthew R. Christiansen, Comment, *FPA Preemption in the 21st Century*, 91 N.Y.U. L. REV. ONLINE 1, 1-3 (2016) (previewing the Supreme Court case of *PPL EnergyPlus, LLC v. Nazarian*, which involves the Federal Power Act, and arguing that the Court should narrow its field preemption doctrine to avoid “impairing the dual-federalist model that is the heart of the FPA”).

141. Tolson, *supra* note 6, at 1258 (noting that the Court’s “voting rights jurisprudence presupposes that the states still retain a large amount of ‘sovereignty’ over elections, leaving room for the Court to characterize the federal/state relationship over elections as one of shared power instead of viewing the state as subordinate to federal authority. The view of electoral authority as ‘shared’ has led the Court to defer more to the states over the matter of elections”).

142. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2252-60 (2013).

143. *See id.* at 2256-57.

144. *Id.* at 2257 n.6.

“legislature” for the purpose of congressional redistricting.¹⁴⁵ The Court upheld an Arizona law adopted through direct democracy that delegated the state legislature’s redistricting authority to an independent commission.¹⁴⁶ The Court rejected the argument that the Clause, which states that “[t]he Times, Places and Manner” of federal elections “shall be prescribed in each State by the Legislature thereof,” was designed “to restrict the way States enact legislation,” and instead found that its “dominant purpose ... was to empower Congress to override state election rules.”¹⁴⁷ In an alternate holding, the Court found that the State’s redistricting scheme was permitted by a federal statute, 2 U.S.C. § 2a(c),¹⁴⁸ which lists several requirements for congressional redistricting in the event that a state fails to adopt a redistricting plan.¹⁴⁹ This statute refers to a valid state redistricting plan as one that is adopted “in the manner provided by the laws thereof,” which is a change from earlier language that required redistricting “by a State’s ‘legislature.’”¹⁵⁰

On the surface, the Court’s description of the Elections Clause in both *Arizona Inter Tribal* and *Arizona IRC* defies the dual sovereignty narrative because the Court emphasizes congressional power. This approach is inconsistent with the traditional federalism framework that delegates to each sovereign an exclusive sphere of authority, insulated from interference from one another. The majority opinion in *Arizona Inter Tribal*, in particular, adopted a broad view of congressional authority over federal elections, at one point describing this authority as a “paramount” and noting that it “may be exercised at any time, and to any extent which [Congress] deems expedient.”¹⁵¹ The Court therefore declined to apply the presumption against preemption, maintaining that federalism concerns in this

145. See *Arizona IRC*, 135 S. Ct. 2652, 2658-59 (2015).

146. See *id.* at 2677.

147. *Id.* at 2659, 2672.

148. *Id.* at 2659, 2666.

149. *Id.* at 2669 n.19. (noting that 2 U.S.C. § 2a(c) requires “that Representatives be elected ‘by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants,’ and that the districts ‘be equal to the number of Representatives to which [the] State may be entitled in Congress, no district electing more than one Representative” (quoting Act of Aug. 8, 1911, Ch. 5 §§ 3-4, 37 Stat. 14)).

150. *Id.* at 2669 (emphasis omitted).

151. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2253-54 (2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

context are “somewhat weaker” than in its Supremacy Clause cases because the Elections Clause gives Congress the power to displace any elements of a preexisting state regulatory regime that deal with the procedure of federal elections.¹⁵² Similarly, in *Arizona IRC*, the Court not only held that the Elections Clause does not constrain lawmaking by the people, provided that the state constitution has endorsed direct democracy, but also gave significant weight to the fact that section 2a(c) permitted the people of Arizona, through ballot initiative, to delegate the state’s redistricting authority to an independent body.¹⁵³

Once one peels back the layers of the *Arizona* decisions, however, the differences between these cases and the Court’s federalism jurisprudence are revealed as differences of form rather than substance. In these cases, the Court invoked similar concerns about state sovereignty that previously limited the reach of the Fourteenth and Fifteenth Amendments.¹⁵⁴ For example, the contention in *Arizona Inter Tribal* that every exercise of congressional authority under the Clause is a preemption of state law may be ideologically linked to the state action doctrine advanced in the *Civil Rights Cases*.¹⁵⁵ As the latter cases recognized, Congress secures the rights protected by the Fourteenth Amendment

by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given ... to legislate for the purpose of carrying such prohibition into effect; [but] *such legislation must necessarily be predicated upon such*

152. *See id.* at 2257 (noting that “the States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it ‘terminates according to federal law’” (quoting *Buckman Co. v. Plaintiff’s Legal Comm.*, 531 U.S. 341, 347 (2001))). While the Supremacy Clause is considered a federalism provision—allowing Congress to preempt state law in the event of any conflicts—congressional authority under the Elections Clause is much broader, allowing Congress to independently make law. *See infra* Part III.C.1.

153. *Arizona IRC*, 135 S. Ct. at 2670 (“So long as a State has ‘redistricted in the manner provided by the law thereof’—as Arizona did by utilizing the independent commission procedure called for by its Constitution—the resulting redistricting plan becomes the *presumptively* governing map.” (emphasis added)).

154. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2621, 2622 n.1 (2013).

155. *See The Civil Rights Cases*, 109 U.S. 3, 11-12 (1883).

*supposed State laws or State proceedings, and be directed to the correction of their operation and effect.*¹⁵⁶

By making state law a prerequisite to federal action, the Court's decision in *Arizona Inter Tribal* could be viewed as a similar attempt to preserve the sovereignty of the states at the expense of congressional power, deemed by the Court to be "paramount."¹⁵⁷

Arizona IRC also subordinated federal authority to state power in adopting an expansive reading of the term "legislature," and declining to treat federal authorization in 2 U.S.C. § 2a(c) as a necessary prerequisite before the state's redistricting authority could be delegated to an independent commission.¹⁵⁸ In other areas in which federal power is paramount, the Court has taken congressional silence to be a form of acquiescence in the state regulatory scheme.¹⁵⁹ When Congress has spoken, however, the Court determines whether federal law displaces state authority or if Congress has expressly ratified the state regulatory scheme.¹⁶⁰

Properly framed, these cases are beholden to the Court's state-centered federalism jurisprudence that emphasizes the values of federalism as benefits that inure to the state; reinforces a status quo in which state law is presumptively valid; and closely scrutinizes legislative intrusions by the federal government. As the Court stated in *Gregory v. Ashcroft*,

[Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in

156. *Id.* (emphasis added); see also *Virginia v. Rives*, 100 U.S. 313, 318 (1879); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875).

157. One might argue that the Court did not intend to impose a state action requirement for the Elections Clause. Instead, the majority may have been more concerned with limiting congressional authority to displacing only the times, places, and manner of federal elections that states may (or may not) enact in order to cabin off voter qualification standards from federal power. I discuss the flaws of both of these interpretations in Part III.

158. See *Arizona IRC*, 135 S. Ct. at 2699 (Thomas, J., dissenting) (describing the Court's defense of direct democracy as "faux federalism").

159. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

160. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012) (finding all but section 2(b) of the Arizona immigration law, which "requires state officers to conduct a status check during the course of an authorized, lawful detention" to be preempted because there was no "showing that it has other consequences that are adverse to federal law and its objectives").

government; and it makes government more responsive by putting the States in competition for a mobile citizenry.¹⁶¹

More recently, *United States v. Windsor* affirmed the state-centric vision of federalism, noting that the Defense of Marriage Act (DOMA), which defined marriage as between a man and a woman for purposes of federal law, impermissibly “rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State.”¹⁶² The Court acknowledged the myriad ways in which federal law has helped define the substance of the right to marriage by according benefits to the union in its own way, which is a constitutional use of federal authority.¹⁶³ Additionally, it was not that state and federal law could not live harmoniously—DOMA defined marriage for purposes of federal, not state, law. Instead, the Court privileged the state definition of marriage, even for purposes of executing a federal law that might have benefitted from a uniform definition of marriage, because authority over marriage had long resided within the sovereign authority of the states.¹⁶⁴

In contrast, the Elections Clause prioritizes federal law, despite the substantial authority that states exercise over federal elections, because “[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules” to “insur[e] against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.”¹⁶⁵ Moreover, the Clause “act[s] as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate.”¹⁶⁶ This Article’s focus on preserving the legitimacy of federal elections captures these variant strands that the Court

161. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

162. 133 S. Ct. 2675, 2692 (2013).

163. *See id.* at 2689-90.

164. *See id.* at 2691 (“[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.” (alteration and omission in original) (citation omitted) (quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906))).

165. *Arizona IRC*, 135 S. Ct. 2652, 2672 (2015).

166. *Id.*

and historical record have identified as the purpose behind the adoption of the Elections Clause—the Framers’ concerns about partisan entrenchment potentially marginalizing the electorate; their overwhelming desire to ensure the continued health and vitality of federal elections; and their surprising willingness to give the states a central and ongoing role in the composition of the federal government—to have federal officials elected through a process that is legitimized through criteria adopted in light of all of these considerations.¹⁶⁷

The Elections Clause embodies principles that ensure the legitimacy of federal elections, contrary to the state centered values that are the focus of the Court’s federalism jurisprudence. The Court must interpret the allocation of power between the two levels of government in a manner that best promotes this goal. First, Congress usually defers to state law governing federal elections, but Congress has been especially deferential if the law furthers the Elections Clause values of respecting popular sovereignty while ensuring finality and ease of administration. Second, the Clause’s focus on congressional, rather than state, sovereignty is embodied by Congress’s authority to “alter” state law where appropriate, “make” law completely independent of the state’s legal regime, and “commandeer” state officials to implement federal law.¹⁶⁸ This structure permits Congress to implement a complete code for federal elections, which is an invaluable source of authority, particularly if states have jeopardized the health and vitality of federal elections in some way. These values, as well as the structure of the Clause, are integral to its overarching purpose of ensuring the legitimacy of federal elections, much of which turns on the electorate’s belief that the system is working.

167. Tolson, *supra* note 6, at 1226 (“The congressional veto in the Elections Clause was linked to the then-prevailing notion that the national government would be insulated from the passions of the people in a way that the states were not and probably should not be. The absence of sovereignty in the Clause, therefore, was viewed by the founding generation as a structural safeguard against partisan zeal and tyranny. The veto also reflected the delegates’ fear that the states, had they been in complete control of elections, could have used this power to the detriment of their citizens, who would have little recourse.” (footnote omitted)); *see also* ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850*, at 113-23 (1987) (detailing the partisanship and the big state/small state disputes underlying the controversy in large versus district elections since the founding).

168. *See supra* note 19 and accompanying text.

III. PRESERVING THE LEGITIMACY OF FEDERAL ELECTIONS THROUGH ELECTIONS CLAUSE VALUES

Similar to our system of federalism, the Elections Clause can promote democratic outcomes by deferring to the states and placing a premium on popular sovereignty. But in practice, the Clause’s values cannot be divorced from federal power, exercises of which are often counter-majoritarian in prioritizing finality and ease of administration over citizen participation.¹⁶⁹ The Court has had difficulty in balancing these competing, and sometimes conflicting, factors, leading it to default to the baseline of state sovereignty in most cases.

For example, the *Arizona Inter Tribal* Court acknowledged, but still struggled with the notion of congressional sovereignty, taking every opportunity to reaffirm a governing role for the states. For its part, the *Arizona IRC* decision reflected that Congress’s scope of authority under the Elections Clause is influenced by democratic norms inherent in constitutional provisions that have expanded individual access to our governing institutions.¹⁷⁰ Nonetheless, this important insight was overshadowed by a glaring error in the majority opinion that undermined one of the key attributes of congressional sovereignty inherent in the Clause. The Court, by relying on 2 U.S.C. § 2a(c) as an alternate holding, overlooked the indispensability of congressional approval to all procedural questions surrounding federal elections.¹⁷¹

The majority’s analysis should have emphasized that sovereignty lies with Congress, such that state law is presumptively valid only if Congress permits it to be. For example, in *Arizona v. United*

169. For example, the NVRA was designed to increase the opportunities for voter registration, but not at all costs. Under current case law, states can impose proof of citizenship requirements as a prerequisite to voting if the state provides evidence that the NVRA interferes with the administration of their voter qualification requirements. See *Arizona Inter Tribal*, 133 S. Ct. 2247, 2258 (2013).

170. *Arizona IRC*, 135 S. Ct. at 2672.

171. 2 U.S.C. § 2a(c) is evidence that Congress has ratified the use of independent redistricting commissions and as such, it is indispensable to the Court’s decision that the state is permitted to use them. Cf. *Bragdon v. Abbott*, 524 U.S. 624, 644-45 (1998); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

States, the Court upheld the majority of Arizona's immigration law because of its consistency with the federal scheme, not because states have some type of sovereign authority to regulate immigration independent of federal law.¹⁷² Similarly, Congress defers to state lawmaking procedures, not because the states are sovereign, but because it respects popular sovereignty and promotes administrative ease. Both are important Elections Clause values that Congress itself recognized in adopting section 2a(c).¹⁷³ As this Part shows, the juxtaposition between popular sovereignty, competent election administration, and congressional sovereignty makes these values distinct from any value of federalism currently protected by the courts or favored by the legal scholarship. These values are designed to further the Clause's overarching purpose of electoral legitimacy, but the Court has ignored them, resulting in an impermissibly narrow view of federal authority.

A. Elections Clause Value: Preserving the Legitimacy of Federal Elections Through Respect for Popular Sovereignty

So where do these Elections Clause values come from? The first of these values—respect for popular sovereignty—derives from constitutional changes to our political system, starting with our founding documents but extending through several amendments that increased the political power of the people during the twentieth century, including, most notably, the Seventeenth Amendment.¹⁷⁴ The Apportionment Act of 1911 (the 1911 Act), the predecessor to section 2a(c) at issue in *Arizona IRC*, is especially instructive

172. *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012).

173. See Nathaniel Persily et al., *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 696 (2016) (“As for platitudes about popular sovereignty, the Framers instilled in the Elections Clause the notion that control of elections should be conducted by the institution most representative of the people.”).

174. As the *Arizona IRC* Court noted, in resolving whether,

[a]bsent congressional authorization, ... the Elections Clause preclude[s] the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts[.] The history and purpose of the Clause weigh heavily against such preclusion, *as does the animating principle of our Constitution that the people themselves are the originating source of all the powers of government.*

135 S. Ct. at 2671 (emphasis added).

here.¹⁷⁵ In its initial form, the Act referred to state “legislatures” as the entity responsible for redistricting, but it was enacted during the Progressive Era, which saw an increase in ballot initiatives and referenda, the use of primary elections, and ultimately, the adoption of the Seventeenth Amendment.¹⁷⁶ Progressives, who sought to marginalize the political elites who had created doubt and uncertainty about the outcome of many elections, argued that state legislatures should not have the power to select United States senators because the legislatures conspired with the business community regarding appointments.¹⁷⁷ They believed that average people should become directly involved with the political process to mitigate this corruption.¹⁷⁸ In response to these concerns, Congress altered the language of the 1911 Act to encompass state laws enacted through ballot initiatives to be responsive to the popular sovereignty concerns driving the Progressive movement.¹⁷⁹

During this period, the overhaul of the political process highlighted divisions over the question of the entity with which sovereignty lies, but arguably, Congress’s embrace of direct democracy through the 1911 Act, when interpreted in light of the Seventeenth Amendment, rejected a formalistic conception of state sovereignty in favor of a broader definition that encompassed the people of the state.¹⁸⁰ Even though the Amendment specifically dealt with the election of senators, its adoption, along with the 1911 Act, suggests that the change in the nature of state sovereignty to be inclusive of the populace—at least in the context of federal elections—was broad and wholesale.

175. See Apportionment Act of 1911, Pub. L. No. 62-5, 37 Stat. 13.

176. See *id.*

177. Cf. Ben Hovland, Comment, *Championed by Progressives and William U'Ren: Can Oregon Give the Ballot Initiative to the People Again?*, 85 OR. L. REV. 275, 279 (2006).

178. See *id.*

179. Compare 2 U.S.C. § 2a(c) (2012) (“[I]f there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State.” (emphasis added)), with Apportionment Act of 1911 § 4 (“That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act.” (emphasis added)).

180. Cf. Persily et al., *supra* note 173, at 696.

Congress's reliance on the Elections Clause to make allowances for popular sovereignty is in line with the Framers' desire to use the constitutional structure as a safeguard for individual liberty. As I have argued in a prior article, the Framers were willing to give Congress veto authority over state election laws, as opposed to all state laws, as a compromise position that allowed Congress to weigh in on a limited, but very important circumstance—voting and representation.¹⁸¹ But, importantly, the congressional veto was also a safeguard for the people:

The Elections Clause furthered fears that the Constitution created an all-powerful national government that would introduce tyranny, despotism, and a governing aristocracy. To address these concerns, Federalists often drew parallels between the rights that free men surrendered to their governments to protect liberty and the power that states relinquished to the central authority, also viewed as necessary to protect freedom. In other words, just as individuals had to give up some of their individual liberty to state governments in order to secure peaceful enjoyment of those liberties, so too did states have to surrender some of their power to the federal government for the same purpose—to protect the people. The congressional veto in the Elections Clause, from this perspective, was simply another layer of protection for the people in return for the states surrendering their final policymaking authority over elections to the federal government.¹⁸²

The Clause's origins as an additional safeguard for individual liberty show that the *Arizona IRC* case was not, as the dissenters contend, about Congress's ability through section 2a(c) to unilaterally enlarge its own power by changing the meaning of the term "legislature."¹⁸³ Properly seen, the case was about the less controversial issue of whether the Court should interpret Congress's power to "make or alter" election regulations to permit Congress to shift decision-making authority under the Clause from one state entity to another in the name of popular sovereignty. In answering this question, it quickly becomes clear that there can be no independent

181. See Tolson, *supra* note 6, at 1223.

182. *Id.* at 1224 (footnote omitted).

183. See *Arizona IRC*, 135 S. Ct. 2652, 2677-78 (2015) (Roberts, C.J., dissenting).

analysis of the meaning of “legislature” without consideration of federal law.

To understand this point, pretend that Congress did not sanction redistricting by independent commission in section 2a(c), but instead prohibited it. The Court would then have had to directly confront the question of whether Congress, through federal statute, could prevent a state from using an independent commission for congressional redistricting. It is pretty clear that the answer would depend on the Court’s interpretation of Congress’s power to “make or alter” state regulations. As it stands, the statute plays very little role in the outcome because, by permitting direct democracy, it simply reinforces what the Court had already concluded with respect to the meaning of the term “legislature”: that the term embodies whatever prescriptions for lawmaking are in the state constitution.¹⁸⁴ But the Court’s approach unnecessarily aggrandizes state power at Congress’s expense by leaving unresolved fundamental questions about federal power under the Elections Clause.

The majority’s privileging of state law in this way is deeply ironic given that it did not prevent four dissenters from criticizing the decision as insufficiently protective of state sovereignty, at least to the extent that ideal is represented by the state legislature. As Chief Justice Roberts cautioned:

[T]he majority’s reading of Section 2a(c) as a statute approving the lines drawn by the Commission would seemingly authorize Congress to alter the Elections Clause. The first part of the Elections Clause gives state legislatures the power to prescribe regulations regarding the times, places, and manner of elections;

184. See *id.* at 2671 (majority opinion) (declining to resolve the constitutionality of section 2a(c) because “[a]ny uncertainty about the import of § 2a(c) ... is resolved by our holding that the Elections Clause permits regulation of congressional elections by initiative”); *id.* at 2687-88 (Roberts, C.J., dissenting) (“Section 2a(c) establishes a number of default rules that govern the States’ manner of electing representatives ‘[u]ntil a State is redistricted in the manner provided by the law thereof.’ Section 2a(c) is therefore ‘inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict’ the State. Here, the Commission *has* redistricted the State ‘in the manner provided by the law thereof.’ So by its terms, Section 2a(c) does not come into play in this case.” (alteration in original) (quoting *Branch v. Smith*, 538 U.S. 254, 275 (2003) (plurality opinion))). Even if Chief Justice Roberts is correct that section 2a(c) does not apply because the Commission redistricted the State, the statute still stands as persuasive evidence that Congress permits states to delegate their authority to an independent commission pursuant to the Clause.

the second part of the Clause gives Congress the power to “make or alter such Regulations.” There is a difference between making or altering election regulations prescribed by the state legislature and authorizing an entity *other than the state legislature* to prescribe election regulations.¹⁸⁵

Both the majority and the dissenters ignore, however, that section 2a(c) confirms that not only does Congress have the authority to determine the procedures and the institution through which states can enact the times, places, and manner of federal elections, but also the statute that the Court billed as an alternate holding definitively resolved the main issue of the case—whether states can re-district by independent commission.

Cases decided in the wake of the 1911 Act and the Seventeenth Amendment confirm that the reallocation of redistricting authority from the state legislature to an independent commission in the name of popular sovereignty is constitutionally permissible, subject only to congressional approval. *Davis v. Hildebrant*, for example, involved a constitutional challenge to Ohio’s process for enacting its congressional redistricting plan.¹⁸⁶ Instead of obtaining the governor’s approval for the plan as required by state law, a majority of Ohioans used the referendum process enshrined in the Ohio Constitution to vote down the redistricting plan.¹⁸⁷ The Court held that, not only did Congress endorse the referendum process in the 1911 Act as part of the legislative power of the state, the issue of whether this structure violated the Elections Clause created a nonjusticiable political question.¹⁸⁸ The Court’s deferential posture suggests that

185. *Id.* at 2688-89 (Roberts, C.J., dissenting); see also Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 81 (2016) (arguing that the *Arizona IRC* decision impermissibly allows states to “completely and permanently exclude their institutional legislatures from regulating congressional—and, by extension, presidential—elections, subject to no apparent limiting principle”). Professor Morley recognizes that states have “no inherent power to regulate federal elections” and he focuses on a number of ways in which the text and case law limits their authority. Morley, *supra*, at 103-04. But he ignores that Congress itself is also a limiting principle on state authority and can weigh in at will, even with respect to the state institutions responsible for administering the regulations that govern federal elections, because that is the nature of sovereign authority.

186. See 241 U.S. 565, 566-67 (1916).

187. See *id.*

188. See *id.* at 568 (“[W]e think it clear that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the

Congress has sole authority to determine whether states have exercised their authority under the Elections Clause in a manner that is consistent with the Guarantee Clause.¹⁸⁹ Indeed, a different outcome in *Davis*—that the state legislature must enact regulations governing federal elections even if the state’s constitutionally prescribed lawmaking function lies with some other entity—would present a nonfrivolous issue under the Tenth Amendment, an unintended paradox for a Clause that is specifically focused on congressional sovereignty.¹⁹⁰

Most important, the term “legislature” defies fixed meaning in the context of the Elections Clause because the functions of the respective legislatures and their compositions vary by state.¹⁹¹ In *Smiley v. Holm*, for example, the plaintiff contested the validity of Minnesota’s congressional redistricting plan after the Secretary of State implemented the plan without the governor’s approval.¹⁹² The Court rejected the redistricting plan because it had not been adopted in accordance with state law, and the Clause explicitly

previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law.”).

189. *Id.* at 569 (“To the extent that the contention urges ... to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of Article I of the Constitution, and hence void ... we again think the contention is plainly without substance [because it] must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which ... in effect annihilates representative government [in violation of the Guarantee Clause and] ... presents no justiciable controversy.”). The Court appeared to retreat from this position a few years later. In *Hawke v. Smith*, the Court referred to “legislature” as a term that is fixed throughout the Constitution, defined as “the representative body which made the laws of the people.” 253 U.S. 221, 227 (1920). As such, Ohio could not subject the state legislature’s ratification of the Eighteenth Amendment to a referendum by the voters, which was not required by Article V of the Federal Constitution. *Id.* at 225, 231. But *Hawke* can be easily distinguished on the grounds that it did not involve federal elections, and later Elections Clause cases are inconsistent with its holding. See *infra* notes 191-94 and accompanying text.

190. The Tenth Amendment issue would arise because forcing all election regulations through the state legislature would intrude on the state’s sovereign authority to structure its government in the manner that it sees fit, and by implication determine which entity has lawmaking authority. See *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932) (“[There is] no suggestion in [Article I, Section 4] of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted.”).

191. See *id.* at 372-73.

192. See *id.* at 361-62.

confers on the state the authority to prescribe, *by law*, the times, places, and manner of federal elections.¹⁹³

Because of the diversity among state governmental structures, it is unsurprising that the *Smiley* Court held that the term “prescribed ... by the Legislature thereof” requires that the apportionment plan be adopted by the lawmaking procedure set out in the state constitution,¹⁹⁴ which is also the document that determines the varying composition and character of all fifty state legislatures. For this reason, and contrary to the assertions of the *Arizona IRC* dissenters, “legislature” cannot be a fixed term. Query what would be the outcome under their theory if Arizona had defined its legislature in the state constitution to encompass the independent commission responsible for drawing state legislative districts? While it is unclear, one could argue that forbidding this structure *ex ante* undermines state sovereignty significantly more than endorsing a flexible definition of the term “legislature” subject only to implicit or explicit congressional approval.

The flexibility of the term “legislature” shows that the Elections Clause is broad enough to encompass any accommodations for popular sovereignty that a state chooses to incorporate in its lawmaking procedures. Such considerations are legitimate, provided that Congress, in its sovereign capacity to “make or alter” state law, prioritizes this value, as it had in both section 2a(c) and the 1911 Act.

193. *See id.* at 367-68.

194. U.S. CONST. art. 1, § 4, cl. 1. While the end result is the correct one, the Court in *Smiley* argued that the term legislature is fixed, but its functions vary. *See Smiley*, 285 U.S. at 365-66 (noting that the legislature may act as a “ratifying body,” a “consenting body,” a “representative body,” or an “electoral body”). This approach denies the dynamicism that is inherent in our constitutional structure that makes it difficult for “legislature” to have uniform meaning. For example, Nebraska has a unicameral legislature and all other states have bicameral legislatures. *See History of the Nebraska Unicameral*, NEB. LEGISLATURE, http://nebraskalegislature.gov/about/history_unicameral.php [https://perma.cc/3SN7-ZR34]. So long as the state legislature comports with minimum constitutional requirements, a state has a lot of leeway in determining the structure of its representative body. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (requiring that state representatives be elected from districts of as “equal population as is practicable”).

B. Elections Clause Value: Preserving the Legitimacy of Federal Elections Through Predictable and Competent Election Administration

Elections Clause values also derive more generally from the Supreme Court’s case law, which has consistently prioritized election integrity, or the idea that federal elections must be administered in a manner that does not call the outcome into question.¹⁹⁵ The judiciary’s de facto deference to state law does not derive from any special solicitude for the states as states; rather, it is about ensuring that elections are well run in order to produce a legitimate outcome.¹⁹⁶ Toward this end, courts have developed a separate doctrine—the *Purcell* principle—named for a short, per curiam, 2006 Supreme Court decision that sets the standards for injunctions in election law cases that emerge close to the time of the election.¹⁹⁷ The *Purcell* principle privileges the status quo by blocking changes that would alter rules on the eve of the election due to administrative concerns and the increased risk of disenfranchisement should voting changes occur shortly before the election.¹⁹⁸

Purcell recognized the risk of instability and uncertainty in the election law context. Along the same lines, an open struggle for power between the states and the federal government, which can help define and promote the values of federalism in other substantive contexts, can undermine the legitimacy of our system of elections. The perception that the election system was broken had damaged our political system in the wake of *Bush v. Gore*, after voters endured thirty-seven days of political high theater in which the Florida Supreme Court and the United States Supreme Court

195. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-90 (2008) (plurality opinion); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

196. Notably, the need for finality and easy administration of state election laws is the primary reason why the right to vote is not treated like other rights, at least according to the Court’s case law. See Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 168-72 (2015).

197. *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (per curiam) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”).

198. See *id.* at 5-6; see also Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428-29 (2016) (arguing that the *Purcell* principle should give way if there is a “risk of issuing orders [that] can disenfranchise voters or impose significant burdens on election administrators for no good reason”).

battled over whether the recount comported with constitutional requirements.¹⁹⁹ Ultimately, George W. Bush squeaked out a victory in Florida after the United States Supreme Court ended the recount, effectively handing him the presidency.²⁰⁰ Controversy over the 2000 election dogged Bush for his entire first term, which for years was haunted by accusations that he was not duly elected despite his 546-vote margin over Al Gore in Florida.²⁰¹

Bush v. Gore notwithstanding, the Court generally has deferred to the states by privileging their interest in ensuring the integrity of their elections over a citizen's interest in exercising his or her constitutional rights. Notably, many states have enacted "election integrity" regulations under the guise of complying with federal law. For example, in *Crawford v. Marion County Election Board*, the Court upheld Indiana's voter identification law as an effort to effectuate the goals of HAVA and NVRA, both of which impose various requirements on the states that, among other things, modernize election procedures, insure the accuracy of the voter rolls, and impose a more uniform system of voter registration.²⁰² As the Court stated in *Crawford*, "Of course, neither HAVA nor NVRA required Indiana to enact SEA 483, but they do indicate that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology."²⁰³

In some ways, *Crawford* resembles *Arizona IRC*—federal law permitted but did not require Indiana to adopt a voter identification law,²⁰⁴ just as Arizona did not have to delegate its redistricting authority to an independent commission in order to comport with

199. See Rick Hampson, *2000 v. 2016: Why Gore Then Is Different Than Trump Now*, USA TODAY (Oct. 21, 2016, 11:04 AM), <https://www.usatoday.com/story/news/politics/elections/2016/10/20/donald-trump-al-gore-2000-election-outcome/92477932/> [<https://perma.cc/L2DJ-TB6B>].

200. See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam).

201. See Hampson, *supra* note 199 (discussing the criticisms of the Bush presidency in the wake of *Bush v. Gore*).

202. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality opinion) (vindicating the state's "interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient ... in preventing voter fraud ... [and] in safeguarding voter confidence"); *supra* note 44; see also *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 607-08 (4th Cir. 2016).

203. *Crawford*, 553 U.S. at 193.

204. See *id.*

section 2a.²⁰⁵ In both cases, the Court pointed to federal law as an alternative justification for the state regulation, and the justifications were explicitly tied to the key Elections Clause values of eliminating administrative concerns and ensuring the legitimacy of the outcome in federal elections.²⁰⁶ But *Crawford* is especially problematic, with the court vindicating the state’s interest in election integrity over the individual’s right to vote without requiring any evidence that the regulation actually furthered Indiana’s regulatory goals.²⁰⁷ While one might take issue with the Court’s approach for this and other reasons,²⁰⁸ it is nonetheless clear from *Crawford* that the states’ interest in election integrity is a cornerstone of our political system, and it has been validated, in the Court’s view, by federal legislation enacted pursuant to the Elections Clause.

Doe v. Reed further confirmed that the states’ interest in election integrity is substantial, holding that states can disclose the names of those who sign a petition to challenge a state law by referendum.²⁰⁹ Although there were First Amendment concerns in compelling the disclosure of the signatories through a public records request, the Court stated that the electoral context must be taken into account in determining whether such disclosure raises constitutional concerns.²¹⁰ The Court determined that, on balance, Washington’s interest in preserving the integrity of its electoral process trumped its citizens’ First Amendment rights:

[T]he State’s interest in preserving the integrity of the electoral process suffices to defeat the argument that [disclosure] is unconstitutional with respect to referendum petitions in general [That] interest is particularly strong with respect to efforts to root out fraud But the State’s interest ... is not limited to

205. See *supra* notes 145-49 and accompanying text.

206. See *supra* notes 145-49 and accompanying text.

207. See *Crawford*, 553 U.S. at 192-93.

208. And I have. See Tolson, *supra* note 196, at 161-65.

209. See 561 U.S. 186, 191 (2010).

210. *Id.* at 194-95 (“The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. An individual expresses a view on a political matter when he signs a petition under Washington’s referendum procedure. In most cases, the individual’s signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered ‘by the whole electorate.’” (quoting *Meyer v. Grant*, 486 U.S. 414, 421 (1988))).

combating fraud[; it] extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. [The State's] interest also extends more generally to promoting transparency and accountability in the electoral process.²¹¹

Though *Doe* did not involve federal law, the Court cited to *Purcell* and *Crawford* to illustrate the overriding importance of protecting the legitimacy of our political system, even when there are countervailing First Amendment interests (or in the cases of *Crawford* and *Purcell*, Fourteenth Amendment interests) on the other side.²¹²

The regulatory actions that states can take in the name of election integrity are extremely broad, so the Court's view that Congress has endorsed this interest in federal legislation is extremely important. In addition to *Crawford's* description of "election integrity" to include the state's adoption of a voter identification law as a means of modernizing its administrative procedures,²¹³ the Court has also upheld various state statutes in the name of election integrity. For example, the Court has allowed states to place boundary restrictions on the distribution of campaign finance materials;²¹⁴ impose waiting periods on voters who wanted to change their party registration;²¹⁵ bar judicial candidates from personally soliciting campaign funds;²¹⁶ and exclude write-in candidates from the ballot.²¹⁷ It is clear that the rubric of "election integrity" is not only about an honest process, but also about easing the administrative burdens on state officials. Once one understands that certainty of outcome and ease of administration hold a vaunted position in the

211. *Id.* at 197-98 (citations omitted).

212. *Id.* at 197.

213. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191, 200 (2008) (plurality opinion).

214. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion).

215. *Am. Party of Tex. v. White*, 415 U.S. 767, 793-94 (1974); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 210-11 (1986).

216. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015).

217. *Burdick v. Takushi*, 504 U.S. 428, 430 (1992).

electoral context,²¹⁸ it is easier to dismiss some of the more prominent theories of federalism that promote organizational structures between the states and the federal government that could potentially undermine the electoral legitimacy that these values are designed to safeguard.²¹⁹

In my prior work, I rejected the argument that polyphonic federalism, which “asks how the overlapping power of the state and federal governments can best address a particular issue,”²²⁰ works as a governing framework for the Elections Clause because the fluidity of the doctrine is not amenable to a system that requires clear winners and losers.²²¹ I have also probed the utility of cooperative federalism as an underlying theory for the Elections Clause,²²² a

218. Note that emphasizing the values of integrity and efficiency is qualitatively different from deferring to state sovereignty, even though states often rely on the latter in justifying their interest in electoral integrity and efficiency. The states and the federal government may have differing opinions about how the goals of integrity and efficiency are best furthered. *See, e.g., Arizona Inter Tribal*, 133 S. Ct. 2247, 2251, 2260 (2013) (finding that Arizona’s documentary proof of citizenship requirement is preempted by the NVRA, which only requires voters to affirm their citizenship status).

219. *See, e.g.,* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 119 (2010) (arguing that Congress can “tax, spend, and regulate” under Article I, Section 8 “when two or more states face collective action problems” that derive from “interstate externalities and national markets ... that affect the general welfare”). This theory’s focus on using federalism to provide a solution for collective action problems as a justification for federal action could apply to the Elections Clause. Congress often imposes uniformity on the states to address a problem that requires a one-size-fits-all solution, *see, e.g.,* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311 (Supp. III 2016), but this theory does not capture the unique dynamic of the Clause in which Congress can act for any reason at all—no collective action problem required.

220. Tolson, *supra* note 6, at 1214 (quoting Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005)).

221. *See, e.g., id.* at 1214-15 (rejecting the theory of polyphonic federalism because “encouraging the dialogue that polyphonic federalism envisions between state and federal governments results in an absence of finality and an increase in forum shopping that could undermine the legitimacy of our electoral system” (citing Schapiro, *supra* note 220, at 291)). Polyphonic federalism would arguably support a view of Congress’s Elections Clause authority that places voter qualification standards firmly within the scope of federal authority. *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 95 (2009) (“In the polyphonic conception, federalism is characterized by the existence of multiple, independent sources of political authority. The scope of this political authority is not defined by subject matter. No kind of conduct is categorically beyond the boundaries of state or federal jurisdiction.”). This Article resists a reading of federal power that would essentially negate the constitutional structure, arguing instead that Congress can reach voter qualifications pursuant to Elections Clause only in certain circumstances. *See* Tolson, *supra* note 39.

222. Tolson, *supra* note 6, at 1216 (noting that the Clause “provides that states will draw

contention that, at least initially, seemed more plausible than polyphonic or process-based theories of federalism.²²³ But I ultimately concluded that the presence of the congressional veto in the text of the Elections Clause and the substantive mandates imposed on the states are in direct conflict with the very idea of “cooperative” federalism.²²⁴

Recent work by Professor Abbe Gluck has added significantly more nuance to the concept of “cooperative federalism,” nuance that—at least initially—may offer stronger support than prior iterations for cooperative federalism as a theoretical description of our system of elections.²²⁵ Professor Gluck envisions a system in which states preserve some aspects of their sovereign authority through inter-governmental cooperation, in which states strengthen their position relative to the federal government through altering, shaping, and implementing federal law.²²⁶ States exercise this power

the lines in the first instance but gives Congress the ability to change or alter such plans, suggesting a coordination that is akin to many modern federal regulatory programs”).

223. While the states’ role in setting the times, places, and manner of federal elections is an important “political safeguard of federalism” that gives states significant autonomy in this sphere, *see* Tolson, *supra* note 99, at 861-62, Congress’s ability to negate state law at will in furtherance of values that have little to do with protecting the policy-making authority of the states limits this theory’s explanatory power as a framework for the Clause, *see* Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1554 (2012) (noting that process federalists “argue that federalism depends on preserving the de facto autonomy of the states, not the de jure autonomy afforded by sovereignty”). Some process theorists have also relied on courts to police federal power as a supplement to the political safeguards. *See, e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1358-59 (2001). However, I reject the argument that the federalism-based doctrines that the Court has developed to protect state power, such as the equal sovereignty or clear statement rules, apply to legislation enacted pursuant to the Elections Clause. *See supra* notes 19-21 and accompanying text.

224. *See* Tolson, *supra* note 6, at 1216 (“[M]ost cooperative federalism programs entail voluntary state involvement[, but] [t]he VRA and other federal legislation that alters or changes state electoral practices are anything but voluntary and tend to trigger substantial outrage on the part of the states.”); *see also* Corwin, *supra* note 133, at 21 (discussing cooperative federalism in the context of social security and noting, “[t]he other great objection to Cooperative Federalism is more difficult to meet, if indeed it can be met. This is, that ‘Cooperative Federalism’ spells further aggrandizement of national power. Unquestionably it does, for when two cooperate it is the stronger member of the combination who calls the tunes.”).

225. *See* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998-99 (2014).

226. *See id.* at 1997 (“With almost every national statutory step, Congress gives states new governing opportunities or incorporates aspects of state law—displacing state authority with one hand and giving it back with the other. Federalists should pay attention: ... this role for the states within the federal legislation is a primary vehicle through which states have

at the pleasure of Congress, but still play a substantial role in coordinating the structure and scope of federal regulatory programs.²²⁷

The political system is similar in this respect because Congress routinely relies on state-level implementation and state law in regulating federal elections.²²⁸ Prior to *Shelby County*, section 5 of the VRA allowed states to negotiate with the federal government over changes that the state wanted to make to its election laws.²²⁹ Both the HAVA and the NVRA are prime examples of federal statutes that rely on state implementation and cooperation.²³⁰ Congress could arguably administer the programs itself, but instead has used its “make or alter” authority to delegate this responsibility, evoking Professor Gluck’s powerful imagery of intergovernmental cooperation that is at the heart of cooperative federalism.

Nonetheless, conceptual problems arise when describing the interaction between the states and the federal government over elections as “cooperative federalism.” Federal election statutes, even those that rely on state law for substantive content, are very restrictive of state power in a way that is unimaginable for a statute emerging from the federalism inspired process that Professor Gluck outlines.²³¹ The VRA’s preclearance regime, for example, is not a system in which any state concerned about its sovereign authority would want to participate.²³²

Similarly, the NVRA looks far different than the structure created by the Affordable Care Act (ACA), which Professor Gluck points to as a paradigmatic example of federalism in the age of statutes.²³³ The NVRA’s requirements are driven, not by deference to state law, but by a need for certainty and legitimacy of the outcome with re-

influence on major questions of policy, and through which state *sovereign* powers retain their relevance, albeit in ways different from those contemplated by the traditional account.”).

227. *See id.* at 1998-99.

228. *See supra* Part II.

229. *See* Michael J. Pitts, *Rescuing Retrogression*, 43 FLA. ST. U. L. REV. 741, 743-44 (2016).

230. *See* Weinstein-Tull, *supra* note 34, at 749-52.

231. *See* Gluck, *supra* note 225, at 1997, 1999.

232. *See, e.g.,* *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966); *see also* *Shelby County v. Holder*, 133 S. Ct. 2612, 2618, 2624 (2013) (criticizing the VRA for requiring states to seek approval to enact laws that are otherwise constitutional).

233. In the context of the ACA, states have final policy-making authority over some aspect of the healthcare statute, but Congress delegates this authority to them. *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 539-41 (2011).

spect to voter registration, factors that do not apply to the same extent in the context of the ACA and other federal statutory regimes that have structures premised on flexibility.²³⁴ The NVRA establishes criteria with which states must adhere in conducting voter registration for federal elections and prohibits certain regulations that would needlessly disenfranchise individuals. The statute clarifies when states can conduct voter registration;²³⁵ how voters can be removed from the voter rolls;²³⁶ and the process by which states must allow voters to register.²³⁷ These regulations impose costs and minimize the flexibility that states would otherwise have in structuring this aspect of their electoral system.²³⁸ Arguably, recent attempts by states to alter the federal voter registration form highlight the problem with flexibility in this context; it can lead to voter confusion and disenfranchisement that ultimately undermines the statute's purposes.²³⁹ Comparatively, the ACA, which permits states to decide whether to set up health care exchanges, has managed to survive despite the fact that its reach has been undermined by the flexibility

234. *See, e.g.*, Jackson, *supra* note 137, at 2181 (“[S]tability in sustaining a sufficiently principled law of federalism-based limits on national power can be better achieved with more flexible (rather than categorical) standards, given the dynamic and pragmatic character of successful federalism.”).

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

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

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

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

239. *See* Robin Shulman, *Avoiding Contempt of Court, Kansas Secretary of State Kris Kobach Says He'll Let People Vote*, ACLU (Sept. 29, 2016, 5:15 PM), <https://www.aclu.org/blog/voting-rights/promoting-access-ballot/avoiding-contempt-court-kansas-secretary-state-kris?redirect=blog/speak-freely/avoiding-contempt-court-kansas-secretary-state-kris-kobach-says-hell-let-people> [<https://perma.cc/B54K-WB5M>].

of its mandates—flexibility that could be fatal to the legitimacy and administration of federal elections.²⁴⁰

If Professor Gluck’s theory fails to capture the finality and administrative ease at the heart of the Elections Clause, then Professor Heather Gerken’s theory of federalism as nationalism presents this problem to an even greater degree. Professor Gerken argues that the true value of federalism is in achieving a well-functioning national democracy and, as such, her theory is significantly less concerned with state sovereignty than other approaches.²⁴¹ With this theory’s focus on federal preemption of state law, the states can become irrelevant if their governing prerogatives do not further democratic end goals.²⁴²

Contrary to nationalism, the Elections Clause assumes that well-functioning states will exercise significant authority in order to preserve their role in the formation of the federal government,²⁴³ and are not there simply to “tee up the conflicts and debates that forge national norms.”²⁴⁴ Toward this end, Congress has routinely

240. See Gluck, *supra* note 233, at 539-41.

241. Gerken, *supra* note 223, at 1556-57 (arguing that a well-functioning national democracy can be achieved by placing policy-making authority with the federal government, but it does not preclude the devolution of decisions down to the state level if doing so would achieve this goal).

242. Cf. Gluck, *supra* note 225, at 2000 (“[T]o be clear, National Federalism is not a federalism shorn of state sovereignty. It is true that National Federalism emerges through congressional displacement of state law with a new, overarching federal statutory scheme. But this federalism depends on, and strengthens, the states’ continuing sovereign status in important ways that have yet to be recognized.”).

243. See Tolson, *supra* note 6, at 1207, 1258 (arguing that this is one of the purposes behind the Clause’s adoption).

244. See Heather K. Gerken, *Sovereignty Is the Wrong Path for Federalism: A Response to Ilya Somin*, BALKINAZATION (Jan. 3, 2017), <https://balkin.blogspot.com/2017/01/sovereignty-is-wrong-path-for.html> [<https://perma.cc/UVE7-DPZ7>] (emphasis omitted) (arguing that states do not need to be sovereign to play this important role). This debate further corroborates the problems with the federalism framework, and in particular, its laser focus on state sovereignty but oversight of congressional sovereignty. Sovereignty remains an important concept as applied to the Elections Clause because it can resolve disputes between the states and the federal government over the regulation of federal elections. But both the nationalists and the more traditional federalists continue to deploy notions of state sovereignty—or in this case the absence of sovereignty—in ways that are consistent with federalism doctrine but inconsistent with the Elections Clause. Compare Rick Hills, *A Response to Heather Gerken: Why the Politics of Tolerant Pluralism Need the Legal Institutions of Federalism*, PRAWFSBLAWG (Jan. 3, 2017, 4:15 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/01/a-response-to-heather-gerken-why-the-politics-of-tolerant-pluralism-need-the-legal-institutions-of-f.html> [<https://perma.cc/M8HP-D8QS>], with Heather K. Gerken, *Do the Rules of the Game*

declined to intercede in the management of federal elections, even when states have passed laws that are decidedly antidemocratic.²⁴⁵ And the few times when Congress has intervened in the electoral process were not only to protect our national democracy, but also to further important process goals designed to keep the states inextricably intertwined in the business of federal elections.

Congress's enactment of HAVA as a response to several issues that occurred during the 2000 presidential election is instructive of this point.²⁴⁶ The statistical tie in Florida, where approximately one hundred million ballots were cast, created significant doubt about the voting process in several counties in Florida, leading to litigation and public protest.²⁴⁷ Congress had major concerns about the use of varying technologies throughout the state, the questionable experience of poll-workers, and the fact that local governments bore the costs of elections and voter registration—all of which played a role in the controversy surrounding the 2000 election.²⁴⁸ Given this, Congress could have easily justified imposing a uniform rule that addressed these issues, but HAVA does not nationalize presidential elections. Instead, it addresses these administrative problems by moving the election process “from an environment of local control with loose state and federal oversight to an environment of strong state control and loose federal oversight.”²⁴⁹ Congress assumed that most states were well-functioning such that they could continue to manage presidential elections; for those with problems, the answer was not federal uniformity, but more oversight of local election boards by state officials.

Through HAVA, Congress adhered to its traditional position of leaving much of the preexisting state regime in place to promote finality and ease of administration, even when it was incentivized, as with the 2000 election controversy, to remove all aspects of federal

Matter When You Are Playing in a Hurricane?, BALKINIZATION (Jan. 8, 2017, 2:23 PM), <https://balkin.blogspot.com/2017/01/do-rules-of-game-matter-when-you-are.html> [https://perma.cc/23Q5-CB4L].

245. See *supra* notes 211-17 and accompanying text.

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

247. See *Bush v. Gore*, 531 U.S. 98, 103 (2000) (per curiam) (holding that the recount of presidential ballots without uniform standards violated equal protection).

248. See Shambon, *supra* note 246, at 424-25.

249. *Id.* at 431.

election regulation from the states entirely. Congress’s decision not to nationalize federal elections in the wake of the 2000 election illustrates that these values matter at least as much as—and probably more than—creating a well-functioning national democracy in which uniform federal authority might better address dysfunction in a swing state, but could potentially cause chaos in the forty or so other states that properly conduct their elections. The baseline assumption in the Clause is that states should be sufficiently autonomous to properly structure federal elections, but in those instances in which federal oversight could result in more democratic outcomes, Congress has proven to be remarkably stubborn in enacting uniform and far reaching legislation.²⁵⁰ This complex dynamic cannot be captured by a theory that marginalizes the role of the states in national politics, particularly when their continued political health must be a vital part of any theory that seeks to explain the unique structure of the Elections Clause. For purposes of legitimacy and ease of administration, states remain relevant and important for the regulation of federal elections—just not sovereign over them.

C. Elections Clause Value: Preserving the Legitimacy of Federal Elections Through Congressional Sovereignty

Recently, scholars have built on Professor Gerken’s nationalism approach by explicitly applying this sovereignty-free theory of federalism—congressional, state, or otherwise—to explain intergovernmental relationships in the context of federal elections. For example, Professor Justin Weinstein-Tull describes the Elections Clause as embodying “election clause federalism” because federal election statutes enacted pursuant to the Clause impose liability on states for any violations, even though most states have delegated responsibility for election administration to local governments.²⁵¹ As a result, states often attempt to evade liability under these statutes by pointing to local governments as the wrongdoers, placing the federal government in the uncomfortable position of trying to force the

250. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 276-77 (2004) (plurality opinion) (noting the numerous times that Congress has proposed, but not passed, legislation to govern redistricting).

251. See Weinstein-Tull, *supra* note 34, at 764.

states to enforce federal election law against their subdivisions.²⁵² Professor Weinstein-Tull describes these relationships as “hyperfederalized[,] not only because states push election decisions down to the local level, but because the quality of decentralization, including legal relationships between counties and states, varies by state.”²⁵³

While Professor Weinstein-Tull’s insight about the complexities of these relationships is important, he uses the federalism label in a manner that ignores the historical and legal baggage associated with the term, while downplaying the importance of congressional sovereignty in resolving the hard questions that arise over election regulation.²⁵⁴ Indeed, Congress’s ability to act in complete disregard of state sovereignty not only undermines the federalism narrative, but it also explains why statutes like the HAVA and NVRA can, as Professor Weinstein-Tull argues, “require states to organize their subdivisions to either effectively oversee certain kinds of election administration or administer elections themselves[,] ... even though organizing and delegating power to political subdivisions has long been understood as the very essence of state sovereignty.”²⁵⁵

Shoving the Clause’s organizational structure into an ill-fitting federalism framework that does little to explain the *sui generis* nature of congressional power does not provide clarity or resolve issues arising across a broad range of cases in determining which entity should dictate policy in this area. The Clause’s focus on congressional sovereignty helps resolve these legal and political disputes.²⁵⁶

252. *See id.* at 767-75; *see also* Gerken, *supra* note 223, at 1556-60.

253. Weinstein-Tull, *supra* note 34, at 753.

254. *See id.* at 753 n.33 (“Courts and scholars have discussed federalism and voting rights before—particularly in the context of the ‘federalism costs’ of the Voting Rights Act. Here, I mean something different: not the costs to state sovereignty of the federal election statutes, but rather the set of federal-state-local relationships implicated by the statutes and the balance of power—both formal and functional—inherent in those relationships.” (citation omitted)). It is not entirely clear if Professor Weinstein-Tull models his Elections Clause theory after a cooperative federalism model, or if he thinks that this is federalism just because it involves governance by more than one sovereign. *See id.* (suggesting that it is the latter). *But see id.* at 753 n.32 (“The term ‘election law federalism’ follows a number of other studies about federalism as it relates to specific policy areas.”). If Professor Weinstein-Tull embraces nationalism as his governing theory, nationalists view federalism as one of many tools that can further the theory’s focus on creating a national democracy, but do not see it as a theory of federalism in and of itself. *See* Gerken, *supra* note 223.

255. *See* Weinstein-Tull, *supra* note 34, at 751-52.

256. *See* Issacharoff, *supra* note 47, at 108 (arguing that “the level of constitutional scrutiny should drop when Congress exercises powers directly granted by the Constitution rather than

However, the level of deference accorded to state law in this context often turns on the Court’s view that states retain sovereignty under the Elections Clause in amounts similar to the Reconstruction Amendments.²⁵⁷

Consistent with this view, the *Arizona* cases reaffirm that federal authority is paramount in the context of federal elections. But these cases impermissibly view the federal government’s primary role to be a vehicle to protect state sovereignty over elections instead of furthering the Clause’s primary goal of ensuring the legitimacy of federal elections. As Justice Alito argued in his dissent in *Arizona Inter Tribal*:

[T]he Elections Clause’s default rule [that states retain their authority unless Congress indicates otherwise] helps to protect the States’ authority to regulate state and local elections. As a practical matter, it would be very burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls. For that reason, any federal regulation in this area is likely to displace not only state control of federal elections but also state control of state and local elections.²⁵⁸

Because congressional interference can undermine a state’s authority over its own elections, Justice Alito (and Justice Thomas who dissented as well)²⁵⁹ argued that the Court must defer to state authority to regulate federal elections.²⁶⁰ But the Clause does not

powers inherited pursuant to the enforcement of the Equal Protection Clause”).

257. See *supra* Part II; see also Morley, *supra* note 185, at 99 (arguing that the Elections Clause is a “grant[] of constitutional authority to state legislatures ... [and] this specific delegation of authority imposes a special duty on other governmental entities to ensure that they apply election laws as written by the legislature, rather than with the flexibility and discretion they otherwise might be permitted to apply”).

258. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2272 (2013) (Alito, J., dissenting).

259. See, e.g., *id.* at 2262 (Thomas, J., dissenting).

260. See also *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1416 (9th Cir. 1995) (rejecting the argument that the use of state offices and state officials to implement the NVRA violated the Tenth Amendment). Notably, *Wilson* does not prioritize state sovereignty over federal power, rightly confining its analysis to whether the NVRA could impair the state’s authority over its own elections in violation of the Tenth Amendment. See *id.* at 1413. The court concluded that this is the only federalism that matters—not the relationship between the states and the federal government over federal elections, but the relationship between the states and the federal government over state and local elections. See *id.* at 1415. Although declining to

require Congress to circumscribe its own power to protect state authority in this way.

Nonetheless, the Court's framing in *Arizona Inter Tribal* of congressional power under the Clause as "none other than the power to pre-empt" could be interpreted in two possible ways that are consistent with the dissenters' protectionist stance toward state sovereignty.²⁶¹ Because Congress shares concurrent authority over the times, places, and manner of federal elections with the states, one reading of *Arizona Inter Tribal* is that federal power, when exercised, by definition displaces some aspect of state authority, even if the state has not acted.²⁶² The Court approaches its dormant Commerce Clause cases in this manner, and could be applying similar reasoning to the Elections Clause.²⁶³ Alternatively, the Court's language framing federal power in terms of preemption alone could mean that Congress has to displace some element of state law to act pursuant to the Clause and cannot legislate independently.²⁶⁴ This

read the NVRA in a manner that would impair California's power to conduct its state elections, the Ninth Circuit rightly recognized that, with respect to federal elections, states cannot use the power reserved to them under the Tenth Amendment to subvert Congress's authority under the Elections Clause. *See id.* at 1415-16.

261. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2257 (2013).

262. One could argue that, similar to cases involving field preemption, Congress has the authority to preempt laws that states have enacted as well as those laws that could be, but were not enacted. This framework would leave Congress with the authority to independently make law. But to frame the Clause's structure in terms of field preemption principles ignores the substantial authority that the Clause delegates to states over the times, places, and manner of federal elections and the Clause's broader purpose that the states would continue to exercise this power, if not abused. Given *Arizona Inter Tribal's* concession that federal power under the Clause could interfere with state control over voter qualifications, arguably one is justified in taking seriously the possibility that the Court intended to impose a state action requirement on exercises of federal power under the Elections Clause.

263. *Cf. Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571 (1997) (holding that "the Commerce Clause had not only granted Congress express authority to override restrictive and conflicting commercial regulations adopted by the States, but that it also had immediately effected a curtailment of state power. 'In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.'" (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945))). *But see Arizona Inter Tribal*, 133 S. Ct. at 2257 n.6 (distinguishing the exercise of federal power under the Elections Clause from the Commerce Clause because "laws enacted under the Commerce Clause (arguably the other enumerated power whose exercise is most likely to trench on state regulatory authority) will not always implicate concurrent state power—a prohibition on the interstate transport of a commodity, for example").

264. *Arizona Inter Tribal*, 133 S. Ct. at 2257 & n.6 ("When Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces

is the equivalent of a state action requirement, similar to that which exists under the Reconstruction Amendments.²⁶⁵ This requirement would preserve “state control of state and local elections”²⁶⁶ but hamper Congress’s ability to regulate federal elections.

Both of these interpretations are problematic for a number of reasons. If the Court, under the dormant Commerce Clause approach, seeks to limit Congress to the subject matter of the Clause—times, places, and manner—by tying it to state power over the same topic, this approach ignores the elusive boundary between manner regulations and voter qualification standards. As Justice Thomas argued in dissent, it is impossible to disentangle Arizona’s proof of citizenship requirement (arguably a voter qualification standard) from the regime of voter registration (long held to be a manner regulation), posing problems for the power that the states retain, under Article I, Section 2, to set voter qualifications for federal elections.²⁶⁷ The answer, however, is less about finding ways to vindicate or protect state authority, and more about conceding the sovereignty that Congress has under the Clause, which may, in some limited instances, permissibly interfere with state control over voter qualifications.²⁶⁸

The state action interpretation of the Elections Clause raises even more red flags than the dormant Commerce Clause approach. By interpreting every exercise of congressional authority as a preemption of state law, the Court read the terms “make” and “alter” in the Clause as synonyms, which is contrary to its prior case law. In *McConnell v. FEC*, for example, the Court upheld Title I of the Bipartisan Campaign Regulation Act against a claim that Congress exceeded its authority under the Elections Clause in barring the use of soft money to fund federal elections.²⁶⁹ While the Court acknowledged that Title I would “prohibit[] some fundraising tactics that would otherwise be permitted under the laws of various States,” the Court framed these effects as “indirect” because Title I “does not

some element of a pre-existing legal regime erected by the States” because “the text of the Clause confers the power to do exactly (and only) that”).

265. *Cf.* *James v. Bowman*, 190 U.S. 127 (1903); *The Civil Rights Cases*, 109 U.S. 3, 11-12 (1883).

266. *Arizona Inter Tribal*, 133 S. Ct. at 2272.

267. *Id.* at 2265-68 (Thomas, J., dissenting).

268. *See* Tolson, *supra* note 39.

269. 540 U.S. 93, 184 (2003).

expressly pre-empt state legislation, ... leav[ing] the States free to enforce their own restrictions on the financing of state electoral campaigns.”²⁷⁰

In contrast, *Arizona Inter Tribal* could be interpreted as making state legislation a prerequisite for federal action because of the Court’s unerring loyalty to the dual federalism regime. Federalism, and its focus on the governing prerogatives of the states, is at odds with the two key features of congressional sovereignty in the Elections Clause: (1) Congress’s power to legislate in complete disregard of state law; and (2) Congress’s authority to commandeer state officials to enforce federal election law.²⁷¹ As we see in the *Arizona* cases, concerns about state power make it easy to confuse the state’s autonomy in this area with authentic sovereign authority, but these factors confirm that the Clause’s focus is federal power.

1. Federalism “Lite”: State Sovereignty and Congress’s Independent Authority to Legislate

The Supreme Court’s statements about the supremacy of federal law under the Elections Clause, while true, lull the reader into thinking that state sovereignty has taken a backseat to congressional power. But the Court’s implicit deference to state law in the *Arizona Inter Tribal* opinion suggests that this narrative is misleading. By declining to apply the presumption against preemption, the Court made an institutional choice that it, and not Congress, is best equipped to determine the extent to which state law is preempted. Recent preemption controversies have been primarily matters of institutional choice, or put differently, questions over which institution should determine if a federal statute preempts state law.²⁷² The presumption against preemption places this responsibility squarely on the shoulders of Congress, by requiring Congress to be express in its preemption of state law, lest the Court decide otherwise by assuming the presumptive validity of state law.²⁷³ Declining to apply the presumption aggrandizes the Court at the expense of

270. *Id.* at 186.

271. See Tolson, *supra* note 6, at 1216.

272. Cf. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 508 (1992).

273. See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 728 (2008).

Congress, and unfortunately, the Court has perceived its role in this area to be protector of the states.²⁷⁴

The refusal to apply the presumption is defensible only if the Court truly believes, as it claims in *Arizona Inter Tribal*, that federalism interests are weaker in the context of federal elections.²⁷⁵ Congress is arguably sovereign in that sphere, and the Court’s doctrine must always reflect this primacy. On initial review, the *Arizona Inter Tribal* Court’s refusal to apply the presumption against preemption to the NVRA accords with this basic observation. There should be no presumption against preemption in this context, just as there are no other prerequisites—such as a clear statement rule—which would require Congress to “make its intention [to alter the usual constitutional balance between the states and the federal government] ‘unmistakably clear in the language of the statute.’”²⁷⁶ For example, the Sixth Circuit declined to apply the clear statement rule to exercises of federal power under the Elections Clause because

the Clause expressly presses states into the service of the federal government by specifying that state legislatures “shall” prescribe the details necessary to hold congressional elections. This stands in stark contrast to virtually all other provisions of the Constitution, which merely tell the states “not what they must do but what they can or cannot do.”²⁷⁷

But the Court’s position in *Arizona Inter Tribal* that every federal action under the Clause displaces some preexisting element of a state regime applies in a manner that limits federal power in a

274. One could easily make an argument for the application of the presumption in those cases in which Congress makes legislation, but solely for normative reasons that respect what has historically been Congress’s posture toward legislation under the Clause. The states are the first movers with respect to setting the times, places, and manner of federal elections.

275. See, e.g., *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 110, 112 (2d Cir. 2016) (declining to apply the presumption against preemption because bankruptcy, governed by Article I, Section 8, Clause 4 of the Constitution, is not “an area recognized as traditionally one of state law alone”).

276. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

277. *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (quoting *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995)).

counterintuitive way. First, the few decisions dealing with preemption under the Elections Clause prior to *Arizona Inter Tribal* analyzed the relevant state laws under conflict preemption principles rather than express preemption, which appropriately reflects that state and federal law can live harmoniously under the Clause.²⁷⁸ Federal appeals courts have applied two major tests to questions of Elections Clause preemption in recent years, and these tests conflict with the Court's all-or-nothing approach. Despite *Arizona Inter Tribal's* focus on express preemption, none of these tests assess whether federal law should replace a preexisting state law. The tests used by the Fifth, Ninth, and Tenth Circuits all provide that a state election law will be struck down if, and only if, it directly conflicts with federal law.²⁷⁹ Indeed, the Fifth Circuit perceived Congress's failure to legislate on a subject as acquiescence in the state scheme, as opposed to a sign that the exercise of federal power is

278. The Court's express preemption approach is a curious move, particularly when Justice Scalia dissented in a case in which the Court tried to treat state and federal power as having the exact same substantive scope in an analogous context. In *King v. Burwell*, he drew on the Elections Clause in arguing that state and federal authority should not be viewed as equivalents, even if a statute allows Congress to step in when the state has failed to act:

The Court emphasizes that if a State does not set up an Exchange, the Secretary must establish "such Exchange." It claims that the word "such" implies that federal and state Exchanges are "the same." To see the error in this reasoning, one need only consider a parallel provision from our Constitution: "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*." Just as the Affordable Care Act directs States to establish Exchanges while allowing the Secretary to establish "such Exchange" as a fallback, the Elections Clause directs state legislatures to prescribe election regulations while allowing Congress to make "such Regulations" as a fallback. Would anybody refer to an election regulation made by Congress as a "regulation prescribed by the state legislature"? Would anybody say that a federal election law and a state election law are in all respects equivalent? Of course not. The word "such" does not help the Court one whit.

135 S. Ct. 2480, 2499-500 (2015) (Scalia, J., dissenting) (citations omitted).

279. See *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) ("[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot directly conflict with federal election laws on the subject."); see also *Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012), *aff'd sub nom. Arizona Inter Tribal*, 133 S. Ct. 2247 (2013) (holding that if the two statutes would complement each other as part of the same scheme, there is no conflict, and therefore no preemption); *Kobach v. U.S. Election Assistance Comm'n*, 6 F. Supp. 3d 1252, 1265-66 (D. Kan. 2014), *rev'd and remanded*, 772 F.3d 1183 (10th Cir. 2014).

limited by or somehow tied to the actions of the states.²⁸⁰ Similarly, the Ninth Circuit’s preemption analysis recognized that every action of Congress is not intended to displace state law, and the court explicitly took the position that “state and federal laws [are to be examined] as if they comprise a single system of election procedures.”²⁸¹

Second, Congress can legislate independently of the states because, as sovereign, its power over the times, places, and manner of federal elections is broader than the power retained by the states.²⁸² For example, in *Foster v. Love*, the Court held that 2 U.S.C § 7, which sets the November date for the biennial election for federal offices, preempted a Louisiana law allowing candidates for federal office to be “elected” on primary day in October if they obtained a majority of the votes.²⁸³ Notably, the Court did not hold that the states must have the opportunity to set the date for federal elections *first* before Congress could act. In addition, congressional power under the Clause arguably extends to setting voter qualifications if

280. For example, in *Voting Integrity Project, Inc. v. Bomer*, the court examined the text of a Texas statute that allowed voting to begin seventeen days before election day, and found that the statute did not conflict with federal voting statutes requiring that the “election” of members of Congress and presidential electors occur on the Tuesday after the first Monday in November. See 199 F.3d at 774. The plaintiffs argued that federal law contemplated that all voting would occur on the same day because the statutes set a specific date for the “election” of federal representatives. See *id.* at 776 (interpreting “election” to mean “the combined actions of voters and officials meant to make a final selection of an office holder” (quoting *Foster v. Love*, 522 U.S. 67, 71 (1997))). The court held that, “[b]ecause the election of federal representatives in Texas is not decided or ‘consummated’ before federal election day,” the Texas laws were not inconsistent with federal law. *Id.* Notably, the court determined that Congress’s failure to curb absentee balloting, which is now available in all fifty states but has been in use for over a century, is persuasive evidence that “election” does not require that all voters cast ballots on the same day. *Id.* at 777. In fact, the court noted that there are certain federal laws in which Congress has actually *required* that individuals be able to vote absentee, most notably the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and portions of the VRA. *Id.*

281. *Gonzalez*, 677 F.3d at 394.

282. The Court has rejected a construction of congressional power in other contexts in which the scope of Congress’s authority would be unduly tied to the actions of the states or the courts. See *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966) (rejecting New York’s challenge to the literacy test provisions of the VRA because Congress does not need a judicial determination that state literacy requirements actually violate the Constitution before Congress can act).

283. See 522 U.S. 67, 68-69 (1997); see also *Millsaps v. Thompson*, 259 F.3d 535, 547, 549 (6th Cir. 2001) (upholding the Tennessee early voting statute because the law was “not intended to make a final selection of a federal officeholder” on the day before Election Day).

Louisiana had failed to do so for its general election, indicating that federal power under the Clause is different in kind and scope than state authority.²⁸⁴ The Court recognized that the Elections Clause “gives Congress ‘comprehensive’ authority to regulate the details of elections, including the power to impose ‘the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.’”²⁸⁵

Functionally, tying federal action to state law calls into question the myriad examples in which it is not clear whether Congress is independently making new law or altering some element of the pre-existing state regime.²⁸⁶ For example, the NVRA allows a state to remove a person from the official list of registered voters, but only if the voter: (1) confirms in writing that he has moved outside the jurisdiction in which he is registered, or (2) fails to return a postage prepaid, pre-addressed address confirmation card and does not vote in two consecutive federal election cycles.²⁸⁷ Under Colorado law, an individual could be removed from the voter rolls if the confirmation card is returned as undeliverable within twenty days of mailing the notice, but the State does not check to see if the person has also failed to vote in two consecutive federal election cycles.²⁸⁸

This provision of the NVRA could be an example of Congress altering state law by preempting Colorado’s rule that an undeliverable confirmation card is sufficient to remove the voter from the rolls, or Congress could be making new law by adding an additional requirement that a person must fail to vote in two consecutive elections before they can be removed from the rolls. It is not immediately apparent which interpretation is the correct one, but if Congress’s ability to “make” law is tied to replacing some element of the preexisting state regime, then the constitutionality of this

284. Tolson, *supra* note 39.

285. *Foster*, 522 U.S. at 71 n.2 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *see also id.* (stating that this authority encompasses both congressional elections and “any ‘primary election which involves a necessary step in the choice of candidates for election as representatives in Congress’” (quoting *United States v. Classic*, 313 U.S. 299, 320 (1941))).

286. *See Arizona Inter Tribal*, 133 S. Ct. 2247, 2272 (2013) (Alito, J., dissenting) (“A federal law regulating the operation of grain warehouses, for example, necessarily alters the ‘pre-existing legal regime erected by the States’—even if only by regulating an activity the States had chosen not to constrain.” (citation omitted)).

287. National Voter Registration Act of 1993, 52 U.S.C. § 20507(d) (Supp. III 2016).

288. *See Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1264-65 (D. Colo. 2010).

provision of the NVRA turns on whichever interpretation the court adopts. The district court in *Common Cause of Colorado v. Buescher* construed the Colorado law to apply only to new voters, thereby avoiding any conflict with the NVRA.²⁸⁹ By reading the NVRA’s dual requirements to apply to existing voters and leaving Colorado’s scheme in place as it applies to new voters, the district court’s approach illustrates Congress’s authority to independently make law, separate from the state regulatory regime, under the Elections Clause.

The Supreme Court confronted a similar issue in the winter of 2018 when it heard arguments in *Husted v. A. Philip Randolph Institute*, which challenges Ohio’s supplemental process that removes voters who have not engaged in any “voter activity” for two years, such as filing an address change on a voter registration card or with a state agency; or voting, either provisionally, through an absentee ballot, or in person on election day.²⁹⁰ The first method that Ohio uses to purge its rolls is to remove voters who do not respond to a confirmation card or update their registration, *and* who do not vote in two consecutive federal elections.²⁹¹ But the supplemental process imposes an additional burden on voters by allowing them to be purged after six years of inactivity, even if the person is otherwise eligible to vote.²⁹² The Sixth Circuit treated the issue as one of statutory interpretation; however, like the Colorado law, the legitimacy of Ohio’s supplementary scheme depends in part on whether Congress was making law in enacting the NVRA, which suggests that states can purge their rolls only in accordance with the NVRA process;²⁹³ or altering state law, which suggests that states can supplement the NVRA process with their own procedures.²⁹⁴

Treating the validity of Ohio’s supplementary process solely as an issue of statutory interpretation does not fully resolve why the law is problematic. For example, a supplemental process is arguably

289. *See id.* at 1277-78.

290. 838 F.3d 699, 703 (6th Cir. 2016), *argued*, No. 16-980 (U.S. Jan. 10, 2018).

291. *See id.* at 702-03.

292. *See id.* at 703.

293. *See* 52 U.S.C. § 20507(a)(3) (Supp. III 2016); *see also Arizona Inter Tribal*, 133 S. Ct. 2247, 2260 (2013) (holding that Arizona’s additional proof of citizenship requirements for voter registration are preempted by the NVRA).

294. *Cf. Arizona Inter Tribal*, 133 S. Ct. at 2273 (Alito, J., dissenting) (arguing that states can supplement the federal form).

contrary to the purpose of the NVRA, which is to “establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.”²⁹⁵ But the NVRA also has another purpose that could be consistent with the Ohio scheme: “to ensure that accurate and current voter registration rolls are maintained.”²⁹⁶ The NVRA’s statutory scheme suggests that Congress was making new law and prioritizing the former purpose over the latter.²⁹⁷ Explicitly recognizing Congress’s ability to independently make law, as the Court failed to do in *Arizona Inter Tribal*, avoids muddying the water with respect to whether states can supplement federal voting requirements, even if doing so would make it harder for individuals to vote. In theory, this increased difficulty should raise concerns under the Fourteenth Amendment, but despite recent successes, such claims are usually difficult to prosecute.²⁹⁸ Thus, clarity under the Elections Clause doctrine is especially important.

HAVA’s provisional balloting requirements raise a separate question about whether the federal government can impose new, substantive requirements on the states that are not traceable to state law, or that might skirt the boundaries of what is considered a time, place, and manner regulation. Section 303(b) of HAVA requires a voter who registered by mail to present photo identification or documentary proof of identification when voting in person for the first time.²⁹⁹ Without such identification, states must treat a prospective voter’s ballot as provisional until he or she produces the proper documentation.³⁰⁰ Prior to HAVA, many states required voters to produce identification at other points during the voting process; allowed individuals to vote using less onerous forms of

295. 52 U.S.C. § 20501(b)(1).

296. *Id.* § 20501(b)(4); see *A. Philip Randolph Inst.*, 838 F.3d at 705-06 (recognizing the tension between the dual purposes of the NVRA but noting that the statute imposes “multiple constraints” on the state’s ability to maintain accurate voter rolls).

297. See Franita Tolson, Husted, *Arizona Inter Tribal*, and *Lessons from the Constitutional Structure*, ACS BLOG (Aug. 17, 2017), <https://www.acslaw.org/acsblog/husted-arizona-inter-tribal-and-lessons-from-the-constitutional-structure-0> [<https://perma.cc/52V9-TAR4>] (noting that the NVRA “imposes significant constraints on the states’ ability to remove voters”).

298. And will likely become more difficult given the spate of recent judicial appointees to the federal courts—appointees who are less likely to be amenable to voting rights claims than appointees of the prior Administration.

299. Help America Vote Act of 2002, 52 U.S.C. § 21083(b)(1)-(2).

300. *Id.* § 21083(b)(2)(B).

identification; or utilized procedures, including for provisional ballots, that were altogether different. To the extent that voter identification requirements straddle the line between manner regulation and voter qualification standards, HAVA might raise some constitutional concerns.³⁰¹

Courts have already mediated disputes over the scope of HAVA and the extent to which it displaces state law. In *Sandusky County Democratic Party v. Blackwell*, the district court concluded that voters have a right to cast a provisional ballot under HAVA and a private right of action to enforce the provisional voting requirement, but the state was not required to count provisional ballots cast in the wrong precinct.³⁰² The court reasoned that “[t]here is no reason to think that HAVA, which explicitly defers determination of whether ballots are to be counted to the States, should be interpreted as imposing upon the States a federal requirement that out-of-precinct ballots be counted.”³⁰³

In contrast, *White v. Blackwell* read HAVA to require states to allow voters who requested (but did not cast) an absentee ballot to vote provisionally.³⁰⁴ At the time of the election, Ohio did not have a law that was preempted by this requirement.³⁰⁵ *White v. Blackwell* is a prime example of Congress creating “new law” pursuant to its authority under the Elections Clause while *Sandusky* takes a more conservative view of Congress’s intent to “make” new law given the statute’s structure. But both cases implicitly recognize that Congress has independent authority to legislate and use HAVA—rather than state law—as the baseline for resolving the thorny issues in these cases.³⁰⁶

301. Tolson, *supra* note 83.

302. 387 F.3d 565, 568 (6th Cir. 2004) (per curiam).

303. *Id.* at 578.

304. See *White v. Blackwell*, 418 F. Supp. 2d 988, 991 (N.D. Ohio 2006).

305. See *id.* at 990-91 (discussing how Ohio Rev. Code § 3509(B)(1) moots the litigation because it requires the state to allow electors to cast a provisional ballot when the elector has requested (but not received) an absentee ballot).

306. See, e.g., *Arizona Inter Tribal*, 133 S. Ct. 2247, 2270-75 (2013) (Alito, J., dissenting).

2. *The Incidents of Congressional Sovereignty: Commandeering State Offices, State Law, and State Officials*

In addition to its authority to “make or alter” state regulations, the sharpest and most prominent iteration of congressional sovereignty under the Elections Clause is its power to commandeer state offices, state law, and state officials—authority that stands in stark contrast to traditional views about the nature of sovereignty under federalism doctrine.³⁰⁷ Under a cooperative federalism framework, Congress might be able to depart from the anticommandeering principle, but the Elections Clause allows Congress to go much further than even the most permissive theory of federalism. And despite the reinvigoration of the Court’s federalism jurisprudence and the advent of new, judicially created safeguards to preserve state power, Congress’s authority to commandeer state officials pursuant to the Elections Clause remains unchanged. As Samuel Issacharoff has observed,

[Congress’s] power to enforce its “general supervisory power”... has remained intact [under the Elections Clause], even with the Court’s developing Eleventh Amendment jurisprudence, which carves out a protected zone for core state functions.... Similarly, direct federal regulation [of elections] is unaffected by the concern for impermissible federal commandeering of state functions presented by congressional attempts to compel state undertakings for federal programs directly.³⁰⁸

The text of the Clause similarly suggests that Congress, in the course of exercising its authority, can commandeer the offices, law, and officials of the state in accordance with its “general supervisory power.”³⁰⁹ The Clause’s provision that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, *shall be*

307. See Morley, *supra* note 185, at 101 (noting that the Supreme Court has not resolved this issue, but determining that “anti-commandeering challenges ... are unlikely to succeed”); Weinstein-Tull, *supra* note 34, at 752. Other scholars have also argued that Congress can commandeer state officials when acting pursuant to the Elections Clause. See, e.g., Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 237-38.

308. Issacharoff, *supra* note 47, at 109.

309. See *id.* (quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)).

prescribed in each State by the Legislature thereof” is very different from Congress’s authority, which “*may at any time* by Law make or alter such Regulations.”³¹⁰ The use of the mandatory language “shall be prescribed” to describe state authority and “may ... make or alter” to describe congressional authority, illustrates that Congress can act if it chooses, but states must act, even if at the behest of Congress.

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

This view is consistent with how the Supreme Court has generally interpreted “shall,” a term signaling that Congress can conceivably—and in other contexts, impermissibly—draft state officials into implementing a federal regulatory regime.³¹¹ Indeed, those times where the Court has interpreted “shall” to mean “may” have been to avoid the constitutional issues created by Congress’s commandeering of state officials in the context of the Commerce Clause which, unlike the Elections Clause, does not give Congress the same commandeering power.

In *New York v. United States*, for example, the Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required that states form regional compacts with other states in order to dispose of waste generated within their borders; those states that refused to comply were forced to take title to waste generated by any source and pay damages incurred by the

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

311. See, e.g., *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995) (“Though ‘shall’ generally means ‘must,’ legal writers sometimes use, or misuse, ‘shall’ to mean ‘should,’ ‘will,’ or even ‘may.’ For example, certain of the Federal Rules use the word ‘shall’ to authorize, but not to require, judicial action.” (citations omitted)).

failure to take prompt possession.³¹² The Court held that Congress could not commandeer states into enacting a federal regulatory program by forcing them to take title to their waste.³¹³ However, the Court applied the constitutional avoidance canon to section 2032c(a)(1)(A) of the Act, declining to read its language that “[e]ach State *shall* be responsible for providing ... for the disposal of ... low-level radioactive waste generated within the State” as a direct command from Congress, “despite the statute’s use of the word ‘shall,’” because “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems.”³¹⁴ Thus, the Court read “shall” to mean “may” and treated section 2021c(a)(1)(A) as establishing a series of incentives in order to encourage states to dispose of their waste.

Recent cases have confirmed that the Court interprets “shall” to mean “may” in order to avoid striking down the statute only because the Commerce Clause does not allow Congress to commandeer state officials as a strict interpretation of “shall” would require. In *National Federation of Independent Businesses v. Sebelius*, the dissenters argued that the individual mandate was a penalty for this very reason because it “commands that every ‘applicable individual *shall* ... ensure that the individual ... is covered under minimum essential coverage.”³¹⁵ Instead, the Court treated the mandate, which encouraged people to get health insurance by imposing a tax for non-compliance, as a financial incentive similar to those at issue in *New York v. United States*.³¹⁶

Avoiding potentially unconstitutional interpretations is not the only reason the Court has interpreted “shall” to be permissive. The Court also has done so in order to bring coherence to an otherwise ambiguous statutory scheme. In *Gutierrez de Martinez v. Lamagno*,

312. 505 U.S. 144, 151-54 (1992).

313. *Id.* at 149.

314. *Id.* at 151, 170 (second omission in original) (emphasis added) (quoting 42 U.S.C. § 2021c(a)(1)(A) (1988)); see also *Nat’l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 663 (2012) (Scalia, J., dissenting) (declining to read *New York v. United States* to “justify reading ‘shall’ to mean ‘may’” because the “‘shall’ in that case was contained in an introductory provision—a recital that provided for no legal consequences”).

315. *Nat’l Fed. of Indep. Bus.*, 567 U.S. at 649 (quoting 26 U.S.C. § 5000A(a) (Supp. IV 2006)).

316. See *id.* at 568-70 (majority opinion).

for example, the Court declined to read “shall” as mandatory in interpreting the Westfall Act,³¹⁷ which empowers the Attorney General to certify that a federal employee was acting within the scope of his employment if that employee is sued for a wrongful or negligent act.³¹⁸ The Act provides that, “Upon certification by the Attorney General ..., any civil action or proceeding ... *shall* be deemed an action against the United States ..., and the United States *shall* be substituted as the party defendant.”³¹⁹ Reading “shall” to be mandatory instead of permissive would make the Attorney General’s certification conclusive, and in the process, run afoul of the “traditional understandings and basic principles[] that executive determinations generally are subject to judicial review and that mechanical judgments are not the kind federal courts are set up to render.”³²⁰ In contrast, the Elections Clause’s Congress-centric focus, which allows states to be pushed into the service of the federal government, is not inherently ambiguous such that reading the term “shall” as mandatory instead of permissive creates separation of powers (or any other structural) issues.

The Court in *Arizona Inter Tribal*, by reasoning that the Elections Clause is an area of concurrent state and federal power in which each government exercises power of the same kind and type, hobbles Congress’s commandeering authority. Congress’s ability to commandeer the states is unlike any power that the states possess and often occurs in the absence of state action.³²¹ Over the past two centuries, Congress has stepped in to facilitate election administration when the states have been unable or unwilling to do so, commandeering state officials, state facilities, and state law to ensure the continued health of federal elections. During the Reconstruction Era, for example, Congress sought to force state election officials to comply with state law by making noncompliance with state law a federal crime.³²² The Enforcement Act of 1870 incorporated by reference

317. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 436-37 (1995) (Ginsburg, J.).

318. 28 U.S.C. § 2679(d)(1) (2012).

319. *Gutierrez de Martinez*, 515 U.S. at 421-22 (majority opinion) (quoting 28 U.S.C. § 2679(d)(1) (1994)).

320. *Id.* at 434.

321. *Arizona Inter Tribal*, 133 S. Ct. 2247, 2257 (2013).

322. See Enforcement Act of 1870, ch. 114, § 22, 16 Stat. 140, 145. For example, section 22 of the Enforcement Act of 1870 provided:

That any officer of any election at which any representative or delegate in the

substantive state law that governed the mechanics of federal elections,³²³ exposing state officials to dual liability that blurred the lines of accountability at the core of the Court's anticommandeering jurisprudence.³²⁴ In the companion cases of *Ex parte Siebold* and *Ex parte Clarke*, the Supreme Court rejected the argument that this use of state law and state officials was impermissible, noting in *Siebold* that

it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties.³²⁵

The Court further argued that, while "Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State," Congress can punish them for violating federal law.³²⁶

More recently, Congress has commandeered both state officials and state offices by imposing affirmative obligations on the states to implement the NVRA. Under section 10 of the NVRA, each state must designate a state officer as the chief state election official responsible for coordinating the requirements of the Act.³²⁷ The NVRA also requires each state to designate all offices in the state that

Congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States or by or under any State, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election ... shall be deemed guilty of a crime and shall be liable to prosecution and punishment therefor.

Id.

323. *Id.* § 2.

324. See *Ex parte Clarke*, 100 U.S. 399, 408 (1879) (Field, J., dissenting).

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

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

327. 52 U.S.C. § 20509 (Supp. III 2016).

provide either public assistance or state-funded programs primarily engaged in providing services to persons with disabilities as voter registration agencies.³²⁸ In *Voting Rights Coalition v. Wilson*, California argued that these provisions violated the Tenth Amendment by commandeering state agencies to administer a federal election scheme.³²⁹ The Ninth Circuit rejected this argument, holding that “Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators. The exercise of that power by Congress is by its terms intended to be borne by the states without compensation.”³³⁰ Courts in both Pennsylvania and South Carolina declined to impose an anticommandeering rule for similar reasons, recognizing that Congress can directly regulate the state’s manner and means of voter registration.³³¹

CONCLUSION

Despite the increasing sophistication in how we think about federalism both descriptively and normatively, this Article shows how federalism doctrine is a poor framework for understanding the nature of the Elections Clause and the values the Clause embodies.

To the extent that federalism traditionally is, and has been, about granting a subunit of government final policy-making authority in an area of governance, the Clause denies states the true hallmark of sovereignty by giving Congress veto authority over the times, places, and manner of federal elections. Other theories of federalism, most of which are less focused on sovereignty and instead promote the instrumental uses of federalism, fail to capture the unique dynamics that motivate federal action in this area, action

328. *Id.* § 20506(2)(A)-(B); see *Nat’l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 285 (4th Cir. 1998) (holding that NVRA applies to public colleges); *Nat’l Coal. for Students with Disabilities v. Taft*, No. 2:00-CV-1300, 2002 WL 31409443, at *2 (S.D. Ohio Aug. 2, 2002) (same); see also *United States v. New York*, 700 F. Supp. 2d 186, 203-04 (N.D.N.Y. 2010) (holding that NVRA applies to public colleges and community colleges).

329. 60 F.3d 1411, 1415 (9th Cir. 1995).

330. *Id.*

331. See *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Ridge*, Nos. CIV. A. 94-7671 & CIV. A. 95-382, 1995 WL 136913, at *6-7 (E.D. Pa. Mar. 30, 1995); *Condon v. Reno*, 913 F. Supp. 946, 963 (D.S.C. 1995).

that is primarily focused on preserving the legitimacy of federal elections.

The failure to recognize congressional sovereignty in this context has led courts to interpret Congress's power under the Elections Clause more narrowly than is appropriate in order to avoid intruding on the states' authority over elections. Because Congress is sovereign with respect to federal elections, however, the Court's long-standing deference to the states is not only unnecessary, but courts, scholars, and advocates should consider the sheer breadth of the Clause and its irreverence of state power when thinking about the protections that the Constitution extends to the right to vote. These considerations are important on the eve of the 2020 redistricting cycle, as courts struggle to define the scope of the anti-discrimination framework under the Fourteenth and Fifteenth Amendments, leaving room for the Elections Clause to play an important supporting role in voting rights enforcement.