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## The Meaning, History, and Importance of the Elections Clause

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# THE MEANING, HISTORY, AND IMPORTANCE OF THE ELECTIONS CLAUSE

Eliza Sweren-Becker and Michael Waldman\*

*Abstract:* Historically, the Supreme Court has offered scant attention to or analysis of the Elections Clause, resulting in similarly limited scholarship on the Clause’s original meaning and public understanding over time. The Clause directs states to make regulations for the time, place, and manner of congressional elections, and grants Congress superseding authority to make or alter those rules.

But the 2020 elections forced the Elections Clause into the spotlight, with Republican litigants relying on the Clause to ask the Supreme Court to limit which state actors can regulate federal elections. This new focus comes on the heels of the Clause serving as the primary constitutional basis for democracy reform legislation that passed the U.S. House of Representatives in 2019 and was reintroduced in 2021. Increased interest heightens the need for a deeper understanding of the intent and meaning of the Elections Clause. This Article fills a gap in the literature by providing a first-of-its-kind comprehensive analysis of the purpose, meaning, and interpretation of the Elections Clause by the Framers, early Congresses, and federal courts.

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## INTRODUCTION

The Elections Clause—Article I, Section 4 of the U.S. Constitution—has been rarely studied and infrequently adjudicated. That is changing.

The Clause 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.”<sup>1</sup> In other words, the Elections Clause affirmatively directs states to regulate federal congressional elections, but reserves to Congress the superseding power to make its own regulations or to modify state election law.

It is a provision of extraordinary, if often latent power. Nowhere else in the original Constitution is Congress given explicit authority to “alter” state laws even absent a conflicting federal statute. It is also one of the few places in the Constitution where states are given an explicit instruction to act—in this case, to ensure the continuation of the federal legislature. Beyond the significance of this exertion of federal power,

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1. U.S. CONST. art. I, § 4, cl. 1.

what is noteworthy about the Clause is the motive that drove its inclusion: a clear-eyed sense of the risk of political abuse by state lawmakers and the unambiguous decision *not* to leave federal elections in their hands alone.

Unexpectedly, the Elections Clause has emerged as the latest voting rights battleground. In 2020, litigants filed more than forty cases raising Elections Clause and Electors Clause<sup>2</sup> claims, largely seeking to limit voting access before the election or to overturn results after election day.<sup>3</sup> Unlike bizarre claims about Dominion voting machines and a deceased Venezuelan president,<sup>4</sup> these cases had the patina of constitutional seriousness. Today, in partisan voting rights battles, litigants focus on the meaning of the word “legislature,” assuming it to restrict election regulation only to elected representatives in each state capitol. They claim, variously, that election officials, governors, or even state courts interpreting state constitutions cannot act. From the founding era to the present, one would have to look far and wide for evidence that the framers sought to limit these actions only to legislators (as opposed to understanding that language to refer to states generally). Indeed, suspicion of those very legislators suffuses the purpose and history of the Clause. After four justices—considering voting cases on the U.S. Supreme Court’s 2020 “shadow docket”<sup>5</sup>—suggested that they would limit which state entities can regulate federal elections under the Elections and

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2. The Electors Clause, U.S. CONST. art. II, § 1, directs how *presidential* electors are appointed by the states. “[C]ourts have construed the Electors Clause coextensively with the Elections Clause, holding that the former endows Congress with the same authority over presidential elections that the latter grants it over congressional races.” Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 54 (2021); *see also* *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) (“The broad power given to Congress over congressional elections has been extended to presidential elections . . . .”); *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995) (“[Article II section 1] has been interpreted to grant Congress power over Presidential elections coextensive with that which Article I section 4 grants it over congressional elections.”); Eugene Gressman, *Uniform Timing of Presidential Primaries*, 65 N.C. L. REV. 351, 355 (1987) (“[T]he Court employs the same constitutional analysis—the same broad treatment of vested congressional power—in dealing with article II, section 1.”).

3. *Voting Rights Litigation Tracker 2020*, BRENNAN CTR. FOR JUST. (July 8, 2021), <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020> [https://perma.cc/4MDM-628K].

4. Glenn Kessler, *Fact-Checking the Craziest News Conference of the Trump Presidency*, WASH. POST (Nov. 19, 2020, 2:18 PM), <https://www.washingtonpost.com/politics/2020/11/19/fact-checking-craziest-news-conference-trump-presidency/> [https://perma.cc/A6WR-8HFS].

5. The term “shadow docket,” coined by William Baude, refers to Supreme Court decisions decided outside of its regular docket, without oral argument. *See* William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

Electors Clauses,<sup>6</sup> several petitioners sought certiorari to ask the Court to limit which state entities can regulate federal elections.<sup>7</sup>

At the same time, the Elections Clause serves as the primary constitutional rationale for federal democracy reform legislation to expand and protect voting access, including the For the People Act, which passed the U.S. House of Representatives in 2019 and again in 2021, and the Freedom to Vote Act (introduced in the Senate in September 2021).<sup>8</sup> And the Elections Clause took center stage in the Supreme Court's 2019 political gerrymandering decision, *Rucho v. Common Cause*.<sup>9</sup> The Clause was the subject of a 2015 ruling that allowed voters to enact election reforms through ballot initiatives.<sup>10</sup> In 2013, the Clause was the basis of a case on the scope of the National Voter Registration Act.<sup>11</sup> Understanding the Elections Clause's purpose, history, and application over more than 200 years is now essential.

Though the Elections Clause generated substantial friction during the state constitutional ratification debates from 1787 to 1790, it is not widely

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6. *See, e.g.*, *Wise v. Circosta*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 658 (2020) (mem.) (Justices Thomas, Alito, and Gorsuch would have granted an application to enjoin the North Carolina State Board of Elections' extension of the state's absentee ballot receipt deadline. The deadline extension was challenged based on the claim that the Board is not the "legislature" under the Elections and Electors Clauses.); *Democratic Nat'l Comm. v. Wis. State Legislature*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 28, 29–30 (2020) (Gorsuch, J., concurring) (in denying an application to stay a Seventh Circuit decision—which stayed the district court's order to extend the ballot receipt deadline—Justice Gorsuch, concurring, wrote that state legislatures, not judges or other state officials, bear primary responsibility for setting election rules); *id.* at 32 (Kavanaugh, J., concurring) (Justice Kavanaugh agreed that designing electoral procedures is a "legislative task"); *Republican Party of Pa. v. Boockvar*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 643 (2020) (mem.) (Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted an application to stay the Pennsylvania Supreme Court's ruling to extend the mail ballot receipt deadline, which was challenged based on the claim that the state court is not the "legislature" under the Elections and Electors Clauses).

7. *See generally* *Petition for Writ of Certiorari, Corman v. Pa. Democratic Party*, 592 U.S. \_\_\_, 141 S. Ct. 732 (2021) (mem.) (No. 20-574); *Petition for Writ of Certiorari, Republican Party of Pa. v. Degraffenreid*, 592 U.S. \_\_\_, 141 S. Ct. 732 (2021) (mem.) (No. 20-542); *Petition for a Writ of Certiorari, Bognet v. Degraffenreid*, \_\_\_ U.S. \_\_\_, 209 L. Ed. 2d 544 (2021) (mem.) (No. 20-740), 2021 WL 1520777. The Court declined to grant certiorari in *Corman* and *Republican Party of Pennsylvania v. Degraffenreid*. The Court granted certiorari in *Bognet* before vacating the ruling and instructing the lower court to dismiss the case as moot.

8. For the People Act of 2019, H.R. 1, 116th Cong. (2019); For the People Act of 2021, H.R. 1, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021). The Brennan Center for Justice has advocated in support of the For the People Act, including offering testimony before Congress in support of the legislation.

9. \_\_\_ U.S. \_\_\_, 139 S. Ct. 2484 (2019). The Brennan Center for Justice submitted an amicus brief to the Court in support of appellees.

10. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015). The Brennan Center for Justice submitted an amicus brief to the Court in support of appellees.

11. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). The Brennan Center for Justice submitted an amicus brief to the Court in support of respondents.

known, at least as far as constitutional provisions go. Congress did not legislate pursuant to its power under the Elections Clause until 1842,<sup>12</sup> and the Supreme Court did not elaborate on its meaning until 1879.<sup>13</sup> In a nearly unbroken string of cases since then, the Court has deemed uncontroversial a wide range of elections regulations. But the Court did not engage in a robust analysis of the provision's history until 2013.<sup>14</sup> Given the Court's scant attention, scholarship on the Clause—especially its original meaning and public understanding over time—has been limited and is typically directed to the relationship between the Elections Clause and a specific issue.<sup>15</sup> This Article builds on this literature by providing a comprehensive examination of the purpose, meaning, and understanding of the Elections Clause over time.

The full sweep of the history of the Clause—from its drafting to the current day—tells a clear story. It was understood from the start to give

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12. Act of June 25, 1842, ch. 47, 5 Stat. 491.

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

14. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. at 7–9.

15. See, e.g., Jamal Greene, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021 (2005) (justiciability of partisan gerrymandering); Troy McCurry, *Leeway for Judicial Usurpation: Ignoring the Default of the Elections Clause in the Texas Redistricting Cases*, 25 QUINNIPIAC L. REV. 631 (2007) (same); Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (2010) (campaign finance); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012) (Elections Clause, when combined with Congress's ability to enforce the Fourteenth and Fifteenth Amendments, provides constitutional justification for the VRA); MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 340–48 (2016) (discussing Antifederalist views of and arguments against the Elections Clause); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 317 (2019) [hereinafter Tolson, *Congressional Authority*] (exploring the breadth of congressional power over elections, which derives from multiple sources of congressional authority and should overcome federalism concerns); Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171 (2019) (addressing Congress's Elections Clause authority to enact the For the People Act of 2019 (H.R. 1)); *Recent Legislation*, 133 HARV. L. REV. 1806 (2020) (addressing anti-commandeering under the Elections Clause in the contest of H.R. 1). But see Stephanopoulos, *supra* note 2 (writing more broadly on congressional authority over elections). A separate line of scholarship addresses the “independent state legislature” theory. See Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=353013](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=353013) 6 [<https://perma.cc/P5GC-PXHU>]; Vikram David Amar, *Federal Court Review of State Court Interpretations of State Laws that Regulate Federal Elections: Debunking the “Independent State Legislature” Notion Once and for All, and Keeping Federal Judges to Their Important but Limited Lanes* (Nov. 23, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3731755](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731755) [<https://perma.cc/NFM4-ZPEC>]; Derek T. Muller, *Legislative Delegations and the Elections Clause*, 43 FLA. ST. U. L. REV. 717, 726–28, 734 (2016); Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79 (2016); Richard L. Hasen, *When “Legislature” May Mean More Than “Legislature”*: Initiated Electoral College Reform and the Ghost of Bush v. Gore, 35 HASTINGS CONST. L.Q. 599 (2008); Hayward H. Smith, Comment, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

Congress extraordinary power over federal elections. Some derided it for this reason; others welcomed that federal oversight; all took it for granted. It was an important, if narrow, aspect of the Constitution's federalist clockwork machinery. From the start, the Elections Clause was motivated by great and still-relevant constitutional goals: to guarantee and amplify basic democratic rights by ensuring fair and accurate representation, and by precluding tactics that could be used by incumbent factions and parties to blunt representation and exclude voters.

Part I analyzes the drafting of the Elections Clause along with the state constitutional ratification and public debates on the provision. Part II considers the early congressional record and Congress's understanding of its authority under the Elections Clause. Part III explores the Supreme Court's interpretation of the Clause. And Part VI explains the importance of the Elections Clause for today's legal and political fights about our democracy.

## I. THE ELECTIONS CLAUSE AT THE FOUNDING

### A. *The Constitutional Convention*

#### 1. *The Framers' Goals*

The Framers' inclusion of the Elections Clause was driven by two overlapping concerns of current relevance: a focus on representation and a distrust of state lawmakers.

First, the Framers cared passionately about representation.<sup>16</sup> As every American schoolchild knows, a fighting slogan was "No taxation without representation."<sup>17</sup> Americans understood the risks of electoral manipulation to minimize effective representation—manipulation they saw in England, and to a degree in their own pre-revolutionary past.

During the fight over British repressive acts that led up to the revolution, Americans bristled at the notion that they need not be represented directly in parliament. Britain insisted that virtual representation was enough. In the colonies, where many more people owned land and the electorate was a larger share of the population than in Britain, especially in the north, actual representation was deemed a necessary aspect of legitimate government.

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16. See generally J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND & THE ORIGINS OF THE AMERICAN REPUBLIC* (1966).

17. Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 *HOUS. L. REV.* 1377, 1378 (2008) ("That 'no taxation without representation' was the rallying cry of colonists seeking their independence in 1776 is the 'mother's milk' of American history education. Generations of schoolchildren have been weaned on it.").

British parliamentary seats were notoriously malapportioned. The booming industrial cities of Birmingham and Manchester had no representation.<sup>18</sup> On the other hand, a verdant hilltop known as Old Sarum had a seat in parliament.<sup>19</sup> Britain had ample reason to avoid the topic. As one historian writes, “Heeding American arguments about representation of the colonists in Parliament would open up a Pandora’s box of defective representation in Britain.”<sup>20</sup>

In American colonies, on the other hand, new towns were awarded legislative seats. Larger communities, such as Philadelphia and Boston, were awarded extra seats. As tensions rose, the Crown attempted to manipulate this practice. In Pennsylvania, it refused to add legislative representation when new towns were incorporated.

John Adams articulated the colonists’ focus on ensuring the representative nature of legislatures in his *Thoughts on Government*, written in the spring of 1776 as the Continental Congress was preparing to formally declare independence.

The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it.<sup>21</sup>

Others echoed Adams’s words.<sup>22</sup>

As the revolutionaries established new governments, they kept an eye on the need to ensure accurate representation. One pamphlet, possibly written by Thomas Paine,<sup>23</sup> proposed that “A Constitution should lay down some permanent ratio, by which the representation should

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18. CHARLES SEYMOUR, ELECTORAL REFORM IN ENGLAND AND WALES 349, 490–91 (1915).

19. Stephen Farrell, *Old Sarum*, THE HISTORY OF PARLIAMENT, <http://www.historyofparliamentonline.org/volume/1820-1832/constituencies/old-sarum> [<https://perma.cc/5FR8-Y7DD>].

20. R.B. BERNSTEIN, THE EDUCATION OF JOHN ADAMS 52 (2020).

21. John Adams, *Thoughts on Government*, April 1776, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-04-02-0026-0004> [<https://perma.cc/FB3E-YNSE>]; JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50–62 (1989); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 161–75 (1967).

22. See, e.g., THEOPHILUS PARSONS, THE ESSEX RESULT, 1778, reprinted in THE POPULAR SOURCES OF POLITICAL AUTHORITY 341 (Oscar Handlin & Mary Flug Handlin eds., 1966) (“They should think, feel, and act like them, and in fine, should be an exact miniature of their constituents.”).

23. See Gary Berton, Smiljana Petrovic, Lubomir Ivanov, & Robert Schiaffino, *Examining the Thomas Paine Corpus: Automated Computer Authorship Attribution Methodology Applied to Thomas Paine’s Writings*, in NEW DIRECTIONS IN THOMAS PAINE STUDIES 40–41 (Scott Cleary & Ivy Linton Stabell, eds., 2016).

afterwards encrease or decrease with the number of inhabitants; for the right of representation, which is a natural one, ought not to depend upon the will and pleasure of future legislatures.”<sup>24</sup>

The second impetus for the inclusion of the Elections Clause came from a strong distrust of state lawmakers. During the “Critical Period” between the victory in the war and the 1787 gathering in Philadelphia, the newly independent states offered ample evidence of the self-dealing and political corruption of local-minded officials.<sup>25</sup> Indeed, as one Framers put it, the Constitutional Convention was appointed specifically because of the “corruption & mutability of the Legislative Councils of the States.”<sup>26</sup> The Constitution was intended to rectify the weak Articles of Confederation, under which the national government had little leverage over States. The Confederation Congress could not impose taxes, enact statutes, regulate international or interstate commerce, or enforce treaty obligations. States operated largely out of self-interest. For example, New York enacted its own import duties in 1784, generating substantial revenue and keeping its property taxes low, leading to the state’s reluctance to approve an amendment to the Articles that would have permitted federal taxing.<sup>27</sup> Madison’s diligent preparation for the convention included thorough study of all the ways state governments had frustrated the national interest.<sup>28</sup> That distrust permeated the final Constitution.

## 2. *Drafting the Elections Clause and Debate at the Constitutional Convention*

The Elections Clause came together over the course of fifteen days in the summer of 1787. Between July 26 and August 6, a five-member

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24. FOUR LETTERS ON INTERESTING SUBJECTS 18–24 (1776), reprinted in 1 THE FOUNDERS’ CONSTITUTION 639 (Philip B. Kurland & Ralph Lerner eds., 1987).

25. See JOHN FISKE, CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789 (Forgotten Books 2012) (1888).

26. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 288 (Max Farrand ed., 1911) [hereinafter 2 Farrand] (notes of James Madison, recording arguments of John Francis Mercer); see also Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009) (“Corruption was discussed more often in the Constitutional Convention than factions, violence, or instability.”).

27. KLARMAN, *supra* note 15, at 31.

28. James Madison, *Vices of the Political System of the United States, April 1787*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0187> [https://perma.cc/N99 G-Z4XQ]; 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 119–20 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 5 ELLIOT’S DEBATES] (noting in the debates of July 25, 1788 that the States repeatedly failed to heed the Confederation Congress, failed to fulfill their national obligations, and even tried to keep secret their defiance of Congress).

Committee of Detail<sup>29</sup> pulled together a first draft of the Constitution based on the resolutions approved to date.<sup>30</sup> Over successive versions, the Clause's broad purpose to protect the integrity of elections came into view.

An early version produced by the Committee of Detail focused only on the timing of congressional elections.<sup>31</sup> Over the next four drafts, the Committee of Detail coalesced around broader language that grew to include authority over the manner of elections.<sup>32</sup> The sixth draft, significantly, introduced the notion that the Clause protects not just the frequency of elections, but the qualification of voters.<sup>33</sup> But by later drafts, the language had been boiled down to a more concise wording.<sup>34</sup> When John Rutledge (S.C.) delivered the Committee's report on August 6, the Elections Clause read: "The times and places and [the] manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States."<sup>35</sup>

As the Clause evolved, the Committee toyed with various roles for Congress (the August 6 version did not yet include its power to "make" elections regulations, an authority added by amendment on August 9). But the drafters consistently preserved Congress's veto power over state regulations of federal elections.

On August 9, 1787, when the full federal convention considered the

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29. The Committee of Detail was comprised of Edmund Randolph, James Wilson, Oliver Ellsworth, John Rutledge, and Nathaniel Gorham. See KLARMAN, *supra* note 15, at 173.

30. See *id.* at 147; 2 Farrand, *supra* note 26, at 129–74.

31. 2 Farrand, *supra* note 26, at 135 ("The Time of the Election of the Members of the H. D. and of the Meeting of U. S. in C. assembled.").

32. *Id.* at 139 ("The elections shall be *biennially* held on the same day through the *same* state(s); except in case of accidents, and where an adjournment to the succeeding day may be necessary. . . . The place shall be fixed by the (national) legislatures from time to time, or on their default by the national legislature. . . . So shall the presiding officer . . . (Votes shall be given by ballot, unless 2/3 of the national legislature shall choose to vary the mode.)") (emphasis in original).

33. *Id.* at 153 (Committee of Detail, VI, Article 4: "The Members of the House of Representatives shall be chosen every second Year (in the Manner following) by the People of the several States comprehended within this Union (the Time and Place and the Manner and the of holding the Elections and the Rules) *The Qualifications of the Electors* shall be (appointed) *prescribed* by the Legislatures of the several States; but *their* provisions (which they shall make concerning them shall be subject to the Control of) *concerning them may at any Time be altered and superseded* by the Legislature of the United States.") (emphasis in original).

34. *Id.* at 165 (Committee of Detail, IX, Article 6: "The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered (or superseded) by the Legislature of the United States.").

35. *Id.* at 179.

proto-Elections Clause, delegates proposed several amendments.<sup>36</sup> Among the suggested changes was an addition to Congress's power—the authority to *make* (not just “alter”) regulations for congressional elections. In his notes, James Madison explained that the delegates added this authority “in case the States should fail or refuse altogether.”<sup>37</sup> This fear, that states might not set up rules for congressional elections *at all*, permeated state ratification debates and congressional debates all the way through Reconstruction. One reason for the provision was the concern that state legislators would try to strangle the new government by refusing to hold federal elections at all.<sup>38</sup> That fear was not far-fetched. Local potentates such as Patrick Henry, who dominated the Virginia legislature, and George Clinton, who held sway in Albany as New York's governor, would prove the new Constitution's most dogged foes.<sup>39</sup> There was a risk the whole experiment could collapse.

One of the amendments proposed that day generated meaningful debate. John Rutledge and Charles Pinckney represented South Carolina, a state with a notoriously malapportioned legislature, with large coastal plantations far better represented than newly populated inland areas.<sup>40</sup> They moved to strike from the Elections Clause the phrase, “but their provisions concerning them may at any time be altered by the Legislature of the United States.”<sup>41</sup> According to Madison's notes, Rutledge and Pinckney argued that the “States . . . could & must be relied on in such cases.”<sup>42</sup> The delegates from the nascent union's most gerrymandered state (before that word was invented) aimed to strike Congress's power to do anything about it.

Several delegates rose to defend the congressional veto. Nathaniel Ghorum remarked that the absence of congressional authority over elections would be just as improper as county control over British parliamentary elections.<sup>43</sup> Rufus King warned that the absence of a congressional override would repeat the mistakes of the Articles of

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36. *Id.* at 229.

37. *Id.* at 242.

38. *See infra* notes 57–62 and accompanying text.

39. *See infra* notes 59, 77, 84.

40. The western “back country” contained as much as seventy-five percent of the colony's white population and was settled by yeoman farmers who enslaved relatively few people. James Haw, *Political Representation in South Carolina, 1669-1794: Evolution of a Lowcountry Tradition*, 103 S.C. HIST. MAG. 106, 112 (2002). As described in greater detail *infra* section I.B.1, South Carolina's malapportionment was repeatedly offered as an example during state ratification debates to demonstrate the need for superseding congressional authority under the Elections Clause.

41. 2 Farrand, *supra* note 26, at 240.

42. *Id.*

43. *Id.*

Confederation.<sup>44</sup> Following King's rejection of the "dangerous" and "fatal" idea that the federal government should depend on state lawmakers, Gouverneur Morris warned that, without congressional authority, states might make "false returns" and then fail to hold new elections.<sup>45</sup> Roger Sherman expressed "sufficient confidence in the State Legislatures," but still approved of congressional authority.<sup>46</sup>

Madison offered the most extensive defense (at least according to his own notes), along with an explanation of the purpose and scope of the Elections Clause.<sup>47</sup> He described the Clause as containing "words of great latitude," stressing the many ways that states could misuse their authority.<sup>48</sup> And recognizing that state lawmakers would abuse their power in ways that were impossible to predict at the time, he warned that the Elections Clause was needed to prevent self-interested partisans from twisting election rules to benefit their faction. Given its singular importance, we quote Madison's defense of the provision in full:

The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode, This view of the question seems to decide that the Legislatures of the States ought not to have the uncontroled right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures. and might materially affect the appointments. Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the

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44. *Id.* at 241.

45. *Id.*

46. *Id.*

47. Madison requested that his notes be published posthumously, a full half century later in 1840. See THE PAPERS OF JAMES MADISON (Henry D. Gilpin ed., 1840); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 24 (1986). Madison was known to have edited and "improved" the transcripts, including his own contributions. Hutson, *supra*, at 25–35; KLARMAN, *supra* note 15, at 135–36.

48. 2 Farrand, *supra* note 26, at 240–41.

candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controuling power to the Natl. Legislature? Of whom was it to consist? 1. of a Senate to be chosen by the State Legislatures. If the latter therefore could be trusted, their representatives could not be dangerous. 2. of Representatives elected by the same people who elect the State Legislatures; surely then if confidence is due to the latter, it must be due to the former. It seemed as improper in principle — though it might be less inconvenient in practice, to give to the State Legislatures this great authority over the election of the Representatives of the people in the Genl. Legislature, as it would be to give to the latter a like power over the election of their Representatives in the State Legislatures.<sup>49</sup>

Particularly focused on fair representation, Madison echoed these concerns during the Virginia ratification debates a year later, “Elections are regulated now unequally in some States; particularly South-Carolina, with respect to *Charleston*, which is represented by 30 Members.”<sup>50</sup>

Madison’s denunciation of the likely machinations of self-interested state politicians seemed to have stilled the debate in Philadelphia. He recorded no subsequent interjections. Before moving on to consider other provisions of the new Constitution, the delegates agreed to the Elections Clause. The vote was unanimous.<sup>51</sup>

### B. *Ratification of the Constitution*

Publication of the Constitution in September 1787 led to a roaring national debate. Antifederalists cautioned that the Constitution would concentrate too much power in the new central government. The Elections Clause was one target for their fire. Antifederalists warned the provision would let Congress manipulate elections. In his pathbreaking 1961 study of the debate over ratification, historian Jackson Turner Main observed that this seemingly frivolous objection to the Elections Clause was “of

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49. *Id.* at 240–41.

50. THE VIRGINIA CONVENTION: DEBATES (JUNE 14, 1788), *reprinted in* 10 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA [3], at 1259–60 (John P. Kaminski et al. eds., 1993) [hereinafter VOL. 10 VIRGINIA 3] (emphasis in original).

51. 2 Farrand, *supra* note 26, at 242.

great importance, judging from the number of times it was introduced.”<sup>52</sup>

### 1. *State Ratification Debates*

Records indicate the Elections Clause was discussed at the ratification conventions in nine of thirteen states<sup>53</sup> and was the subject of proposed amendments from at least six states. Every state that proposed specific amendments included one to trim or eliminate the clause.<sup>54</sup>

Defenders of the Elections Clause repeatedly expressed an unvarnished distrust of state legislatures. For example, in Massachusetts, George Cabot argued that if state lawmakers exclusively regulated congressional elections “they may at first diminish, and finally annihilate that controul [sic] of the general government, which the people ought always to have through their immediate representatives—as one of the *people*, . . . the 4th section is to be as highly prized as any in the constitution.”<sup>55</sup> Others warned against relying, even “for a moment, on the will of state legislatures,” and expressed concern about state lawmakers trying to exercise “undue influence in elections” and making “improper regulations” arising from “sinister views.”<sup>56</sup>

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52. JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788*, at 149–51 (2d ed. 2017).

53. No such debate was found in records of the Connecticut, Delaware, Georgia, and New Jersey ratification debates (in Elliot’s *Debates* or the *Documentary History of the Ratification of the Constitution*). These four states ratified the Constitution most quickly. The vote was unanimous in Delaware, Georgia, and New Jersey; in Connecticut, the margin in favor of ratification was more than three to one. KLARMAN, *supra* note 15, at 422–23.

54. MAIN, *supra* note 52, at 151.

55. THE MASSACHUSETTS CONVENTION: CONVENTION DEBATES (Jan. 16, 1788), *reprinted in* 6 *RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS* [3], at 1217 (John P. Kaminski et al. eds., 2000) [hereinafter VOL. 6: MASSACHUSETTS 3] (emphasis in original).

56. THE NEW YORK CONVENTION: DEBATES (June 25, 1788), *in* 22 *RATIFICATION OF THE CONSTITUTION BY THE STATES: NEW YORK* [4], at 1906 (John P. Kaminski et al. eds., 2008) [hereinafter VOL. 22: NEW YORK 4] (“Richard Morris suggested that so far as the people, distinct from their legislatures, were concerned in the operation of the constitution, it was absolutely necessary that the existence of the general government should not depend, for a moment, on the will of the state legislatures. The power of perpetuating the government ought to belong to their federal representatives; otherwise, the rights of the people would be essentially abridged.”); *Plain Truth: Reply to an Officer of the Late Continental Army*, INDEPENDENT GAZETTEER, Nov. 10, 1788, *reprinted in* 2 *RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA* 222 (Merrill Jensen ed., 1976) [hereinafter VOL. 2: PENNSYLVANIA] (“Congress indeed are to have control to prevent undue influence in elections, which we all know but too often happens through party zeal.”); *Text of a Federalist Speech Not Delivered in the Maryland Convention*, MD. J. (July 21, 1788), *reprinted in* 12 *RATIFICATION OF THE CONSTITUTION BY THE STATES: MARYLAND* [2], at 884 (John P. Kaminski et al. eds., 2015) (“It has been said, that congress will be more likely to make improper regulations, than the general assembly. But that is an assertion without foundation, because although we may easily suppose improper regulations to take place in a state assembly, from the prevalence and sinister views of a party . . .”).

Backers worried that balky states would simply refuse to participate in federal elections.<sup>57</sup> Rhode Island's refusal to send delegates to Congress and the Constitutional Convention was top-of-mind.<sup>58</sup> Indeed, in New York, supporters of George Clinton would manage to stall the first House election in two districts in 1788.<sup>59</sup> At times, supporters assured anti-federalists that the purpose of the Clause was simply to ensure that states held elections. At the first ratification convention the prominent lawyer James Wilson claimed the Clause was needed for "the very existence of the federal government."<sup>60</sup> The authority would not be abused because Congress would act only "to correct the improper regulations of a particular state."<sup>61</sup> James Iredell attempted to soothe critics by explaining that the provision would only be used when states failed to hold elections, such as in case of a military invasion (and even proposed an amendment along those lines).<sup>62</sup>

But many federalists, as well as antifederalists, saw the power given to Congress to be far more sweeping than just one to be used if a state refused to hold elections. Just as at the Constitutional Convention, proponents warned that powerful factions within states would use unchecked control over elections to gerrymander districts and entrench their power.

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57. See Roger Sherman, *A Citizen of New Haven*, CONN. COURANT, Jan. 7, 1788, reprinted in 3 RATIFICATION OF THE CONSTITUTION BY THE STATES: DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT 526 (Merrill Jensen ed., 1978) [hereinafter VOL. 3 DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT] ("The regulating the time, place, and manner of elections seems to be as well secured as possible. The legislature of each state may do it, and if they neglect to do it in the best manner, it may be done by Congress; and what motive can either have to injure the people in the exercise of that right?"); Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), reprinted in VOL. 3 DELAWARE, NEW JERSEY, GEORGIA, CONNECTICUT, *supra*, at 569; THE PENNSYLVANIA CONVENTION: PROCEEDINGS AND DEBATES OF THE CONVENTION, reprinted in VOL. 2: PENNSYLVANIA, *supra* note 56, at 402–03, 406 (statements of James Wilson); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 60 (Jonathan Elliot ed., 2d ed., 1836) [hereinafter 4 ELLIOT'S DEBATES] ("It would have been a solecism, to have a government without *any means* of self-preservation. The Confederation is the only instance of a government without such means, and is a nerveless system, as inadequate to every purpose of government as it is to the security of the liberties of the people of America. When the councils of America have this power over elections, they can, in spite of any faction in any particular state, give the people a representation.") (replicating a statement of William R. Davie) (emphasis in original).

58. See THEOPHILUS PARSONS: NOTES OF CONVENTION DEBATES (Jan. 16, 1788), reprinted in VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1210–11 (noting Theodore Sedgwick's statement: "But this controlling power is necessary to preserve the general government . . . Attend to the conduct of Rhode Island last winter; without any reason, they recalled their delegate and refused to send any. The same may happen under the general government"); 4 ELLIOT'S DEBATES, *supra* note 57 (noting the statement of William R. Davie addressing "the little state of Rhode Island").

59. FORREST McDONALD, *THE PRESIDENCY OF GEORGE WASHINGTON* 7 (1974).

60. Proceedings and Debates of the Convention, reprinted in VOL. 2: PENNSYLVANIA, *supra* note 56, at 565 (Dec. 11, 1787).

61. *Id.* at 565–66.

62. 4 ELLIOT'S DEBATES, *supra* note 57, at 53–54.

Theophilus Parsons, who later became Massachusetts's chief justice, spoke at the commonwealth's ratifying convention in January 1788. During the ratification debate, he warned of abuse in prescient and eerily modern language:

But a state legislature, under the influence of their senators, who would have their fullest confidence, or under the influence of ambitious or popular characters, or in times of popular commotion, and when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the State into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy[.]<sup>63</sup>

The Elections Clause, Parsons explained, “provides a remedy—A controuling power in a legislature, composed of senators and representatives of twelve States, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election.”<sup>64</sup> According to Parsons, the Elections Clause vested superseding power in Congress to “secur[e] to the people their equal rights of election.”<sup>65</sup>

Indeed, federalists warned that voter suppression tactics by state lawmakers would make it harder for voters to be heard. For example, James Wilson, arguing for the Constitution, noted with a shiver that Pennsylvania's elections could be moved to far-west Pittsburgh.<sup>66</sup> Thomas McKean (Pennsylvania's chief justice) asked, if States directed that votes be cast by voice, Congress must be authorized to change that mode to secret ballot “to preserve the suffrages of the citizens from bias and influence[.]”<sup>67</sup> He later explained that it is Congress's duty to ensure that its members were “fairly chosen” and, to do so, “it is proper they should have it in their power to provide that the times, places, and manner of election should be such as to insure free and fair elections.”<sup>68</sup> One Massachusetts commentator explained, a state “might abuse the inhabitants, by appointing a place for holding the elections, which would prevent some from attending, and burthen [sic] others with very great inconveniences. These are cases in which the supreme power must

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63. VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1218.

64. *Id.*

65. *Id.* at 1217.

66. VOL. 2: PENNSYLVANIA, *supra* note 56, at 403.

67. *Id.* at 413.

68. *Id.* at 537.

interpose, and abuses which none but it can rectify.”<sup>69</sup>

In particular, Elections Clause proponents sought to avoid the malapportionment that had plagued England and reemerged in South Carolina. One essayist explained that, in England,

the people have by no means an equal representation, even in the house of commons, the only popular branch of their legislature. The old, decayed, and almost forgotten borough of Sarum, sends two members to parliament, when Bristol, the second town in the kingdom, sends only two. London, which contains at least the seventh part of the inhabitants of England, does not furnish the hundredth part of the representation in parliament.<sup>70</sup>

Early in 1788, at the Massachusetts ratification, Rufus King described that under South Carolina’s constitution, Charleston held a disproportionate number of seats in the state’s General Assembly and refused to “alter[] of this unequal mode of representation” even though the population had grown in “[t]he back parts of Carolina.”<sup>71</sup> If South Carolina’s legislature had unchecked power to draw congressional districts, congressional “representatives, therefore, from that State, will not be chosen by the people, but will be the representatives of a faction of that State.”<sup>72</sup> King then asked, “[i]f the general government cannot control in this case, how are the people secure?”<sup>73</sup>

In addition, federalists urged national uniformity.<sup>74</sup> According to one Maryland commenter, the “great object” of the Framers at the convention “appears to have been, to institute a government as *uniform* and equal in all its parts, as could be accomplished. It was foreseen that the states, by different regulations with regard to the above recited instances, might obstruct that *uniformity*, and occasion great inconveniences.”<sup>75</sup>

69. Remarker ad Corrigendum, INDEP. CHRON., Jan. 17, 1788, *reprinted in* 5 RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS [2], at 738 (John P. Kaminski et al. eds., 1998) [hereinafter VOL. 5: MASSACHUSETTS 2]; *see also* 4 ELLIOT’S DEBATES, *supra* note 57, at 54 (explaining that the Elections Clause “might also be useful . . . lest a few powerful states should combine, and make regulations concerning elections which might deprive many of the fair exercise of their rights, and thus injure the community, and occasion great dissatisfaction.”).

70. Caroliniensis, CHARLESTON CITY GAZETTE, 1, Apr. 2, 1788, *reprinted in* 27 RATIFICATION OF THE CONSTITUTION BY THE STATES: SOUTH CAROLINA 240 (John P. Kaminski et al eds., 2016) [hereinafter VOL. 27: SOUTH CAROLINA].

71. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 267–68 (Max Farrand ed., 1911) (Jan. 21, 1788, Massachusetts Convention).

72. *Id.* at 268.

73. *Id.*

74. 4 ELLIOT’S DEBATES, *supra* note 57, at 60 (statement of William R. Davie); VOL. 10: VIRGINIA 3, *supra* note 50, at 1259 (statement of James Madison).

75. ARATUS: TO THE PEOPLE OF MARYLAND, *reprinted in* 11 RATIFICATION OF THE CONSTITUTION

Uniformity as to the time of elections, in particular, would ensure there would always be a quorum in the House, including during periods of emergency.<sup>76</sup>

Madison made his own arguments at the pivotal, contentious Virginia ratifying convention, consistent with his statement at the Constitutional Convention and the reasoning of his federalist colleagues in other states. For days, Madison defended the Constitution against assault from Patrick Henry, George Mason, and other prominent foes. Henry warned that the Elections Clause could “totally destroy the end of suffrage” if Congress sets the election at a place “the most inconvenient in the state” or far from where voters live.<sup>77</sup> James Monroe (who would soon face Madison in the first congressional election) challenged the Clause. He asked why regulation of congressional elections was under the “ultimate controul” of the national legislature.<sup>78</sup> At Charlottesville, Madison set out his view of the broad purposes behind the Clause, beyond whether states held elections at all. State regulation of congressional elections, he declared, “should be uniform throughout the Continent. Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust.”<sup>79</sup> Critiquing South Carolina’s malapportionment,<sup>80</sup> he added, “[s]hould the people of any State, by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government.”<sup>81</sup>

Antifederalists waged repeated attacks. The Elections Clause, they argued, granted Congress too much power. One Massachusetts delegate remarked that the Clause would “make Congress omnipotent.”<sup>82</sup> A North Carolina delegate called the provision “reprehensible” and predicted that it could cause “state legislatures [to] entirely decay away.”<sup>83</sup> In Virginia, Patrick Henry claimed that the control “given to Congress over the time, place, and manner of holding elections, will totally destroy the end of suffrage.”<sup>84</sup> And the dissenting minority in Pennsylvania warned that

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BY THE STATES: MARYLAND [1], at 38 (John P. Kaminski et al. eds., 2015) (emphasis in original) (thought to be authored by George Lux).

76. THE VIRGINIA CONVENTION: DEBATES (JUNE 4, 1788), *reprinted in* 9 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA [2], at 920–21 (John P. Kaminski et al. eds., 1990) [hereinafter VOL. 9: VIRGINIA 2] (statement of George Nicholas).

77. *Id.* at 964.

78. VOL. 10: VIRGINIA 3, *supra* note 50, at 1259.

79. *Id.* at 1260.

80. 2 Farrand, *supra* note 26, at 242.

81. *Id.*

82. VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1398–99.

83. 4 ELLIOT’S DEBATES, *supra* note 57, at 50–51.

84. VOL. 9: VIRGINIA 2, *supra* note 76, at 964–65.

when the spirit of the people shall be gradually broken; when the general government shall be firmly established, and when a numerous standing army shall render opposition vain, the Congress may complete the system of despotism, in renouncing all dependence on the people, by continuing themselves, and [their] children in the government.<sup>85</sup>

Opponents warned that members of Congress could entrench themselves by situating polling places at inconvenient locations,<sup>86</sup> and they advanced similar arguments in published essays and private letters.<sup>87</sup> One opponent, John Steele in North Carolina, addressed these concerns by highlighting the newly powerful federal judiciary; if Congress enacted Elections Clause legislation that was “inconsistent with the Constitution, independent judges will not uphold them[.]”<sup>88</sup> Many proposed that

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85. THE DISSSENT OF THE MINORITY OF THE CONVENTION (DEC. 18, 1787), *reprinted in* VOL. 2: PENNSYLVANIA, *supra* note 56, at 629–30.

86. *See, e.g.*, THE SOUTH CAROLINA GENERAL ASSEMBLY CALLS A STATE CONVENTION (JAN. 19, 1788), *reprinted in* VOL. 27: SOUTH CAROLINA, *supra* note 70, at 167 (statement of Charles Pinckney); VOL. 10: VIRGINIA 3, *supra* note 50, at 1290–91 (June 14, 1788) (denoting George Mason’s concerns that Congress could establish polling place at inconvenient locations); VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1409 (Feb. 2, 1788) (undelivered speech by Timothy Winn); *see also* VOL. 2: PENNSYLVANIA, *supra* note 56, at 510 (Dec. 6, 1787); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 30–32 (Jonathan Elliot ed., 2d ed., 1836) [hereinafter 2 ELLIOT’S DEBATES]; 4 ELLIOT’S DEBATES, *supra* note 57, at 70.

87. *See* An Officer of the Late Continental Army, PHILA. INDEP. GAZETTEER, Nov. 6, 1787, *reprinted in* VOL. 2: PENNSYLVANIA, *supra* note 56, at 210; Consider Arms, Malachi Maynard & Samuel Field, *Dissent to the Massachusetts Convention*, HAMPSHIRE GAZETTE, Apr. 16, 1788, at 9, *reprinted in* 7 RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS [4], at 1734–35 (John P. Kaminski et al. eds., 2001); *Samuel*, INDEP. CHRON., Jan. 10, 1788, *reprinted in* VOL. 5: MASSACHUSETTS 2, *supra* note 69, at 680 (John P. Kaminski et al. eds., 1998); Brutus, VA. INDEP. CHRON., May 14, 1788, *reprinted in* VOL. 9: VIRGINIA 2, *supra* note 76, at 802; A Farmer and Planter, MD. J., Apr. 1, 1788, *reprinted in* 12 RATIFICATION OF THE CONSTITUTION BY THE STATES: MARYLAND [2], at 467 (John P. Kaminski et al. eds., 2015); Letter from John Brown Cutting to William Short (Dec. 13, 1787), *in* 14 COMMENTARIES ON THE CONSTITUTION [2], at 479 (John P. Kaminski et al. eds., 2009).

88. 4 ELLIOT’S DEBATES, *supra* note 57, at 71; *see also* *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964). Judicial review was not foreign to the Framers, even if finding legislation unconstitutional was atypical. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 891, 927–82 (2003) (noting that “there is a wealth of evidence that the Founders believed that the courts could exercise some form of judicial review over federal statutes” and presenting such evidence, including review of state statutes); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 798 (1999) (“[F]or many Americans in the 1790s judicial review of some sort did exist. But it remained an extraordinary and solemn political action . . .”). In the years before *Marbury v. Madison*, judicial review particularly reflected distrust of state lawmakers, as “exercises of judicial review served to keep state legislatures, rather than Congress, in check.” William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 459 (2005). Notably, in a case shortly after ratification in which a circuit court struck down a state statute (unrelated to elections), the court made the case for

Congress's power to regulate should only be triggered by a state's complete failure to enact federal election regulations.<sup>89</sup> Generally, they assumed that would require a rewrite of the Clause. The Pennsylvania antifederalist Samuel Bryan (or his father, George) suggested that the language of the Clause *already* limited Congress's authority to apply only in cases of state default,<sup>90</sup> and John Jay of New York seemed to have understood the Clause in the same manner.<sup>91</sup> But that interpretation was belied by the fact that, upon ratifying the Constitution, nearly half of all states proposed amendments to limit Congress's power to occasions of state default or, in Massachusetts and New Hampshire, if states acted in a way that was "subversive of the rights of the people to a free and equal representation in Congress."<sup>92</sup> Ultimately, however, those amendment efforts failed.

## 2. *Federalist Papers*

During the state debates, Madison, along with Alexander Hamilton and John Jay, made the case for ratifying the new Constitution in the *Federalist Papers*. In *Federalist Papers* Nos. 59, 60, and 61, published in late February 1788, Hamilton addressed "the Power of Congress to Regulate

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judicial review by arguing that state lawmakers "surely" could not make election laws that contravened a state's constitution. *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 309 (C.C.D. Pa. 1795) ("Could the Legislature have annulled these articles, respecting . . . elections by ballot? Surely no. As to these points there was no devolution of power; the authority was purposely withheld, and reserved by the people to themselves. . . . The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times . . ."). *But see* *Rucho v. Common Cause*, \_\_ U.S. \_\_, 139 S. Ct. 2484, 2496 (2019) ("The Framers were aware of electoral districting problems and considered what to do about them. . . . At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.").

89. See VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1213–22; 26 RATIFICATION OF THE CONSTITUTION BY THE STATES: RHODE ISLAND [3], at 920–21 [hereinafter VOL. 26: RHODE ISLAND] (debates of Mar. 3, 1790); 23 RATIFICATION OF THE CONSTITUTION BY THE STATES: NEW YORK [5], at 2206 (John P. Kaminski et al. eds., 2009) (debates of July 17, 1788); Letter from David Ramsay to Benjamin Rush (Nov. 10, 1787), *reprinted in* VOL. 27: SOUTH CAROLINA, at 38 (John P. Kaminski et al. eds., 2009).

90. See, e.g., Centinel I, PHILA. INDEP. GAZETTEER, Oct. 5, 1787, *reprinted in* VOL. 2: PENNSYLVANIA, *supra* note 60, at 163–64 ("The plain construction of [Art. I, Sec. 4] is, that when the state legislatures drop out of sight, from the necessary operation of this government, then Congress are to provide for the election and appointment of Representatives and Senators.") (quoting who is thought to be Samuel Bryan)

91. VOL. 22: NEW YORK 4, *supra* note 56, at 1905 (June 25, 1788).

92. See 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 322, 325–26, 329–30 (Jonathan Elliot ed., 2d ed., 1836); see also 4 ELLIOT'S DEBATES, *supra* note 57, at 246; VOL. 26: RHODE ISLAND, *supra* note 89, at 999–1000 (Rhode Island Form of Ratification and Amendments); 2 ELLIOT'S DEBATES, *supra* note 86, at 545 (meeting at Harrisburg, after Pennsylvania had ratified the Constitution).

the Election of Members”<sup>93</sup> and rebutted objections to that power.<sup>94</sup> These articles are illuminating, though they are somewhat misleading in their narrow focus on what to do if states fail to hold elections.

In Federalist No. 59, Hamilton was charged with defending the congressional veto found in the Elections Clause. Hamilton affirmed that Congress must have the authority to regulate the election of its own members because “EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION.”<sup>95</sup> Hamilton made no attempt to disguise his distrust of state lawmakers:

Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs.<sup>96</sup>

Hamilton also offered a rationale for why the Elections Clause uses “words of great latitude.”<sup>97</sup> No specific regulation “would have been always applicable to every probable change in the situation of the country.”<sup>98</sup> Therefore, “a discretionary power over elections” was preferable to a more specific provision that would later require a constitutional amendment to change.<sup>99</sup>

In Federalist No. 60, Hamilton addressed fears that the Elections Clause conferred on Congress the power to “promote the election of some favorite class of men in exclusion of others.”<sup>100</sup> Concerns that Congress could effectively select its members by setting polling places at inconvenient locations were “chimerical.”<sup>101</sup> A “victorious and overbearing majority” might, “in certain turbulent and factious seasons,” violate the right to vote for “a particular class of citizens.”<sup>102</sup> But Hamilton was confident that such a manipulation by Congress—if it affected “the

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93. THE FEDERALIST NO. 59 (Alexander Hamilton).

94. *Id.* NOS. 59–61 (Alexander Hamilton).

95. *Id.* NO. 59 (Alexander Hamilton) (emphasis in original).

96. *Id.* (“With so effectual a weapon in their hands as the exclusive power of regulating elections for the national government, a combination of a few such men . . . might accomplish the destruction of the Union, by seizing the opportunity of some casual dissatisfaction among the people (and which perhaps they may themselves have excited), to discontinue the choice of members for the federal House of Representatives.”).

97. 2 Farrand, *supra* note 26, at 240–41; THE FEDERALIST NO. 59 (Alexander Hamilton).

98. THE FEDERALIST NO. 59 (Alexander Hamilton).

99. *Id.*

100. *Id.* NO. 60 (Alexander Hamilton).

101. *Id.*

102. *Id.*

great mass of the people”—would occasion a “popular revolution” led by State governments.<sup>103</sup> He dismissed the worry that Congress would favor, say, landowners over merchants, because the House of Representatives would be made up of diverse members with varying interests.<sup>104</sup> Nor could Congress regulate elections to accommodate the rich because “the wealthy and the well-born” were not concentrated in particular locations, but were instead “scattered over the face of the country as avarice or chance may have happened to cast their own lot or that of their predecessors.”<sup>105</sup> The Constitution had avoided giving Congress the power to restrict voting to property owners because the power granted by the Elections Clause is “expressly restricted to the regulation of the TIMES, the PLACES, the MANNER of elections.”<sup>106</sup>

In Federalist No. 61, Hamilton noted that states were more likely than Congress to abuse their elections authority to favor a particular class of electors.<sup>107</sup> Congress could establish uniformity, particularly as to the time of electing House members.<sup>108</sup> And although uniformity would be most easily achieved by a constitutional provision setting a date for federal elections, Hamilton explained that “if a time had been appointed, it might, upon experiment, have been found less convenient than some other time.”<sup>109</sup> Nevertheless, Hamilton argued that Congress’s flexible time power would facilitate uniformity as to the time of elections, enabling the House to assemble at a particular period each year and allowing citizens to vote out the entirety of the House at one time, if an “improper spirit” prevailed on all its members.<sup>110</sup>

## II. EARLY CONGRESSIONAL UNDERSTANDING OF THE ELECTIONS CLAUSE

### A. *The First Fifty Years*

In the first five decades after the ratification of the Constitution, Congress enacted no legislation pursuant to its authority under the Elections Clause. However, Congress was far from silent. In debates about proposed constitutional amendments and contested House

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* (emphasis in original).

107. *Id.* No. 61 (Alexander Hamilton).

108. *Id.*

109. *Id.*

110. *Id.*

elections, lawmakers consistently embraced broad conclusions about the Clause's meaning, recognizing that it empowered Congress to supersede state provisions for congressional elections, even if states had not defaulted on their duty to hold such elections.

1. *The First Congress (1789)*

The original public meaning of the Clause—that it gave Congress sweeping power and aimed to curb abuse by state lawmakers—was evident in congressional debates held just a few months after ratification.

In 1789, the First Congress rejected a constitutional amendment that would have let Congress “alter, modify, or interfere in the times, places, or manner” of congressional elections *only* “when any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such election.”<sup>111</sup> Introduced by antifederalist Aedanus Burke of South Carolina as the House considered what became the Bill of Rights, the proposal instigated debate that mirrored the ratification debates. As Fisher Ames, Chair of the House Committee on Elections, stressed, “such an amendment as was now proposed would alter the Constitution: it would vest the supreme authority in places where it was never contemplated.”<sup>112</sup> “[T]he constitution,” Madison maintained, “stands very well as it is.”<sup>113</sup>

By denouncing the constitutional status quo, the amendment's antifederalist proponents confirmed that the Elections Clause conferred unilateral, plenary power upon Congress – going beyond whether states held elections at all. Elbridge Gerry (Mass.) condemned the provision as granting Congress unchecked authority over its own elections—the power of “controlling the elections of the people.”<sup>114</sup> The Elections Clause, he warned, enabled Congress to “abolish the mode of balloting,” require that “every person must publicly announce his vote,” or move the polls to “remote places.”<sup>115</sup> Notably, none of the critics contested that Congress could revise state laws for congressional elections as it saw fit or that “manner” conveyed comprehensive control, including over balloting and

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111. 1 ANNALS OF CONG. 797–802 (1789) (Joseph Gales ed., 1834).

112. *Id.* at 800.

113. *Id.* at 798.

114. *Id.*

115. *Id.* at 797–98. Michael Stone of Maryland endorsed the amendment on the ground that the federal government should not have “the power of determining on the mode of their own election.” *Id.* at 798. Thomas Tucker of South Carolina lamented that the Elections Clause granted Congress the power to decide for itself whether and how states should district for House elections. “It had been supposed by some States, that electing by districts was the most convenient mode of choosing members to this House; others have thought that the whole State ought to vote for the whole number of members to be elected for that State,” Tucker observed. “Congress might, under like impressions, set their regulations aside.” *Id.* at 801.

districting.<sup>116</sup>

Madison, Sherman, and others did not dispute critics' claim of sweeping congressional power. Rather, they argued those powers were integral to the Constitution's design. "The Convention were very unanimous in passing this clause," Sherman insisted, noting that "it was an important provision, and if it was resigned it would tend to subvert the Government."<sup>117</sup> Madison warned that limiting congressional power over elections would "destroy the principles and the efficacy of the Constitution."<sup>118</sup> The purpose was broad: "as much injury might result to the Union from improper regulations, as from a neglect or refusal to many any" and "inadequate regulations were equally injurious as having none."<sup>119</sup> In this spirit, Theodore Sedgwick (later Speaker of the House) proposed a compromise amendment that would have let Congress "alter the times, manner, and places of holding elections, provided the States made improper ones."<sup>120</sup> Ames argued that the elections power was "one of the most justifiable of all the powers of Congress" because "it was essential to a body representing the whole community, that they should have power to regulate their own elections, in order to secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only."<sup>121</sup>

## 2. *Rejected Constitutional Amendments (1801 and 1823)*

In the coming decades, Congress would twice more reject proposed amendments that sought to change the Elections Clause. Its decision confirmed the founding-era view that the clause confers upon Congress discretionary, plenary, and superseding authority over congressional elections.

In 1801, Congress set aside a proposal to amend the Constitution to require that House members be elected from single-member districts in each state "in the manner which the Legislature thereof shall prescribe."<sup>122</sup> The House Committee on Elections concluded that the amendment would be "superfluous and inconvenient" because requiring single-member districts was "already within the limits of the legislative authority of the Government of the United States . . . , to which recurrence may be had at

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116. *Id.* at 797–802.

117. *Id.* at 800.

118. *Id.*

119. *Id.* (statements of Reps. Theodore Sedgwick (Mass.) and Fisher Ames (Mass.)).

120. *Id.*

121. *Id.* at 797.

122. 6 ANNALS OF CONG. 785 (1801).

all times . . . as the public good or convenience may require.”<sup>123</sup> Further, the Committee worried that adopting the amendment would “indirectly tend to withdraw from the Government of the United States its existing control” over House elections by reassigning control of their “manner” to the States.<sup>124</sup>

In 1823, Congress rejected a proposed constitutional amendment that similarly would have required uniform House elections by single-member districts.<sup>125</sup> A special committee urged the House to reduce both congressional and state legislative power over federal elections because that power was so vast that factions at either level could wield it to entrench themselves or their partisans.<sup>126</sup> The Elections Clause, the committee recognized, granted Congress “controlling and superseding power” over its own elections.<sup>127</sup> With that power, Congress could decide whether to hold elections by districts or by “general-ticket” (i.e., at-large, statewide winner-take-all voting) and how to draw the district lines.<sup>128</sup> Congress could even treat some states differently from others.<sup>129</sup> The special committee found these powers to be “exceedingly dangerous” because Congress could create “an artificial arrangement of districts” such that a “small minority of the people would elect a majority of the national representatives.”<sup>130</sup>

Yet the committee equally feared the power the Elections Clause granted the states. The Clause, it was argued, permitted “the very foundations of the two most important branches of this Government . . . to fluctuate with the mutable counsels of twenty-four separate Legislatures.”<sup>131</sup> This “Constitutional laxity” undermined the “stability of the law,” which should have been an “indispensable safeguard.”<sup>132</sup> “[T]emporary factions” might seize state legislatures and use their Elections Clause power to entrench themselves or their allies.<sup>133</sup> The “existing system” was actually “without system” and should be remedied to prevent majorities from adopting measures that would “deprive the

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123. 1 AMERICAN STATE PAPERS: MISCELLANEOUS 218 (Walter Lowrie & Walter S. Franklin eds., 1834).

124. *Id.* at 218–19.

125. 41 ANNALS OF CONG. 850–66 (1823).

126. *Id.* at 850–53.

127. *Id.* at 852.

128. *Id.* at 853.

129. *Id.*

130. *Id.* at 852–53.

131. *Id.* at 852.

132. *Id.*

133. *Id.*

minority of their just rights,” which was “one of the primary objects of a written Constitution.”<sup>134</sup>

Notwithstanding these concerns, Congress rejected the proposed amendments and left the body’s vast powers as it found them.

### 3. *Contested Elections (1789–1841)*

Though Congress did not legislate pursuant to the Elections Clause during its first fifty years, contested House elections gave lawmakers occasion to reflect on the scope of their election powers.

For example, in 1804, after Representative William Hoge vacated his congressional seat, his brother John Hoge was sent to Congress in a special election held at the direction of Pennsylvania’s governor.<sup>135</sup> Pennsylvania lacked legislation pertaining to special elections in the event of a vacancy. The scenario presented Congress with occasion to consider how the Elections Clause interacts with Article I, Section 2, Clause 4, which directs the state executive to issue a writ of elections to fill a congressional vacancy.<sup>136</sup> Representative William Findley (Pa.), who chaired the Committee of Elections, acknowledged that Congress could regulate the times, place, and manner of holding an election for congressional vacancy, even if that election was ultimately called by the governor.<sup>137</sup> John Lucas, also of Pennsylvania, noted that state lawmakers were vested with the power to regulate elections, but added that this is “a subject of such importance that Congress is empowered to control the State Legislatures in that very case.”<sup>138</sup> Three years later, when the House seated a member even though his election defied a state statute requiring that he reside in one subsection of his district, the House reasserted this power. “The Federal Constitution indeed *provisionally* delegates to the State Legislature the authority of directing the time, place, and manner of holding elections *at the discretion of Congress*,” Findley explained.<sup>139</sup> Although Findley thought that Congress should not exercise its Elections Clause power except to check “abuses or usurpations of power by the States,” he readily conceded that the national legislature “may do [so] at discretion.”<sup>140</sup> Similar endorsements of Congress’s supreme,

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134. *Id.*

135. 14 ANNALS OF CONG. 838 (1804).

136. Article I, Section 2, Clause 4 provides: “When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.” U.S. CONST. art. 1, § 2, cl. 4.

137. 14 ANNALS OF CONG. 842–44 (1804).

138. *Id.* at 852.

139. 17 ANNALS OF CONG. 874 (1807) (emphasis added).

140. *Id.*

discretionary power permeate the record of contested House elections throughout these decades.<sup>141</sup>

Congressional debates in this era reflected not only the supremacy of Congress's elections power, but also the variety of legitimate interests that the Elections Clause countenanced. At a minimum, Congress could legislate in order to preserve its existence.<sup>142</sup> Others recognized additional interests, particularly uniformity and the protection of the right of qualified electors to vote in congressional elections.<sup>143</sup> Congress's power to regulate the "manner" of elections included regulation of balloting, counting, election administration, and districting. For example, one representative noted without dispute that the term encompassed whether "the election may be *viva voce*, by ballot, by districts for the convenience of the voters, or by the States in a general ticket."<sup>144</sup> In 1834, Aaron Vanderpoel, a New York Representative and member of the House Committee on Elections, explained that the "manner" of holding elections included "the means, the judges, the instruments, by which the election is to be carried into effect," along with "the sheriff of the county, and a clerk and two judges, appointed by the county court at their term next preceding the election."<sup>145</sup> These collectively formed "[t]he conduits through which the will of the voter is to flow . . ."<sup>146</sup> Nevertheless, some legislators pointed to the limits of the "manner" authority, noting that the qualifications of voters and representatives went beyond such power.<sup>147</sup>

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141. See, e.g., 10 CONG. DEB. 4303 (1834) (statement of Rep. Patrick H. Pope, Ky.) ("[T]he right to vote for members of this House is derived, not from the constitution of Kentucky, but from the constitution of the United States. . . . [T]hat instrument gives to the Legislature, and not to the constitution, or those who framed it, the right to prescribe the time, place, and manner of voting . . . *so long as the Congress shall permit it.*") (emphasis added); 14 CONG. DEB. 1186–87 (1837) (statement of Rep. Hugh S. Legaré, S.C.) (Congress "controlled absolutely the whole subject of congressional elections, with the single exception of the place of electing Senators").

142. See CONG. GLOBE, 25th Cong., 2d Sess. app. at 68 (1838) (statement of Rep. Charles Eaton Haynes, Ga.); CONG. GLOBE, 26th Cong., 1st Sess. app. at 12–13 (1840) (statement of Rep. Robert Rhett, S.C.).

143. See CONG. GLOBE, 25th Cong., 1st Sess. app. at 91–92 (1837) (statement of Rep. George W. Towns, Ga.).

144. 17 ANNALS OF CONG. 912–13 (1807) (statement of Rep. Philip B. Key, Md.); see also 14 CONG. DEB. 1187 (1837) (statement of Rep. Hugh S. Legaré, S.C.) (noting that when discussing an 1837 election dispute, another representative offered a nonexhaustive list of Congress's "manner" authority, which included the power to "pass uniform laws requiring all elections to be by ballot or *viva voce*—all to be by general ticket or by district—all to be at the same season of the year, &c.").

145. 10 CONG. DEB. 4286–87 (1834).

146. *Id.* at 4287.

147. See, e.g., 17 ANNALS OF CONG. 908 (1807) (statement of Rep. Josiah Quincy, Mass.) (explaining that Congress had exclusive power to establish the qualifications of its members through the Qualifications Clause, Article I, Section 5, Clause 1, and that states were not granted such power by the Elections Clause); 10 CONG. DEB. 4303 (1834) (statement of Rep. Patrick H. Pope, Ky.).

B. *The Apportionment Act of 1842 and its Aftermath*

In its first exercise of its power under the Elections Clause, Congress enacted an Apportionment Act in 1842,<sup>148</sup> requiring that House members be elected from contiguous single-member districts.<sup>149</sup> The Act also reduced the size of the House of Representatives by increasing the ratio of persons per representative.<sup>150</sup> The fact that Congress had never before enacted any Elections Clause legislation loomed over the debate.<sup>151</sup> With a slight Whig majority in the Twenty-Seventh Congress, it passed the House by just two votes, along mostly partisan lines.<sup>152</sup>

Coming a half-century after the ratification of the Constitution, it was also a chance for the young nation to reflect on the original intent of the document. Madison's *Notes on the Debates in the Federal Convention* were first published in 1840, and Elliot's *Debates*—a compilation from the state ratifying conventions—came out between 1827 to 1830.<sup>153</sup> Members had a novel opportunity to ground their arguments in the Framers' original intent. As one scholar has noted, “perhaps the most striking feature of the debate was the backward-looking tone and structure of the argument.”<sup>154</sup>

At the time, ten states used at large voting for House elections. Since the first Congress, in fact, nearly one-third of members had been elected that way.<sup>155</sup> This magnified the power of small states, which for decades successfully resisted a requirement for districts.<sup>156</sup> Whigs believed the districting legislation would help preserve their new majority and were angered by Alabama's switch to an at-large ticket in 1840, which deprived the state of Whig representation.<sup>157</sup> But partisanship was not the only

148. Apportionment Act of 1842, ch. 47, 5 Stat. 491.

149. *Id.*

150. *Id.*

151. See, e.g., CONG. GLOBE, 27th Cong., 2d Sess. app. at 316 (1842) (statement of Rep. Andrew Kennedy, D-Ind.) (“[H]ere is a proposition to commence the exercise of a power by this Government, which, if it possess the power at all, it is admitted has never been exercised, but has lain dormant for the entire period of our national existence.”); *id.* at 342 (statement of Rep. George S. Houston, D-Ala.).

152. Martin H. Quitt, *Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, 28 J. EARLY REPUBLIC 627, 637 (2008).

153. *Id.* at 639–40.

154. Johanna Nicol Shields, *Whigs Reform the “Bear Garden”: Representation and the Apportionment Act of 1842*, 5 J. EARLY REPUBLIC 355, 372–73 (1985).

155. ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850*, at 129 (1987).

156. *Id.*

157. Shields, *supra* note 154, at 371; James Thomas Tucker, *Redefining American Democracy: Do*

factor at play. The politics of slavery also led Southerners (including Southern Democrats) to support the Bill, because elections held by district decreased the likelihood that northern districts would elect critics of slavery.<sup>158</sup> One South Carolina Democrat warned, “On all the questions peculiar to Southern interests, the Northern States, owing to the district system, were now divided,” but if “the general [system] prevail[ed], [the Northern states] would overwhelm the South.”<sup>159</sup> Reducing the size of the House by increasing the ratio of persons to representatives also favored the less populous Southern states.<sup>160</sup>

The Bill’s enactment (despite sharply polarized debate), the next Congress’s decision not to repudiate it as unconstitutional, and successive districting legislation confirmed that Congress understood it had the power to regulate congressional elections and the drawing of districts.

### 1. *Elections Clause Issues Raised by the Apportionment Act*

Controversy centered on the Apportionment Act’s second section, which required single-member congressional districts: “[I]n every case where a State is entitled to more than one Representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative.”<sup>161</sup> States would be barred from holding at-large elections, or from electing multiple members from the same district.

#### a. *Federalism*

Some Apportionment Act opponents tried to resurrect a familiar objection: Congress must defer to states unless they refuse or fail to act themselves. “[I]t would be unconstitutional to exercise this power now,” Representative John G. Floyd (D-NY) told the House, “because the debates in the National Convention prove that it was only intended to be an *ultimate* power, for self-preservation, in case the States neglected to

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*Alternative Voting Systems Capture the True Meaning of “Representation”?*, 7 MICH. J. RACE & L. 357, 375 (2002).

158. James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 913 n.114 (2006); ZAGARRI, *supra* note 155, at 140; *see, e.g.*, CONG. GLOBE, 27th Cong., 2d Sess. 448 (1842) (statement of Rep. Garret Davis, W-Ky) (“The peculiar principles of the South, and every interest it cherished, were to be protected by the district system.”).

159. CONG. GLOBE, 27th Cong., 2d Sess. 445 (1842) (statement of Rep. John Campbell, D-S.C.).

160. Shields, *supra* note 154, at 371.

161. Apportionment Act of 1842, ch. 47, 5 Stat. 491.

exercise it.”<sup>162</sup> The Senate heard similar arguments. “[I]t was only intended that Congress should exercise it in case the States should make insufficient regulations, or fail to make them altogether,” one opponent insisted.<sup>163</sup>

The Act’s supporters countered that the text expressly empowered Congress to “alter” state laws for congressional elections at any time. “[W]hat plain, unsophisticated man, reading this clause, would for a moment doubt the power of Congress to control the whole subject, whenever, in its discretion, it shall see fit to do so? Could language be more direct, full, and explicit?” asked Representative Sampson H. Butler (D-S.C.).<sup>164</sup> “Nor is it only in case of a neglect or failure, for any cause, to perform this duty, that it then devolves upon Congress,” Representative Daniel Barnard (W-N.Y.) argued. “To Congress, moreover, the power is ultimate and appellate. If the States fail altogether, or if any one of them fail, Congress must act. If the States act, Congress has a right to review, and revise, and, if need be, correct and ‘alter’ the regulations which they may adopt.”<sup>165</sup> Others echoed this interpretation,<sup>166</sup> and contested rival claims about the Framers’ intent.<sup>167</sup>

Each side acknowledged that Congress could not order the states to enact particular laws. “Congress *may* itself make the *alterations*,” one lawmaker complained, “but may not, cannot, direct the Legislatures of the States to make them.”<sup>168</sup> Similar statements recurred throughout the debates.<sup>169</sup> Even the Bill’s advocates, such as Senator Nathaniel P. Tallmadge (W-N.Y.), conceded: “no one on this side of the question has said anything about a mandamus or a mandate to the States. No one pretends that Congress or this Government has any power to issue such a

162. CONG. GLOBE, 27th Cong., 2d Sess. app. 322 (1842) (emphasis in original).

163. *Id.* at 786; *see also id.* at 584; *id.* at 524 (statement of Sen. Samuel McRoberts, D-Ill.) (“[T]his power was not to be exercised by Congress,” another asserted, “*except when the Legislatures of any State shall neglect, refuse, or be disabled by invasion, or rebellion, to prescribe the same.*”) (emphasis in original).

164. *Id.* at 319.

165. *Id.* at 380.

166. *See, e.g., id.* at 490 (statement of Sen. Jabez W. Huntington, W-Conn.); *id.* at 512 (statement of Sen. Nathaniel P. Tallmadge, W-N.Y.); *id.* at 793 (statement of Sen. Isaac C. Bates, W-Mass.); *id.* at 789 (statement of Sen. Jacob W. Miller, W-Mass.).

167. *Id.* at 380 (statement of Rep. Daniel D. Barnard, W-N.Y.); *see also id.* at 408 (statement of Rep. Nathaniel G. Pendleton, W-Ohio); *id.* at 789 (statement of Sen. Jacob W. Miller, W-Mass.).

168. *Id.* at 467 (statement of Sen. Silas Wright, D-N.Y.) (emphasis in original).

169. *See also id.* at 360 (statement of Rep. William W. Payne, D-Ala.) (“I do deny that Congress has power to command a State Legislature to district a State.”); *id.* at 449 (statement of Sen. James Buchanan, D-Pa.) (“That no such command can be constitutionally issued, I consider to be a clear, nay, an almost self-evident proposition.”); *id.* at 397 (statement of Rep. Charles G. Atherton, D-N.H.); *id.* at 422 (statement of Sen. Leonard Wilcox, D-N.H.).

mandate . . . Congress has no such power, and will not attempt to compel the States.”<sup>170</sup>

The Act’s opponents saw partial election laws as a violation of what would later be called the anti-commandeering principle.<sup>171</sup> One senator insisted: “If they are required to elect by districts, Congress must go on and prescribe the boundaries of the districts.”<sup>172</sup> Senator Silas Wright (D-N.Y.), one of the bill’s most dedicated opponents, added that “The great principle . . . was, that whatever regulations Congress should attempt to make in this matter, should be so made that the people might be able to act under them, without the intervention and aid of laws to be passed by the State Legislatures.”<sup>173</sup>

The Act’s defenders insisted that Congress could exercise as much or as little of its Elections Clause power as it saw fit. Any command to the states came from the Constitution, not from Congress. “[T]he power of Congress and the duty of the States, in relation to this subject, are correlative,” Tallmadge explained.<sup>174</sup> “Whenever Congress exercises its power, the States must perform their duty . . . The extent to which Congress will go in making or altering these regulations, whether in whole or in part, is entirely within its own discretion.”<sup>175</sup> Partial legislation left the states free “to fill up the measure of legislation which the case requires.”<sup>176</sup> Senator Isaac C. Bates (W-Mass.) explained, “[t]here is not only no command in [this bill], which seems so offensive to some Senators; but there is nothing in the form of a command, nor in effect a command.”<sup>177</sup>

With the enactment of the Apportionment Act, the understanding that the Elections Clause allowed Congress to control *some* of the “manner” of elections without having to control *all* of it prevailed.

*b. The Meaning of “Manner”*

Although the precise scope of “manner” remained contested, the Apportionment Act’s passage confirmed that Congress understood the term to include a broad array of topics, including districting. Senator

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170. *Id.* at 512.

171. Under the “anti-commandeering” doctrine, Congress cannot directly compel states or state officials to enforce federal law. *See* *Printz v. United States*, 521 U.S. 898, 924 (1997).

172. CONG. GLOBE, 27th Cong., 2d Sess. app. 524 (1842) (statement of Sen. McRoberts).

173. *Id.* at 469.

174. *Id.* at 512.

175. *Id.*; *see also id.* at 513; *id.* at 793 (statement of Sen. Bates).

176. *Id.* at 380 (statement of Rep. Barnard).

177. *Id.* at 793.

Wright acknowledged that “manner” included “the manner of voting, the manner of receiving, keeping, counting, and returning the votes, and the *districts of territory* within which the freemen should meet and vote at the same poll.”<sup>178</sup> Representative William W. Payne (D-Ala.) argued that “manner” meant

[n]othing more than that Congress might, by law, provide that the electors should vote *viva voce*, or by ticket; that the United States marshal, the sheriff of a county, commissioners of roads and revenue, the county judge, or other officer appointed by Congress, should open the polls, receive and count the votes, declare the result, and issue the certificate of election,

before paradoxically adding, “&c. [*et cetera*], and nothing more.”<sup>179</sup> Representative Walter Colquitt, a newly minted Democrat from Georgia, construed districting as a de facto regulation of the qualifications of representatives and voters, and argued this went beyond Congress’s “manner” authority.<sup>180</sup>

Supporters offered similar lists, but often added districting. Tallmadge explained that “[t]he manner includes the districts; the voting by ballot or *viva voce*; the officers to conduct the election; the form of the ballot, whether written or printed; the ballot boxes; the poll lists; the returns, and all the incidents from the commencement to the close of an election.”<sup>181</sup>

In a sign of how hard it was to deny that “manner” included districting, the Act’s opponents were divided about how (or even whether) to contest that claim. Buchanan, who criticized the bill for commandeering state legislatures, “freely admit[ted] the power of Congress to divide the States into single congressional districts” as one “expressly given to them by the terms of the Constitution itself.”<sup>182</sup> Though he and opponents of the Apportionment Act “might complain of such an act as an abuse of power, we could never contend that it was a violation of the Constitution.”<sup>183</sup> One Representative told his colleagues that he could not justify his claim that “manner” excluded districting.<sup>184</sup> A smaller number of the Act’s critics

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178. *Id.* at 469.

179. *Id.* at 361.

180. *Id.* at 447.

181. *Id.* at 513; *see also id.* at 492 (statement of Sen. Huntington) (“The ‘manner’ of holding elections embraces several things: such, among others, as an election by districts or general ticket; *viva voce* or by ballot; by a plurality or by a majority”).

182. *Id.* at 449.

183. *Id.* at 451.

184. *Id.* at 360 (“The weight of authority is against me,” he confessed, “but I am not lawyer enough to have my thoughts trammelled by precedent, or my mind swayed by authority.”).

offered more confident (if not more convincing) objections.<sup>185</sup> But none of these members won many colleagues to these positions.

The clear (and ultimately successful) majority of the Twenty-Seventh Congress interpreted the “manner of holding elections” to include districting.<sup>186</sup> Like other supporters of the Act, Tallmadge emphasized the original public meaning of the Elections Clause and the intent of the Framers more generally. Congress’s power to direct that representatives be elected by district was “fully and beyond all question,” Tallmadge argued, because of

the contemporaneous exposition given by [the Framers] and those associated with them, in the journal of the convention which formed the Constitution—in the publications that enforced its adoption—in the debates of the conventions of the States which ratified it—and in the proceedings of the first Congress which assembled under it.<sup>187</sup>

Representative Nathaniel G. Pendleton (W-Ohio) reasoned that if the Elections Clause gave the *states* the power to elect their representatives by single-member districts, so too must the Elections Clause give *Congress* the same power.<sup>188</sup>

Supporters of the Apportionment Act also advanced the understanding of the Elections Clause that would prevail by Reconstruction: that the Clause conferred plenary power over congressional elections except as to the matters the Constitution seemed to expressly preclude (*e.g.*, the site of elections to the Senate and the qualifications of voters and candidates).<sup>189</sup> Affirmations that the phrase “times, places, and manner of holding elections” confers plenary power appear throughout these debates.<sup>190</sup>

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185. Senator Arthur P. Bagby (D-Ala.) claimed that the Constitution *required* at-large congressional elections, arguing that single-member districts denied each voter the right to vote for all of his state’s House members. *Id.* at 786. Representative Andrew Kennedy (D-Ind.) suggested that the “manner of holding the elections” meant “prescribing the mode in which the voter shall exercise the right of suffrage,” a definition he thought denied Congress the power to “break into our territorial limits, and there ‘gerrymander’ our States.” *Id.* at 317.

186. *See, e.g., id.* at 512 (statement of Sen. Tallmadge) (“Congress has the power to direct that Representatives to the other House be elected by single districts.”).

187. *Id.*

188. *Id.* at 408.

189. *Id.* at 512 (statement of Sen. Tallmadge) (arguing the Elections Clause “includes every thing necessary to ascertain, under our system of Republican Government, the popular will in regard to those who shall represent them.”).

190. *See, e.g., id.* at 789 (statement of Sen. Miller) (“The exercise of the power by Congress . . . is a primary overruling power, embracing the whole subject.”); *id.* at 490 (statement of Sen. Huntington) (Congress’s power “[i]s ample, full, and plenary; and, so far as it is exercised, it is supreme, overriding State legislation, and is the paramount law, to be obeyed and enforced.”); *id.* at 319 (statement of Rep.

Representatives read the constitutional and ratification conventions, together with the history of rejected constitutional amendments, to confirm their claims. For example, Senator Jabez Huntington explained:

The foregoing views are sustained by the opinions expressed in the National and State conventions, by all who spoke on the subject, and by the resolutions of several of the State conventions, which admitted that full power was given, but expressed an ardent desire that the Constitution might be so amended as that this power should not be exercised except in cases of necessity. All the debates and proceedings connected with this subject show the entire concurrence of all the friends and all the opponents of the Constitution in the opinion that the power of Congress was entire and supreme.<sup>191</sup>

Pendleton explained that “General Hamilton . . . had no such doubts” about whether “the words ‘manner of holding’ . . . can be made to extend to the question whether the elections shall be by districts or by general ticket.” Indeed, Hamilton “treated the authority of the Legislature, whether National or State, as covering the whole ground, embracing all the regulations necessary to the consummation of an election, except such as are established by the Constitution.”<sup>192</sup>

*c. Legitimate Congressional Interests*

Debate on the 1842 Apportionment Act also addressed the ends to which Congress could legitimately exercise its Elections Clause power.

*i. Self-Preservation*

The least controversial interest that Congress could advance under the Elections Clause was one familiar from the Framing: ensuring that congressional elections would take place. As “a legal and moral person,” Congress necessarily had the power “of continuing and perpetuating its own existence, by the due election and perpetuation of these officers,” one representative explained.<sup>193</sup> Opponents of the Act went further, arguing that self-preservation was the *only* permissible basis for the exercise of this federal power. “The power to prescribe the ‘times, places, and manner’ of electing Senators and Representatives, was conferred on this

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Butler) (“Now, sir, what plain, unsophisticated man, reading this clause, would for a moment doubt the power of Congress to control the whole subject . . .? Could language be more direct, full, and explicit?”).

191. *Id.* at 491.

192. *Id.* at 407–08.

193. *Id.* at 379 (statement of Rep. Barnard).

Government for the sole purpose of enabling it to preserve its own existence, provided the States should fail or refuse to elect Representatives, and for no other,” Representative Payne asserted in typical remarks.<sup>194</sup> Over the course of the debate, most of the Act’s critics raised some version of this point.<sup>195</sup>

Some of the Act’s advocates replied that even if the Framers had adopted the Elections Clause to enable Congress to protect itself, the Framers had nevertheless written a sweeping grant of general power over congressional elections that should be interpreted broadly. For example, in response to a critic arguing Congress could not exercise its Elections Clause power “until it is indispensable to prevent a dissolution of the Government,” Pendleton took a “much larger and more liberal, and [he] believe[d] more accurate, view of what the Convention intended by the *preservation of the Government*.”<sup>196</sup> Pendleton argued that the Elections Clause must be understood broadly to ensure “the purity of popular representation in this House, according to the true principles of the Constitution[.]”<sup>197</sup> He urged the embrace of substance over form. Preservation of the federal government would be meaningless if “the show, the appearance, the form of our Government” was maintained “but the spirit and life are gone” because “the Government is almost as much dissolved by a vicious representation as by no representation.”<sup>198</sup> Senator Bates likewise encouraged his chamber to take a broad view of the permissible purposes of the Elections Clause power, arguing that “a particular inducement to a grant is not a limitation upon the grant.”<sup>199</sup>

*ii. Uniformity and Equality*

Representatives also acknowledged that Congress could exercise its Elections Clause power to ensure uniformity and equality among districts. According to Representative Barnard, “[t]he power conferred on Congress by the Constitution, on the subject of the elections, was designed to be exercised in either of two events”: if the states did not provide for congressional elections or “if these regulations in the different States should be such as to produce a want of uniformity and an inequality in the

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194. *Id.* at 361.

195. *See id.* at 397 (statement of Rep. Atherton); *id.* at 465 (statement of Sen. Wright); *id.* at 786 (statement of Sen. Bagby); *id.* at 450–51 (statement of Sen. Buchanan); *id.* at 322 (statement of Rep. Floyd).

196. *Id.* at 407.

197. *Id.*

198. *Id.*

199. *Id.* at 793.

representation on this floor.”<sup>200</sup> Many others agreed.<sup>201</sup> As Senator Huntington explained, Congress could require that its members be elected by district because it would ensure “the right of the people to a free, equal, and just representation in the Legislature” and it would “establish a system uniform, practicable, just, [and] equal—giving to every portion of the people its fair and legitimate political influence.”<sup>202</sup> Huntington added that such a system would ensure the representativeness of the body by “send[ing] up to the House of Representatives men identified in feeling and interest with those whom they represent.”<sup>203</sup> Even some opponents embraced the principle of equal representation. Buchanan, for example, called it “the *beau ideal* of a system of representation.”<sup>204</sup> Buchanan acknowledged that “[a]s the people of the respective congressional districts enjoy equal rights, their Representatives ought to meet and deliberate on terms of perfect equality; and they ought individually to be subjected to an equal responsibility to those by whom they were elected.”<sup>205</sup> And chief foe Senator Wright conceded that Congress had the power to “alter” state election regulations:

[b]ecause the Legislature of a State, from disaffected feeling, or other cause, might make regulations subversive of the principle, of fair and equal representation, impracticable as to time, unreasonable as to place, odious as to manner, or otherwise subversive of those popular rights intended to be secured by the Constitution—and by this provision, as a most essential part of it.<sup>206</sup>

### iii. *Protecting Political Minorities*

Protecting political (*i.e.*, partisan) minorities emerged as an important congressional interest during these debates. One refrain of advocates for single-member districting was that at-large elections denied political minorities proportional (or, sometimes, any) representation. This denial

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200. *Id.* at 381.

201. *See id.* at 491 (Sen. Huntington, arguing that one aim of the Elections Clause was “to produce uniformity in the manner of holding elections, so far as Congress should deem it proper to have the manner uniform”); *id.* at 788 (statement of Sen. Miller); *id.* at 792 (statement of Sen. Bates). Only in the years after this debate would Congress enact legislation to enable uniform administration of federal elections. *See, e.g.*, Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (1845) (uniform presidential election day); Act of Feb. 19, 1851, ch. 11, 9 Stat. 568 (1851) (uniform process for resolving contested House elections).

202. CONG. GLOBE, 27th Cong., 2d Sess. app. 493 (1842).

203. *Id.*

204. *Id.* at 439.

205. *Id.*

206. *Id.* at 465.

of due representation, they contended, amounted to the disenfranchisement of political minorities and the entrenchment of majorities. The Elections Clause gave Congress the power to right that wrong.

Many in Congress were confident that political minorities had rights that Congress had the duty and power to secure. “It needs no argument to prove the importance of minorities to the preservation of public liberty, and the equitable administration of Government,” Huntington said. “They have rights too, which ought to be protected.”<sup>207</sup> Chief among these was the right to vote and be represented. “If the general-ticket system be adopted, that political party which is in a minority, however near it may approximate to an equality in numbers, will virtually be disfranchised,” Senator Huntington elaborated, “and a free and equal representation of the people be prevented.”<sup>208</sup> Senator Bates echoed that concern. “The general-ticket system disfranchises the minority in a State,” he declared, and “may be used by the majority to perpetuate their power.”<sup>209</sup> “[M]inorities, as well as majorities, shall be represented in the Legislature,” another explained. “Majorities certainly must govern, but minorities must be heard.”<sup>210</sup> For many members, single-member districting seemed likely to mitigate, if not eliminate, the threat of the tyranny of the majority.<sup>211</sup>

In response, the Act’s opponents waved off concerns about such a threat and defended a narrower conception of the right to vote as the right (of qualified voters) to cast a ballot and have it counted. Senator Leonard Wilcox (D-N.H.), for example, predicted that House of “nearly or mainly of the same party character” was not “an event to be apprehended or expected” because “[i]f it should ever exist, it would break down the party by its own cumbrous weight.”<sup>212</sup> Senator Bagby argued that denying political minorities representation did not deny the right to vote at all: “While the right to vote according to the dictates of conscience and judgment remains unfettered and uncontrolled, no man is disfranchised. It is said, however, that it is destructive of the rights of minorities. Beyond the ballot-box minorities have no rights.”<sup>213</sup> In enacting the Apportionment Act, Congress repudiated this claim that merely casting a ballot is all that the right to vote guarantees.

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207. *Id.* at 493.

208. *Id.*

209. *Id.* at 793–94.

210. *Id.* at 409 (statement of Rep. Pendleton).

211. *See id.* at 493 (statement of Sen. Huntington); *id.* at 391 (statement of Sen. John J. Crittenden, Ky.); *id.* at 320 (statement of Rep. Butler).

212. *Id.* at 424.

213. *Id.* at 584.

iv. *Preventing Partisan Manipulation*

Finally, and intertwined with the protection of political minorities, the Apportionment Act debate reflected that Congress understood the Elections Clause to enable it to combat partisan manipulation of election law—especially gerrymandering. State power to regulate federal elections, one member observed, led to “a violent struggle for the ascendancy in the State Legislatures, growing out of the knowledge that this power may, and the apprehension that it will, be abused.”<sup>214</sup> Partisan conflict, in turn, would lead to the reality (or at least the appearance) that the minority “had in some way been defrauded of their electoral rights.”<sup>215</sup> “The mode of forming districts, which has received the name of *gerrymandering* . . . which is alike subversive of popular rights and of the spirit of the Constitution,” was one particularly threatening means by which partisan interests could suppress minority representation.<sup>216</sup> Through the Elections Clause, Congress could decide for itself how its elections would proceed, reducing the stakes of state political strife and ensuring that “[a]ll attempts to arrange districts for political, party, or selfish purposes, would be in vain, and the people would be secure in their right to be represented in Congress.”<sup>217</sup>

2. *Enactment and Aftermath*

The first complete draft of the Apportionment Act passed the House with the single-member districting requirement by a vote of 113–87.<sup>218</sup> The House passed the final version of the Bill, embracing two Senate amendments to the apportionment ratio, by votes of 113–103 and 111–102.<sup>219</sup> The Senate passed the final Bill by a vote of 25–19.<sup>220</sup>

In the years after the enactment of the Apportionment Act of 1842, debate about whether the Elections Clause permitted Congress to control congressional districting slowly abated. By the close of Reconstruction, Congress had enacted two similar districting laws with almost no debate.

In the first congressional elections under the Apportionment Act of 1842, four states defied the statute and elected their representatives at-

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214. *Id.* at 407 (statement of Rep. Pendleton).

215. *Id.*

216. *Id.* at 493 (statement of Sen. Huntington); *cf.* CONG. GLOBE, 27th Cong., 2d Sess. 556 (1842) (statement of Sen. Wright) (denouncing the “vice” of gerrymandering, which he predicted would be the result of districting under the Apportionment Act).

217. CONG. GLOBE, 27th Cong., 2d Sess. app. 493 (1842) (statement of Sen. Huntington).

218. CONG. GLOBE, 27th Cong., 2d Sess. 471 (1842).

219. *Id.* at 649.

220. *Id.* at 614.

large.<sup>221</sup> The outgoing House Committee on Elections recommended a bill suspending single-member districting for the upcoming Congress, but it was not adopted.<sup>222</sup>

When the Twenty-Eighth Congress convened, Democrats had ousted the Whig majority. The majority report of the new Congress's committee on the dispute recommended declaring the single-member districting provision unconstitutional on anti-commandeering grounds. Because the Act could not "execute itself without the intervention of the State legislatures" (i.e., unless states drew maps), Congress had commandeered the states.<sup>223</sup> The report did make a significant concession, however, acknowledging that Congress could intervene to protect political rights against state laws that threatened them. "If the legislatures of the States fail or refuse to act in the premises or act in such a manner as will be subversive of the rights of the people and the principles of the Constitution," the report concluded, "then this conservative power interposes, and, upon the principle of self-preservation, authorizes Congress to do that which the State legislatures ought to have done."<sup>224</sup> The minority report repeated the constitutional claims that the Act's original supporters had advanced, and concluded that the state laws providing for at-large elections were void because Congress had acted lawfully in passing the Apportionment Act.<sup>225</sup>

After relitigating the constitutional questions discussed in 1842,<sup>226</sup> Congress voted to seat the disputed representatives-elect,<sup>227</sup> but also voted down a resolution declaring the 1842 law unconstitutional.<sup>228</sup> This seemingly contradictory position likely reflected politics more than a particular view on the Elections Clause. As Franita Tolson, authoritative scholar on the Elections Clause and federalism, notes:

Arguably, the Democrats wanted to impose principled limitations on the exercise of federal power to protect the slaveholding states, which had been concerned about *any* broad interpretation of federal power, while simultaneously taking advantage of their

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221. See CHESTER H. ROWELL, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS, 1789-1901, at 117-20 (1901).

222. See *id.* at 117 n.1; H.R. 649, 27th Cong. (3d Sess. 1843).

223. See ROWELL, *supra* note 221, at 119.

224. See *id.* at 118; see also Tolson, *Congressional Authority*, *supra* note 15, at 352.

225. See ROWELL, *supra* note 221, at 120.

226. See CONG. GLOBE, 28th Cong., 1st Sess. 248-77 (1844).

227. *Id.* at 278.

228. *Id.* (voting 127 to 57 to substitute a resolution seating the disputed representatives in lieu of one that would have declared the Act unconstitutional).

majority status by reaffirming the more expansive interpretation of federal authority embraced by the Whigs through the 1842 Act.<sup>229</sup>

Subsequent congresses embraced the interpretation of the Elections Clause that the Twenty-Seventh Congress had put forward (and rejected the narrower view of the Twenty-Eighth Congress). In 1862, Congress enacted an Apportionment Act substantially similar to the 1842 statute, again requiring that House members be elected from contiguous single-member districts.<sup>230</sup> Debate was desultory.<sup>231</sup> In the Apportionment Act of 1872, Congress again required contiguous single-member districts, and further required that each district “contain[] as nearly as practicable an equal number of inhabitants.”<sup>232</sup>

### C. *Reconstruction, 1865–1877*

During Reconstruction, congressional activity under the Elections Clause centered on two issues. Between 1865 and the ratification of the Fifteenth Amendment in 1870, Congress debated whether the Elections Clause granted it the power to extend the right to vote to more people—namely, Black men. Then, having enacted the Fifteenth Amendment, Congress enacted three bills to protect the right to vote—constructing the first comprehensive system of federal election administration and enforcement. The three Enforcement Acts drew on the constitutional authority of the Fourteenth and Fifteenth Amendments, but they also relied on the Elections Clause. By the close of this period, Congress cemented the understanding that—with the exceptions of voter qualifications and the place of choosing Senators—the national legislature could exercise plenary power over its own elections.

#### 1. *Congressional Power to Expand the Franchise, 1865–69*

Between 1865 and 1869, Congress debated drafts of what became the Fourteenth and Fifteenth Amendments. That debate is as revealing for what Congress assumed as for what it rejected. Most notably, although a

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229. Tolson, *Congressional Authority*, *supra* note 15, at 349.

230. Apportionment Act, ch. 170, 12 Stat. 572 (1862).

231. *See* CONG. GLOBE, 37th Cong., 2d Sess. 3117–18 (1862) (statement of Sen. Lyman Trumbull, R-Ill.) (“This bill reenacts [the 1842 Act], and makes it a permanent law.”); *id.* (statement of Sen. Daniel Clark, R-N.H.) (“After the passage of the old law requiring members to be elected by single districts, the State of New Hampshire refused to comply with the law, and elected all her members by general ticket, and they were all admitted by the House of Representatives. I thought the precedent wrong at the time.”).

232. Apportionment Act, ch. 11, 17 Stat. 28 (1872).

few prominent members of each house contended that the Elections Clause granted Congress the power to specify the qualifications of federal voters, i.e., who was eligible to vote, Congress largely declined to act on that theory.

Congress began to consider this question even before the Civil War had ended. In 1865, New York's legislature formally requested that the Senate adopt

a law making uniform regulation throughout the United States of the times, places, and manner of holding elections for Senators and Representatives, except as to the place of choosing Senators, defining the qualifications requisite for electors, and abrogating such regulations prescribed by the Legislatures in each State or otherwise as may be inconsistent therewith . . . .<sup>233</sup>

The Senate referred the request to the Committee on the Judiciary,<sup>234</sup> which later decided not to act.<sup>235</sup>

Debate on federal legislation to expand the franchise—primarily to prohibit denial of the right to vote on the basis of race, color, or previous condition of servitude—unfolded in earnest after the war concluded. In an 1866 debate about a bill to prohibit denial of the right to vote “on account of color,” Representative William D. Kelley (R-Penn.) advanced what appears to be the first postwar congressional argument that the Elections Clause (read in conjunction with the Guarantee Clause) granted Congress the power to decide who could vote:

[The Framers] made it the duty of the United States Government to *guaranty to each State a republican form of Government*, and having done that they did not fail to provide the means by which the Government on which they had laid that duty should be able to perform it. And they gave Congress the amplest power to execute that section . . . in section four, article one . . . . Now, sir, what did they mean by that provision? . . . Mr. Madison said . . . “*Should the people of any State by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the General Government.*”<sup>236</sup>

Remarking on the injustice of denying the right to vote to the “educated, industrious, taxpaying, school-sustaining, church-building people of this District[.]” Kelly exclaimed: “How bitterly would Madison, unimpassioned as he was, have denounced such treachery to the essential

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233. CONG. GLOBE, 38th Cong., 2d Sess. 849 (1865).

234. *Id.* at 849.

235. *Id.* at 977.

236. CONG. GLOBE, 39th Cong., 1st Sess. 182–83 (1866) (emphasis in original).

principle of republicanism—universal suffrage.”<sup>237</sup> As Kelley understood the ratification debates, the word “manner” was universally acknowledged to include who could vote. “[T]he whole country, so early as the 9th of August, 1787, two years before the final adoption of the Constitution, were informed that that word [‘manner’] in the clause in question embraced not merely the method of voting, the place of voting, and the order of voting,” he contended, “but the grand fundamental question of who should vote, and by what power they might be invested with the right of suffrage.”<sup>238</sup>

Few shared Kelley’s view. “Mr. Speaker, it is utterly impossible, by any rules of construction that have ever properly been applied to language, to place any such construction as that upon the simple clause in the Constitution which has been read,” one representative replied.<sup>239</sup> Another denounced Kelley’s argument as “one of the most dangerous and startling that has yet been suggested in connection with our national policy.”<sup>240</sup> Kelley acknowledged the opposition, but argued that the Elections Clause was fundamentally intended to provide for universal suffrage. “Gentlemen tell me that this is a new construction of the Constitution,” he acknowledged, but “I reply that it is the true one, which is enough for me, and that the old and false one was the fruitful source of discord and war and misery.”<sup>241</sup>

The following year, 1867, Congress did enact one statute expanding the franchise, but the body did not clearly identify the constitutional source of its power to do so.<sup>242</sup> The First Reconstruction Act required the former Confederate States to convene constitutional conventions of delegates “elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election,” and specified that the resulting constitutions “shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates.”<sup>243</sup> The Act directly set the qualifications for *state* voters, and some members sporadically invoked the Guarantee Clause.<sup>244</sup>

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237. *Id.* at 183.

238. *Id.* at 409.

239. *Id.* at 412 (statement of Rep. Samuel S. Marshall, D-Ill.).

240. *Id.* at 454 (statement of Rep. Michael C. Kerr, D-Ind.).

241. *Id.* at 409.

242. CONG. GLOBE, 39th Cong., 2d Sess. 1315–40, 1458–69 (1867) (debating the First Reconstruction Act without invoking the Elections Clause).

243. First Reconstruction Act, ch. 153, 14 Stat. 429 (1867).

244. CONG. GLOBE, 39th Cong., 2d Sess. 1318–19 (1867).

Support for the claim that Congress could decide who could vote in federal elections grew in the remaining years before the passage and ratification of the Fifteenth Amendment, but no more than a small minority of each house understood the Elections Clause that way.<sup>245</sup> In the Senate, Radical Republican Charles Sumner (Mass.) was the leading supporter of congressional power over voter qualifications.

[T]here are two hostile pretensions which must be exposed; the *first*, founded on a false interpretation of “qualifications,” being nothing less than the impossible assumption that because the States may determine the “qualifications” of electors, therefore they can make color a criterion of the electoral franchise; and the *second*, founded on a false interpretation of the asserted power of the States “to regulate suffrage,” being nothing less than the impossible assumption that, under the power to regulate suffrage, the rights of a whole race may be annihilated. These two pretensions are, of course, derived from slavery. They are hatched from the eggs that the cuckoo bird has left behind. Strange that Senators will hatch them . . . . Admitting that the States may determine the “qualifications” of electors; what then? Obviously it must be according to the legitimate meaning of this word . . . . The Constitution, where we find this word, follows the Declaration of Independence and refuses to recognize any distinction of color . . . . The “qualifications” of different officers, as President, Vice President, Senators and Representatives are named; but “color” is not among these . . . . The dictionaries of our language are in harmony with the Constitution. Look at “qualifications” in Webster or Worcester, the two best authorities of our time, and you will find that the word means “fitness”—“ability”—“accomplishment”—“the state of being qualified;” but it does not mean “color!” It embraces age, residence, character, education and the payment of taxes—in short, all those conditions which when honestly administered are in the nature of *regulation*, not of *disfranchisement* . . . . *An insurmountable condition is not a qualification but a disfranchisement.*<sup>246</sup>

Because race was not a “qualification,” he argued, then the Elections Clause empowered Congress to protect the federal right to vote from this unconstitutional restriction. Sumner pointed to Madison’s argument that “[s]hould the people of any State by any means be deprived of the right

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245. CONG. GLOBE, 39th Cong., 1st Sess. 173–83, 403–12, 447–60, 1054–62 (1866); CONG. GLOBE, 40th Cong., 2d Sess. 2053–57, 3023–27 (1868); CONG. GLOBE, 40th Cong., 3d Sess. 555–61, 642–45 (1869).

246. CONG. GLOBE, 40th Cong., 2d Sess. 3026 (1868) (emphasis in original).

of suffrage, it was judged proper that it should be remedied by the General Government.”<sup>247</sup> “Thus was it expressly understood, at the adoption of the Constitution,” Sumner concluded, “that Congress should have the power to prevent any State, under the pretense of regulating the suffrage, from depriving the people of this right or from interfering with the principle of *Equality*.”<sup>248</sup>

In the House, George Boutwell (R-Mass.) led the charge for the view that the Elections Clause was the source of both federal and state power over congressional elections. For that reason, any state power over federal voter qualifications was subject to Congress’s controlling power to “make or alter” state regulations of federal elections. He argued that the Voter Qualifications Clause gives neither to the States nor to Congress the power to determine the qualification of voters.<sup>249</sup> Rather,

[i]t merely declares the fact that the voters for Representatives in Congress shall possess the qualifications of voters for members of the most numerous branch of the State Legislature . . . . But there is no declaration in this section that either [the States or the national Government] has the power, and certainly not that either has the power to the exclusion of the other.<sup>250</sup>

The Elections Clause explained who “has the power,” and on what terms:

The word “manner,” in this connection of course becomes important . . . . It includes, as I maintain, everything relating to an election, from the qualification of the elector to the deposit of his ballot in the box . . . . Either one or the other of two things is true: either these words as herein employed in their scope and meaning cover the entire subject of elections, from the qualifications of the voter to the deposit of his ballot in the box, or else, by necessary legal inference, the States have not the power which they have been in the habit of exercising . . . . But the history of the facts from the first, and the recognition by Congress of the powers of the States, go to the extent of conceding to them entire scope and original control of the whole matter of voting, including the qualifications of the voter, his registration, and the deposit of his ballot in the box . . . . [T]herefore, when a State-rights man proves that by the Constitution of the United States a State has a right to decide who shall exercise the elective franchise, he has proved also that Congress may do the same thing under this provision of

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247. *Id.* at 3027 (emphasis omitted).

248. *Id.* (emphasis in original).

249. CONG. GLOBE, 40th Cong., 3d Sess. 556 (1869).

250. *Id.*

the Constitution which says that Congress may make any regulations it chooses relating to this subject or may alter such regulations as have been made by the States.<sup>251</sup>

Like Sumner, Boutwell closed by pointing to the purpose of the Clause at the founding—to ensure that Congress could provide a remedy when a state deprived people of the right to vote.<sup>252</sup> With this authority, Boutwell urged, federal law should prohibit denial of the right to vote on the basis of race. Gauging support for Sumner’s and Boutwell’s position is difficult, but their arguments were not widely taken up by their colleagues. Congress chose to amend the Constitution instead.

## 2. *The Enforcement Acts*

In 1870 and 1871, in the wake of the Civil War, Congress invoked its powers under the Elections Clause and the new Fourteenth and Fifteenth Amendments to enact three Enforcement Acts to protect the right to vote, particularly for newly enfranchised Black men.<sup>253</sup> The Enforcement Acts and the associated debates underscore that Congress understood the Elections Clause to confer expansive power over congressional elections (the scope of the franchise aside), permitting the federal government to establish a comprehensive code for election administration, integrity, and security. The debates reveal a Congress focused on securing free, fair, and racially inclusive elections by any means deemed necessary and proper, and less concerned than its 1842 predecessor with defining the precise scope of “manner” or identifying particularized legitimate legislative interests.

### a. *The First Enforcement Act*

On May 31, 1870, Congress enacted “An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union”—the First Enforcement Act.<sup>254</sup> As the title suggests, the Act reached beyond the confines of the recently ratified Fifteenth Amendment (which applies to voting restrictions on account of race, color, or previous condition of servitude) to establish a federal regime for protecting the right to vote. For that reason, the Act’s constitutionality rests in large part on the Elections

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251. *Id.*

252. *Id.* at 557.

253. First Enforcement Act, ch. 114, 16 Stat. 140 (1870); Second Enforcement Act, ch. 99, 16 Stat. 433 (1871); Third Enforcement Act, ch. 22, 17 Stat. 13 (1871); CONG. GLOBE, 41st Cong., 2d Sess. 3871–84 (1870); CONG. GLOBE, 41st Cong., 3d Sess. app. 207–14 (1871); CONG. GLOBE, 41st Cong., 3d Sess. 1271–85, 1633–49 (1871).

254. 16 Stat. at 140.

Clause.

The First Enforcement Act deployed sweeping federal power over congressional elections.<sup>255</sup> Congress created new crimes, penalties, and civil causes of action against private individuals for interference with the right to vote, prohibiting the use of “force, bribery, threats, intimidation, or other unlawful means” to “hinder, delay, prevent, or obstruct . . . any citizen from doing any act required to be done to qualify him to vote or from voting at any [congressional] election,”<sup>256</sup> or “to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same.”<sup>257</sup> The Act gave federal district courts exclusive jurisdiction over all crimes and offenses committed against the provisions of the Act, and it granted to federal district and appellate courts concurrent jurisdiction over all other actions arising under the law.<sup>258</sup>

The First Enforcement Act also marked an unprecedented exercise of federal power over the states and their agents. For example, the statute attempted to preempt malfeasance by state actors by deeming that any eligible voter who offered or attempted to fulfill a state’s “prerequisite[s]” for voting would be entitled to vote if a state officer wrongfully failed to receive or permit the performance of the prerequisite.<sup>259</sup> In any election involving a congressional race, the Act declared it a federal crime for any federal or state election officer to “neglect or refuse to perform” the duties imposed by any federal or state election law.<sup>260</sup> Congress established federal protection of, and regulation over, all state voter registration systems that served “any State or other election at which such representative or delegate in Congress shall be chosen,” even if “the same shall also be made for the purposes of any State, territorial, or municipal election.”<sup>261</sup> To escape federal reach, a state would have to operate a completely independent election system for its own elections. Congress authorized the military to augment the courts. The Act declared, “it shall be lawful for the President of the United States to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to aid in the execution of judicial process issued under this

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255. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 454–59 (1988).

256. First Enforcement Act §§ 4, 5.

257. *Id.* § 6.

258. *Id.* § 8.

259. *Id.* § 3.

260. *Id.* § 22.

261. *Id.* § 20.

act.”<sup>262</sup>

Relatively little debate about the Elections Clause preceded the First Enforcement Act—seemingly less than the Apportionment Act of 1842. Still, some House Democrats raised the familiar objection that the statute exceeded congressional authority under the Elections Clause. “Whence came the authority of Congress to make penal bribery, intimidation, or influence in respect of elections in the States . . . ?” Representative Clarkson Potter (D-N.Y.) asked.<sup>263</sup> Finding no basis in the Elections Clause or the Fifteenth Amendment, Potter argued that many of the Act’s provisions “relate neither to the time, place, nor manner of holding elections . . . nor to the denial or abridgment of suffrage on account of race, color, or previous condition of servitude . . . and in all such respects, therefore, this bill is necessarily and flagrantly without authority.”<sup>264</sup> Representative Michael Kerr (D-Ind.) fulminated, “every single section of this bill—twenty-three in number—save only the first, involves a palpable violation of the spirit and letter of the Constitution.”<sup>265</sup> Kerr argued that “[i]t was never contemplated by the people that Congress would attempt to usurp control of the elections in the States, to dictate in what manner they should be conducted, to put them under the supervision of Federal officers, and give all judicial power over them to Federal courts”—but he made no attempt to reckon with the “manner” authority provided by the Elections Clause.<sup>266</sup> Another member objected that the bill was “placing in the hands of Congress all matters growing out of State elections.”<sup>267</sup>

Republicans dismissed these objections. The law’s provisions “are but a simple exercise of the power expressly conferred on the Congress of the United States to regulate elections of members and Delegates to Congress,” Representative John Bingham (R-Ohio), principal author of the Fourteenth Amendment and a legal architect of Congressional Reconstruction, told his colleagues.<sup>268</sup> Bingham explained,

the sum total of the outcry against this bill is that by it the equal rights of the people of this country are to be enforced, for the first time in the history of the Republic, by a national statute and by the whole power of the Union and of the people of all the States.<sup>269</sup>

Representative Noah Davis (R-N.Y.) thundered, “it is true . . . that

262. *Id.* § 13.

263. CONG. GLOBE, 41st Cong., 2d Sess. 3876 (1870).

264. *Id.*

265. *Id.* at 3872.

266. *Id.* at 3872–73.

267. *Id.* at 3875 (statement of Rep. James B. Beck, D-Ky.).

268. *Id.* at 3872.

269. *Id.* at 3883.

heretofore in the history of this country it has not been necessary for Congress to interfere for the purpose of preserving the purity of the election of members of this House. But has not that time now arrived?"<sup>270</sup> Amid the white violence and subterfuge prevailing in the former Confederate States, "members of this body cannot be elected fairly and according to the will of those entitled to exercise the right of suffrage unless Congress intervenes and exercises that dormant power that has so long existed, but which has never yet been exercised."<sup>271</sup>

Indeed, the debates were studded with lurid claims about how the Enforcement Act subjugated white people, particularly when a draft of the bill also included measures ending racial discrimination in the taxation and treatment of immigrants.<sup>272</sup> Opponents chastised the Bill as unfair favoritism towards freed slaves. "The bill now before us seeks to give the negro rights, safeguards, and remedies which are withheld from the white man," one representative complained with reference to section 5, which provided additional protection for the right to vote of anyone "to whom the right of suffrage is secured or guaranteed by the fifteenth amendment."<sup>273</sup> "[Y]ou cannot with impunity trample upon this great white race," he added, arguing that if Congress "humiliate[d] and degrade[d] the white man" by enacting the Enforcement Act, states would simply adopt literacy tests (as Massachusetts had) and enfranchise immigrants to "increase[]" "the white majority at the polls."<sup>274</sup> In response to statements of unabashed white supremacy, Representative Davis tersely affirmed that the bill "simply prohibits crime."<sup>275</sup>

The final version of the First Enforcement Act passed the House with 133 yeas, 58 nays, and 39 members not voting,<sup>276</sup> and passed the Senate with 48 yeas and 11 nays.<sup>277</sup>

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270. *Id.* at 3881.

271. *Id.*

272. *See, e.g., id.* (statement of Rep. John D. Stiles, D-Pa.) ("I protest against this outrage in the name of every white voter in this country. . . . I protest against it because I am in favor of a white man's Government upon this continent, and utterly opposed to forcing upon an unwilling people negro suffrage, negro equality, and negro supremacy . . ."); *id.* at 3877 (statement of Rep. James A. Johnson, D-Cal.) ("Mr. Speaker, this bill ought to be entitled an act to foster paganism . . . to foster child murder, to strike down Christianity, and to deprive the people of their liberties. Of course nearly all of this long conglomeration of vicious verbiage is directed against the white man and in favor of the Chinaman.").

273. *Id.* at 3874 (statement of Rep. Beck, D-Ky.).

274. *Id.* at 3874–75.

275. *Id.* at 3881.

276. *Id.* at 3884.

277. *Id.* at 3809.

b. *The Second Enforcement Act*

The following year, Congress enacted the Second Enforcement Act,<sup>278</sup> framed as a set of amendments to its predecessor. The law established a new system of federal election administration and supervision. At the request of two citizens in any town of at least twenty thousand people, each United States circuit judge was required to commission two local “supervisors of election” to “guard[] and scrutinize[]” voter registration and balloting.<sup>279</sup> These federal election supervisors were authorized to “personally inspect and scrutinize such registry . . . in such manner as will, in their or his judgment, detect and expose the improper or wrongful removal therefrom, or addition thereto, in any way, of any name or names.”<sup>280</sup> They were also authorized to supervise and challenge the counting of the votes,<sup>281</sup> to maintain clear lines of sight over all election processes,<sup>282</sup> and to investigate and challenge the seating of any representative-elect whose election defied the new regime.<sup>283</sup> Congress criminalized the obstruction of these supervisors or any other federal election administration officials—including the federal marshals and deputies tasked with enforcing much of the new election system—and undermining the integrity of the voter registration system.<sup>284</sup> The Act also required the states to conduct congressional elections with paper ballots, expressly displacing all state laws that said otherwise: “[A]ll votes for representatives in Congress shall hereafter be by written or printed ballot, any law of any State to the contrary notwithstanding; and all votes received or recorded contrary to the provisions of this section shall be of none effect.”<sup>285</sup> Finally, the Second Enforcement Act doubled down on enforcement. Among other things, Congress empowered the federal marshals to enlist the local bystanders to combat violent resistance<sup>286</sup> and gave the federal courts complete jurisdiction over all matters arising under the Enforcement Acts.<sup>287</sup>

These additions to the growing federal election system prompted vigorous, if far from novel, congressional debate about the meaning of the

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278. Second Enforcement Act, ch. 99, 16 Stat. 433 (1871).

279. *Id.* § 2.

280. *Id.* § 4.

281. *Id.* § 5.

282. *Id.* § 6.

283. *Id.* § 7.

284. *Id.* § 10.

285. *Id.* § 19.

286. *Id.* § 12.

287. *Id.* § 15.

Elections Clause.

Some opponents raised the tired objection that Congress could only exercise its Elections Clause power if states defaulted on their duty to provide for congressional elections or otherwise threatened the existence of Congress.<sup>288</sup> Although Kerr argued that Congress could only act under very limited circumstances, he conceded that once Congress could act, it could set up the very sort of federal election administration system the two Enforcement Acts had created.<sup>289</sup> In those emergencies,

Congress may declare that elections shall be held at certain times and at certain places and in a certain manner; for example, that ballot-boxes shall be opened at each voting precinct . . . , and that an election board shall be organized there under Federal laws, and in the persons of one inspector and two judges.<sup>290</sup>

When another opponent of the Second Enforcement Act, Senator George Vickers (D-Md.), rose to make a similar argument that Congress could act only for “reasons of absolute, unqualified necessity,” he included among those “paramount reasons of State” not only “to perpetuate the existence of the Government,” but also “to preserve representation” and “to protect minorities by the district system.”<sup>291</sup>

Other opponents resurrected the anti-commandeering objection. Representative Charles Eldridge, for example, asked indignantly whether anyone would argue that under the Elections Clause, or any other constitutional provision, “the Governors of the States and all other State officers can, under penalties, be required by the Federal Government to serve as its officers and do its bidding[.]”<sup>292</sup>

Some lawmakers questioned whether the “manner of holding elections” included the wide range of regulation imposed by the Second Enforcement Act.<sup>293</sup> In response, the statute’s supporters, as in previous

288. CONG. GLOBE, 41st Cong., 3d Sess. 1277 (1871).

289. *Id.*

290. *Id.*

291. *Id.* at 1633. Immediately after it passed, Vickers moved (unsuccessfully) to rename it “An act to prevent the free and intelligent voters of the United States from exercising the right of suffrage.” *Id.* at 1655.

292. *Id.* at 1272.

293. *See, e.g., id.* at app. 208 (“[W]hat is meant by the word ‘manner,’ and with what power does this simple word invest Congress? for it is upon this word, and this word only, that this measure is at all pretended to be justified. . . . Congress may, under this power, prescribe how the votes shall be received for Representatives, whether by ballot or *viva voce*; how they shall be counted or canvassed, how they shall be returned, and how certified; authorize the kind of ballot-boxes to be used, and such like things connected with the ‘holding’ of the election. Nothing more could have been intended . . . .”); *id.* at 1637 (“But what right has Congress to interfere with the registration of voters? What clause of the Constitution gives them the right? The States have the exclusive power to judge

decades, answered that the Clause granted Congress comprehensive power to regulate congressional elections. Calling attention to the Elections Clause, the Necessary and Proper Clause, and the Fourteenth Amendment, Representative William Lawrence (R-Ohio) contended, “Congress could provide officers to conduct the elections of Representatives in Congress. Under these provisions Congress may define and punish crimes against the exercise of the elective franchise in the election of Representatives in Congress.”<sup>294</sup> Just as the constitutional power to tax permits Congress to criminalize violations of the revenue laws, and the constitutional power to establish post offices permits congress to define offenses against the postal service, so too “the power to make regulations as to the ‘times, places, and manner’ of holding elections for Representatives in Congress carries with it the right to define penal offenses against the exercise of the elective franchise.”<sup>295</sup>

Representative Burton Cook (R-Ill.) likewise argued that the power to correct violations of election law was inherent in Congress’s “manner” authority:

if these frauds in the elections grow to any extent out of the manner of conducting the elections, then clearly to that extent the remedy is within our power, and we are called upon to apply that remedy by every consideration that would induce us to preserve our free Government and preserve the liberties of our people.<sup>296</sup>

Cook emphasized that

there can be no valid reason urged against the passage of this bill, unless it can be shown that under a fair and reasonable administration of this act, if it should become a law, men who are justly entitled to vote would be deprived of their right to do so.<sup>297</sup>

And he pointed out that “[n]o evidence” had been produced to that effect.<sup>298</sup>

The bill’s proponents argued that the enforcement legislation was authorized on even the narrowest traditional grounds: Congress’s need to protect itself from subversion by states. In this emergency, nothing less than a federal election code could secure Congress’s fundamental interest in its own existence and integrity. Bingham stated the case clearly. “Your

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of and fix the qualifications of voters; not denying or abridging the right by reason of race, color, or previous condition of servitude. The States are to fix the age and residence. The ‘manner’ of conducting an election refers to a different subject.”)

294. *Id.* at 1276.

295. *Id.*

296. *Id.* at 1280.

297. *Id.*

298. *Id.*

Constitution would have been only a glittering bauble if it had not conferred, as it did confer, upon the national Legislature the power of self-preservation,” he began.<sup>299</sup> “Who does not know that if the State Legislature should choose to incumber the exercise of this power with inconvenient or impossible conditions, and if the national Congress had not the power to overrule or alter such conditions, the nation would perish?”<sup>300</sup> Others concurred. “The idea that Congress cannot protect the national Government in the election of the very officers who are to make its laws is supremely ridiculous and absurd,” Lawrence argued.<sup>301</sup> “This power to preserve the purity of the ballot is simply the exercise of that inherent power, which this, like every other Government has—a power higher, if possible, than the Constitution—the power of preserving its own existence when that existence is threatened by force or fraud . . . .”<sup>302</sup> Lawrence reasoned that no member could deny that such force and fraud had already occurred:

Sir, we all know that Kuklux outrages have been committed, not only in North Carolina, where it was recently necessary to call out a military force to protect the people at the elections, but in other States of the South; and that in more than one city of this Union enormous frauds have been perpetrated upon the ballot-box.<sup>303</sup>

Even if the legislation was unprecedented, the crisis was unprecedented too. “It is said that the last clause of this section [of the Elections Clause] giving the power to Congress has fallen into abeyance, never having been used, and should now be considered but as a dead letter,” Representative Cook said.<sup>304</sup> “Sir, the men who framed this Constitution foresaw that the exigency might arise, *as it has arisen*, requiring the exercise of this power by Congress, and they provided for its exercise when that exigency should arise.”<sup>305</sup>

The bill passed the House by a vote of 144 yeas, 64 nays, and 32 members not voting,<sup>306</sup> and the Senate by a vote of 39 yeas to 10 nays.<sup>307</sup>

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299. *Id.* at 1283.

300. *Id.*

301. *Id.* at 1276.

302. *Id.*

303. *Id.* at 1275.

304. *Id.* at 1280.

305. *Id.* at 1280 (emphasis added).

306. *Id.* at 1285.

307. *Id.* at 1655.

c. *The Third Enforcement Act*

Less than two months later, Congress enacted a third Enforcement Act, also known as the Ku Klux Klan Act.<sup>308</sup> The third Enforcement Act, known as “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,” pursued some of its other purposes through the Elections Clause.<sup>309</sup> Most of the Act’s provisions increased federal military and judicial authority over regional violence, but section 2 of the Act also created a new civil cause of action against voter intimidation and related interference with the right to vote, which remains in the U.S. Code as 42 U.S.C. § 1985(3), and a criminal equivalent, which does not.<sup>310</sup> The House passed its first version by 118–91,<sup>311</sup> and the Senate passed its own by a vote of 45–19.<sup>312</sup> The House approved the final bill by a vote of 93 yeas, 74 nays, and 63 not voting,<sup>313</sup> and the Senate approved it with 36 yeas and 13 nays.<sup>314</sup>

Because this second section of the Act resembled the sixth section of the First Enforcement Act, which created a cause of action against conspiracies to violate the rights of federal citizenship, Congress engaged in little original constitutional debate. As Representative Samuel Shellabarger (R-Ohio) said while making the case for the bill, “it rests upon exactly the same legal ground, and is in its constitutional aspects identical with [the First Enforcement Act], the only difference being that the section of this bill defines the offense with greater exactness.”<sup>315</sup> Only James Garfield felt the need to mention the Elections Clause as the source of constitutional authority for this federal protection of the right to vote, and his remarks on this point appear to have been relatively uncontroversial. Garfield acknowledged that it had been repeatedly argued “that the clause in the main text which gives to Congress the power to regulate the time, place, and manner of holding elections carried with it the whole question of suffrage. I was never able to believe that this clause went so far.”<sup>316</sup> But, he continued, “I did believe, and I do now believe, that it goes so far that, with the fifteenth amendment superadded,

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308. Third Enforcement Act, ch. 22, 17 Stat. 13 (1871).

309. *Id.*

310. *Id.* § 2.

311. CONG. GLOBE, 42d Cong., 1st Sess. 522 (1871).

312. *Id.* at 709.

313. *Id.* at 808.

314. *Id.* at 831.

315. CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871).

316. *Id.* at 154.

Congress is armed with more than a mere negative power, and had the right to pass the enforcement act of May last [*i.e.*, the First Enforcement Act].”<sup>317</sup>

### III. THE ELECTIONS CLAUSE IN FEDERAL COURTS

#### A. *Reconstruction*

The three Enforcement Acts marked Congress’s first foray into creating a federal scheme of election regulations that went beyond districting. At the same time, the Acts granted federal courts jurisdiction over matters arising under the new laws. It’s no surprise then, that the Enforcement Acts offered federal courts, including the U.S. Supreme Court, the first occasions to opine meaningfully on the Elections Clause and its scope.

Before Reconstruction, courts typically referred to the Elections Clause as a way to understand some other issue or unrelated aspect of law.<sup>318</sup> For example, in establishing the foundational principle that federal courts retain the power to review state court decisions interpreting federal law or the Constitution, in *Martin v. Hunter’s Lessee*,<sup>319</sup> Justice Story pointed to the Elections Clause as an instance in which the Constitution makes federal law supreme.<sup>320</sup> In interpreting the word “manner” as used in a statute providing pensions to widows of the Revolutionary War, the Court of Claims explained that the word was so broad as used in the Elections Clause to permit Congress to enact the Apportionment Act of 1842 and compel elections by district.<sup>321</sup>

The Circuit Court for the Southern District of New York appears to have been the first federal court to elaborate on the purpose of the Elections Clause when the court considered the constitutionality of the

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317. *Id.*

318. See Tolson, *Congressional Authority*, *supra* note 15, at 361 (“Prior to Reconstruction, there was not much mention of the Elections Clause in the Supreme Court’s jurisprudence, much less any thorough analysis of the meaning of its terms.”).

319. 14 U.S. 304 (1816).

320. *Id.* at 343; see also *Smith v. Turner* (Passenger Cases), 48 U.S. 283, 497–98 (1849) (Daniel, J., dissenting) (arguing states exercise powers “until they shall be superseded by a paramount authority vested in the Federal government,” including those in the Elections Clause).

321. *Smith v. United States*, 1857 WL 4176, at \*3 (Ct. Cl. Feb. 16, 1857) (“[In 1842 it] was considered by Congress that in the word ‘manner’ was included the power to prescribe that congressional districts should each be composed of contiguous territory, although in some of the States the elections for members of Congress had already been had by general ticket. Whether the authority of Congress in this particular has ever been contested or not, this act shows the construction given by Congress to the word manner. Now, if the manner of holding an election means that Congress may provide that the election of its members shall be by districts composed of contiguous territory, the word is surely comprehensive enough in the present case to mean that the pension shall commence on the 4th of March, 1848.”).

First Enforcement Act less than six months after the law's passage.<sup>322</sup> Noah Davis was the attorney who argued that the Act (and a criminal prosecution thereunder) was constitutional under the Elections Clause.<sup>323</sup> Davis had been a congressman from New York and had vocally defended the Act just months earlier.<sup>324</sup> President Grant appointed Davis to be the U.S. District Attorney (now known as "U.S. Attorney") for the Southern District of New York in July of 1870.<sup>325</sup> As the first court to examine the underpinnings of the Elections Clause in nearly a century of the provision's existence, *United States v. Quinn*<sup>326</sup> should be foundational to understanding the meaning and purpose of the Clause—but it has never been cited by the Supreme Court or any other federal court in analyzing the scope of the Clause.

The *Quinn* Court looked to the intent in drafting and adopting the Elections Clause, examining "the explanations which were given by the great and good men who expounded it."<sup>327</sup> The court repeatedly recognized the singular importance of an accurate and fair vote:

those framers of the constitution did not, for one moment, lose sight of the indispensable condition—on which alone a government of the people could be safe to the people themselves or could secure the beneficent ends for which it was instituted—that her popular vote should be the true expression of the opinions and choice of the electors.<sup>328</sup>

And the court articulated the Framers' underlying fears that "the states might become indifferent to the general good," and as a result fail to hold congressional elections or put obstacles in the way of "the full and fair expression of the popular voice."<sup>329</sup>

Each of Congress's powers under the Elections Clause was, according to the *Quinn* Court, intended to ensure the people could express their voice through a fair vote. For example, Congress needed the authority to set the time of elections because "[t]ime might some where be so arranged, and for some end other than the well-being of the whole nation, that the

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322. See *United States v. Quinn*, 27 F. Cas. 673 (C.C.S.D.N.Y. 1870) (No. 16,110).

323. *Id.* at 676.

324. See *supra* notes 270, 271, 275.

325. *Davis, Noah, (1818–1902)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000126> [<https://perma.cc/WWM5-QAFY>]. Davis was a personal friend of President Grant's, according to Davis's obituary. See *Ex-Justice Davis Dead*, N.Y. TIMES (Mar. 21, 1902), <https://timesmachine.nytimes.com/timesmachine/1902/03/21/101942952.pdf> [<https://perma.cc/WPZ9-6VJU>].

326. 27 F. Cas. 673 (C.C.S.D.N.Y. 1870) (No. 16,110).

327. *Id.* at 678.

328. *Id.*

329. *Id.*

popular voice might be denied a full expression.”<sup>330</sup> Congress likewise required superseding power to establish the place of elections because “[p]lace might be so fixed as in that mode to defeat the general and the indispensable purpose.”<sup>331</sup> Lastly, Congress retained authority over the manner of conducting elections because “[t]he manner of holding an election might be such as to operate to prevent an open, fair expression of the popular voice.”<sup>332</sup> The Elections Clause was designed to avoid a scenario in which “either through an indifference of the states or otherwise, that the general government might find itself unsupported by the very people in whose will the foundations of the government rested.”<sup>333</sup> The *Quinn* Court plainly stated that the “principle on which it was declared that this clause might be useful” was that “all legal voters should have full and fair opportunity to deposit their votes.”<sup>334</sup>

Similarly, where defendants challenged the constitutionality of the law under which they were prosecuted for conspiracy to intimidate voters, a federal court in Louisiana concluded that the law was “clearly within the constitutional power of congress” as granted by the Elections Clause.<sup>335</sup> That provision was “framed to secure the existence of the government itself, and was made in the interest of all the people of all the states.”<sup>336</sup> The Elections Clause, along with the Voter Qualifications Clause, was “intended to place the election of representatives in the ultimate power of congress, so as to secure at all times a house of representatives, first by preventing obstructive legislation by the states, and, second, securing to the voter the protection of the general government.”<sup>337</sup>

The Supreme Court first addressed the constitutionality of the Enforcement Acts in 1875, in two decisions issued on the same day—*United States v. Reese*<sup>338</sup> and *United States v. Cruikshank*.<sup>339</sup> Neither relied on the Elections Clause,<sup>340</sup> and both cases reflect the Court’s well-

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330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *United States v. Goldman*, 25 F. Cas. 1350, 1354 (C.C.D. La. 1878) (No 15,225).

336. *Id.* at 1353.

337. *Id.* at 1354.

338. 92 U.S. 214 (1875).

339. 92 U.S. 542 (1875).

340. *Reese* expressly disclaimed application of the Clause because the case involved an election for state representatives only. *See Reese*, 92 U.S. at 218.

covered narrowing of the Reconstruction Amendments.<sup>341</sup>

Five years later, the Court was confronted with a challenge to other provisions of the First and Second Enforcement Acts in the context of a federal election. In *Ex parte Siebold*,<sup>342</sup> defendants (some of whom were election judges) were charged with stuffing ballot boxes and engaging in other acts of interference in and manipulation of a congressional election in Maryland.<sup>343</sup> The Court upheld several provisions of the First and Second Enforcement Acts as expressly authorized by the Elections Clause. In so doing, the Court embraced Congress's broad authority to legislate under the Clause and rejected the argument that Congress could not enact partial federal regulations:

After first authorizing the States to prescribe the regulations, it is added, 'The Congress may *at any time*, by law, *make or alter* such regulations.' '*Make or alter*.' What is the plain meaning of these words? . . . There is no declaration that the regulations shall be made either wholly by the State legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them.<sup>344</sup>

In fact, the *Siebold* Court expressly blessed the 1842 Apportionment Act. "No one will pretend," it stated, "at least at the present day, that these laws were unconstitutional because they only partially covered the subject."<sup>345</sup> The Court rejected concerns about Congress and states legislating on the same issue concurrently, because federal regulations are always "paramount" to state laws where the two conflict.<sup>346</sup> The Court upheld the federal punishment of state officers for violating state laws, the violation of which was made punishable by the Enforcement Acts, because the state officers also owed duties to the United States and because Congress could effectively adopt state laws and "demand[] their fulfilment."<sup>347</sup>

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341. See, e.g., Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2350–51 (2003) (cataloguing the substantial scholarship on the Court's hollowing of the Fourteenth and Fifteenth Amendments).

342. 100 U.S. 371 (1879).

343. *Id.* at 377–79.

344. *Id.* at 383–84 (emphasis in original).

345. *Id.* at 384.

346. *Id.*; see also *id.* at 386.

347. *Id.* at 387–88.

For the first time, the Supreme Court in *Siebold* declared “that Congress has plenary and paramount jurisdiction over the whole subject” of federal elections.<sup>348</sup> Like the lower court in *Quinn*, the Supreme Court rejected any suggestion that the absence of significant federal elections legislation prior to 1870 diminished Congress’s broad authority on the subject:

If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power.<sup>349</sup>

The Court acknowledged that the “exigency” had arrived: “In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government.”<sup>350</sup> In other words, voter intimidation and violence, fraud, and interference with election integrity had become issues of self-preservation for the federal government.

The Supreme Court decided a companion case, *Ex parte Clarke*,<sup>351</sup> on the same day as *Siebold*. An election officer had been convicted under the Enforcement Act for neglecting to convey a poll-book to the county clerk of court and for permitting the poll-book to be broken open.<sup>352</sup> The Court upheld the conviction and denied the motion for habeas corpus, relying on its reasoning in *Siebold*.<sup>353</sup> Justice Field, joined by Justice Clifford, dissented from the majority opinions in *Siebold* and *Clarke*, arguing, in part, that the Elections Clause’s “make or alter” power did not permit Congress to penalize violations of state law.<sup>354</sup> Justice Field relied on the debates during the constitutional and state ratification conventions, pointing to language from the Framers that identified self-preservation as the primary purpose for the Clause.<sup>355</sup> Justice Field also echoed the anti-

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348. *Id.* at 388.

349. *Id.*

350. *Id.*; *id.* at 382.

351. 100 U.S. 399 (1879).

352. *Id.* at 400–01.

353. *Id.* at 403–04 (“The principal question is, whether Congress had constitutional power to enact a law for punishing a State officer of election for the violation of his duty under a State statute in reference to an election of a representative to Congress. As this question has been fully considered in the previous case, it is unnecessary to add any thing further on the subject. Our opinion is, that Congress had constitutional power to enact the law; and that the cause of commitment was lawful and sufficient.”).

354. *Id.* at 415–16 (Field, J., dissenting).

355. *Id.* at 416–19.

commandeering arguments of the Framers and members of Congress who had urged limitations on, or at least a narrower interpretation of, the Elections Clause.<sup>356</sup> Once again, however, this restrained view of Congress's power under the Elections Clause was a minority opinion that did not carry the day.

The Court reaffirmed its broad view of the Elections Clause in *Ex parte Yarbrough*,<sup>357</sup> a unanimous opinion that upheld the Third Enforcement Act's criminal provisions against conspiracy to intimidate federal voters and conspiracy to deny the "free exercise or enjoyment" of federal privileges or immunities.<sup>358</sup> Eight men sought habeas relief after being convicted of conspiring to prevent Berry Saunders, a Black man, from voting in Georgia's congressional election, and carrying out that conspiracy by violently assaulting Mr. Saunders on account of his race.<sup>359</sup> In response, the Court announced Congress's unmitigated power to protect voters and the integrity of federal elections:

If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.<sup>360</sup>

Again rejecting the argument that Congress's delay in deploying its Elections Clause authority diminished his power,<sup>361</sup> the Court explained that Congress's powers must include the authority to: "provide laws for the proper conduct of those elections[;]" "provide, if necessary, the officers who shall conduct them and make return of the result[;]" "to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function[;]" and "protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation and the election itself from corruption or fraud[.]"<sup>362</sup>

Looking beyond "specific sources of the power to pass these laws[.]" the Court relied on fundamental principles of American democracy in a

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356. *Id.*

357. 110 U.S. 651 (1884).

358. *Id.* at 654–55 (quoting 70 Rev. Stat. § 5508).

359. *Yarbrough*, 110 U.S. at 655–57.

360. *Id.* at 657–58.

361. *Id.* at 660–61.

362. *Id.* at 661; *see also id.* at 662 ("[I]t is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing.").

lofty conclusion:

It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. . . . In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.<sup>363</sup>

Recognizing the profound terror and unrest inflicted throughout the South, the Court also predicted other election manipulations—namely, the distorting effect of money in politics—that were still to come.<sup>364</sup> The Constitution *must* include the power to prevent against such “evils,” because if not “the country [is] in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.”<sup>365</sup>

After *Yarbrough*, the Supreme Court continued to uphold the constitutionality of federal criminal penalties for voter intimidation and federal supervision of congressional elections.<sup>366</sup> Lower federal courts likewise followed *Siebold* and *Yarbrough*, repeatedly recognizing the breadth of Congress’s constitutional authority to enact laws to ensure election integrity and protect the right of citizens to vote freely and

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363. *Id.* at 666–67.

364. *Id.* at 667 (“If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.”).

365. *Id.*

366. *See, e.g., Ex parte Coy*, 127 U.S. 731, 752 (1888) (“[T]he power, under the constitution of the United States, of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and, in fact, whatever is necessary to an honest and fair certification of such election, cannot be questioned. The right of Congress to do this, by adopting the statutes of the States, and enforcing them by its own sanctions, is conceded by counsel to be established.” (citing *Ex parte Clarke*, 100 U.S. 399 (1879))); *Logan v. United States*, 144 U.S. 263, 293–94 (1892), *abrogated on other grounds by Witherspoon v. Illinois*, 391 U.S. 510 (1968); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (holding that criminal penalties for voter intimidation are constitutional because it is “unquestionable that the right to have one’s vote counted is as open to protection by Congress as the right to put a ballot in a box” (citing *Yarbrough*, 110 U.S. 651; *Logan*, 144 U.S. at 293)).

without interference.<sup>367</sup>

*B. The Wide Range of Elections Clause Powers*

As Congress and states began exercising their Elections Clause powers more regularly in the Twentieth Century, the Supreme Court repeatedly reasserted the extraordinary breadth of the “[t]imes, [p]laces, and [m]anner”<sup>368</sup> authority under the provision and largely approved of legislation regulating a wide range of aspects of elections.

In an oft-quoted passage, the Court affirmed in *Smiley v. Holm*<sup>369</sup> that “[i]t cannot be doubted that” the “comprehensive words” of Article 1, Section 4

embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.<sup>370</sup>

Explicitly recognizing that this list was not exhaustive, the Court explained that the Elections Clause authorizes States “in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”<sup>371</sup> The Court went on to acknowledge that this broad power extended to Congress, which may issue “regulations of the same general character” as States and “may supplement these state regulations or may substitute its own” because Congress “has a general supervisory power over the whole subject.”<sup>372</sup> The Court has also recognized that breadth of Congress’s power under the Elections Clause is further bolstered by the Necessary and Proper Clause.<sup>373</sup>

Although it was never disputed that the Elections Clause included the power to draw and redraw districts, in *Smiley*, the Court held that nothing in the Elections Clause prohibited State redistricting legislation from

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367. See, e.g., *Ex parte Geissler*, 4 F. 188, 191 (C.C.N.D. Ill. 1880); *United States v. Munford*, 16 F. 223, 228 (C.C.E.D. Va. 1883); *Ex parte Morrill*, 35 F. 261, 265–66 (C.C.D. Or. 1888).

368. U.S. CONST. art. I, § 4, cl. 1.

369. 285 U.S. 355 (1932).

370. *Id.* at 366.

371. *Id.*

372. *Id.* at 366–67 (citation omitted).

373. *United States v. Classic*, 313 U.S. 299, 320 (1941) (finding that the Necessary and Proper Clause “leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution” in order to “safeguard the right of choice by the people of representatives in Congress”).

being subject to the governor’s veto power.<sup>374</sup> In so holding, the Court implicitly accepted that the power to redistrict is part of the Elections Clause authority. Since *Smiley*, the Court has confirmed this conclusion explicitly. For example, in *Wesberry v. Sanders*,<sup>375</sup> an apportionment challenge, the Court delved into the constitutional ratification debates and explained that the Framers intended the Elections Clause to give Congress the power to rectify the malapportionment that had developed in certain state legislatures and to “lay the state off into districts.”<sup>376</sup> Even as it acknowledged that the breadth of Congress’s power under the Elections Clause was controversial during the constitutional debates, the Supreme Court has treated as undisputed that Article 1, Section 4 left “in state legislatures the initial power to draw districts for federal elections,” and “permitted Congress to ‘make or alter’ those districts if it wished.”<sup>377</sup> The Court went on to list the many instances in which Congress had exercised such power, “in particular to restrain the practice of political gerrymandering.”<sup>378</sup>

In addition to redistricting, the Court has recognized Congress’s power to issue regulations pertaining to voter registration,<sup>379</sup> campaign finance

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374. *Smiley*, 285 U.S. at 372–73.

375. 376 U.S. 1 (1964).

376. *Id.* at 16 (quoting 4 ELLIOT’S DEBATES, *supra* note 57, at 71).

377. *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004).

378. *Id.* at 276–77; *see also* *Rucho v. Common Cause*, 588 U.S. \_\_\_, 139 S. Ct. 2484, 2495 (2019) (“Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering.”); *Oregon v. Mitchell*, 400 U.S. 112, 122 (1970) (“The Framers expected Congress to use this power [in Article I, Section 4] to eradicate ‘rotten boroughs,’ and Congress has in fact used its power to prevent States from electing all Congressmen at large.”) (citations omitted); *cf.* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015) (holding that the Elections Clause permitted Arizona voters to amend the state constitution by proposition to vest congressional redistricting power in the newly created Independent Redistricting Commission).

379. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (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,’ including, as relevant here and as petitioners do not contest, regulations relating to ‘registration.’ . . . The power of Congress over the ‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.’”) (internal citations and quotation marks omitted) (quoting *Smiley*, 285 U.S., at 366; *Ex parte Siebold*, 100 U.S. 371, 392 (1879)).

and corruption,<sup>380</sup> primary elections,<sup>381</sup> recounts,<sup>382</sup> party affiliation rules,<sup>383</sup> and balloting<sup>384</sup> (so long as the balloting rule did not impermissibly attempt to regulate electoral outcomes). In each of these cases, the Court remarked on the comprehensive and wide-ranging scope of the Elections Clause power.

The Court's jurisprudence is muddier with respect to whether Congress can expand the electorate using its Elections Clause powers. In *Oregon v. Mitchell*,<sup>385</sup> Justice Black, announcing the judgments for the Court, concluded that Congress can require states to permit 18-year-olds to vote in federal elections, but could not do so for state elections.<sup>386</sup> Relying on the Elections Clause, as "augmented by the Necessary and Proper Clause,"<sup>387</sup> Justice Black explained that

[t]he breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts.<sup>388</sup>

Four justices agreed with Justice Black that Congress could lawfully require states to extend the franchise to eighteen-year-olds for federal

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380. *Burroughs v. United States*, 290 U.S. 534, 545–47 (1934) (relying heavily on *Ex parte Yarbrough*, 110 U.S. 651 (1884), to uphold as constitutional the financial disclosure and reporting requirements of the Federal Corrupt Practices Act); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("This Court has also held that it has very broad authority to prevent corruption in national Presidential elections." (citing *Burroughs*, 290 U.S. 534)); *Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case."); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 187 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) ("Congress has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes through the means it has chosen.").

381. *United States v. Classic*, 313 U.S. 299, 319–20 (1941) (overturning *Newberry v. United States*, 256 U.S. 232 (1921)); see *Buckley*, 424 U.S. at 13 n.16 (recognizing that *Classic* overturned *Newberry*); *Foster v. Love*, 522 U.S. 67, 69–73, 71 n.2 (1997) (invalidating Louisiana's "open primary" law because the law conflicted with time of elections set by federal statute pursuant to the Elections Clause).

382. *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972).

383. *Storer v. Brown*, 415 U.S. 724, 736 (1974) (holding that a state can require that an independent candidate be unaffiliated with a political party for one year prior to a primary election).

384. *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

385. 400 U.S. 112 (1970).

386. *Id.* at 134–35.

387. *Id.* at 120.

388. *Id.* at 121.

elections, but did so on different grounds.<sup>389</sup> Writing separately, Justice Stewart, with Chief Justice Burger and Justice Blackmun, agreed that Congress *could* regulate some voter qualifications through the Equal Protection Clause, but could not do so with respect to age because the state laws that set the voting age at twenty-one did not “invidiously discriminate against any discrete and insular minority.”<sup>390</sup>

In *Tashjian v. Republican Party of Connecticut*,<sup>391</sup> the Supreme Court later confirmed that the Constitution does “not require a perfect symmetry of voter qualifications in state and federal legislative elections.”<sup>392</sup> The Court unequivocally rejected the argument that the Voter Qualifications Clause requires identical voter qualifications in state and federal legislative elections as “plainly inconsistent” with *Mitchell*.<sup>393</sup> However, Justice Stevens, with Justice Scalia, dissented and argued that the opinions of eight justices in *Mitchell* were consistent with the proposition that the Constitution “requires the same qualifications for state and federal elections.”<sup>394</sup> More recently, justices have weighed in on this question, though in dicta or in minority opinions. For example, in a 2013 decision striking down Arizona’s law requiring would-be voters to provide proof of U.S. citizenship, Justice Scalia waded into the debate, writing that “Prescribing voting qualifications . . . forms no part of the power to be conferred upon the national government by the Elections Clause, which is expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.”<sup>395</sup> Notwithstanding nonbinding statements to the contrary, *Mitchell* and *Tashjian* represent the state of the law: Congress can expand the federal electorate beyond state law voter qualifications. Perfect symmetry is not required so long as all electors for the most

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389. *See id.* at 135–44 (Douglas, J., concurring) (finding Congress can compel states to permit eighteen-year-olds to vote in federal *and state* elections pursuant to the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment); *id.* at 239–81 (Brennan, J., concurring in part and dissenting in part) (writing with Justices White and Marshall, Justice Brennan dissented from the judgment insofar as it declared the age requirement unconstitutional as applied to state and local elections and concluded that Congress could compel states to extend the franchise to eighteen- to twenty-one-year-olds pursuant to the Equal Protection Clause).

390. *Id.* at 293–96 (Stewart, J., concurring in part and dissenting in part).

391. 479 U.S. 208 (1986).

392. *Id.* at 229.

393. *Id.* The Voter Qualifications Clause provides: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. CONST. art. 1, § 2, cl. 1.

394. *Tashjian*, 479 U.S. at 233 (Stevens, J., dissenting).

395. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (citations omitted) (emphases in original); *see also id.* at 29–33 (Thomas, J., dissenting); *Husted v. A. Philip Randolph Inst.*, 584 U.S. \_\_\_, 138 S. Ct. 1833, 1849–50 (2018) (Thomas, J., concurring).

numerous state legislative body also qualify as electors for federal office.

C. *Exceptions to the Rule?*

Three cases run counter to the great weight of jurisprudence recognizing the Elections Clause as a broad grant of power to Congress; one of these cases has since been overturned and another has been called into question—by Justice Scalia in his majority opinion in *Arizona v. Inter Tribal Council of Arizona, Inc.*<sup>396</sup> and by the sweep of history.

In *Newberry v. United States*,<sup>397</sup> the court struck down portions of the Federal Corrupt Practices Act that placed spending limits on spending in primaries or other nomination processes for federal office, in part because the term “elections” in Article I, Section 4 did not include primary elections because that procedure was “unknown” to the Framers.<sup>398</sup> But the Court later rejected this rule in *United States v. Classic*,<sup>399</sup> explaining that when the Elections Clause is “read in the sense which is plainly permissible and in the light of the constitutional purpose,” the Court was required “to hold that a primary election . . . is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.”<sup>400</sup> The *Classic* Court explained that the Necessary and Proper Clause—when operating in conjunction with the Elections Clause—grants Congress the power to legislate to “safeguard the right of choice by the people of representatives in Congress.”<sup>401</sup>

In *United States v. Gradwell*,<sup>402</sup> the Court held that criminal prohibition of fraud against the United States did not extend to election fraud (specifically, bribery of electors).<sup>403</sup> To reach this conclusion, the Court looked at Congress’s history of exercising its Elections Clause power to date, and noted that Congress had rarely interfered with state regulations of elections, except for a period of twenty-four years.<sup>404</sup> The Court wrote off as an aberration the period from 1870 (when Congress issued muscular elections regulations though the Enforcement Acts) to 1894 (when Congress repealed a substantial portion of these laws as Reconstruction

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396. 570 U.S. 1 (2013).

397. 256 U.S. 232 (1921).

398. *Id.* at 250.

399. 313 U.S. 299 (1941)

400. *Id.* at 320.

401. *Id.*

402. 243 U.S. 476 (1917).

403. *Id.*

404. *Id.* at 482–84.

gave way to Redemption). The Court could not expressly state that Congress lacked the authority to regulate on congressional elections; instead, the Court explained that it was merely a matter of “policy” that had prevented Congress from doing so.<sup>405</sup> Because Congress had previously exercised its election authority “by positive and clear statutes,” the *Gradwell* Court declined to read an election regulation into “a law for the protection of the revenue.”<sup>406</sup>

In practice, *Gradwell* has not narrowed the Court’s interpretation of the Elections Clause. Indeed, in explaining why the presumption against preemption does *not* apply in Elections Clause cases, Justice Scalia limited *Gradwell* to its facts, explaining that the “provision at issue was adopted in a tax-enforcement bill, and that Congress had enacted but then repealed *other* criminal statutes specifically covering election fraud.”<sup>407</sup> Thus, “*Gradwell* says nothing at all about pre-emption, or about how to construe statutes (like the NVRA) in which Congress has *indisputably* undertaken ‘to regulate such elections.’”<sup>408</sup> Indeed, Congress’s adoption of sweeping regulation of federal elections throughout the twentieth and twenty-first centuries all but nullifies *Gradwell*.

Finally, in *U.S. Term Limits, Inc. v. Thornton*,<sup>409</sup> the Court held that a state could not impose term limits on U.S. representatives or senators because the “Times, Places and Manner” authority granted to states did not contain the power to determine the qualifications for federal office.<sup>410</sup> Such power would contravene the intent of the Framers, who were motivated by “evident concern that States would try to undermine the National Government.”<sup>411</sup> Justice Stevens several times noted that the Elections Clause was intended to grant Congress control over the “procedural” aspects of elections (i.e., how elections are run), rather than the “substantive” qualifications of candidates for office.<sup>412</sup> But it would be a mistake to read Justice Stevens’s focus on election procedure too narrowly, given the Framers’ emphasis on the breadth of the Elections Clause (e.g., “words of great latitude”), the intent to protect against voter

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405. *Id.* at 482 (“Although Congress has had this power of regulating the conduct of congressional elections from the organization of the government, our legislative history upon the subject shows that except for about twenty-four of the one hundred and twenty-eight years since the government was organized, it has been its policy to leave such regulations almost entirely to the states, whose representatives Congressmen are.”).

406. *Id.* at 485.

407. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13 n.5 (2013) (emphasis in original).

408. *Id.* (emphasis in original).

409. 514 U.S. 779 (1995).

410. *Id.* at 828.

411. *Id.* at 810.

412. *Id.* at 810, 832–35.

suppression and intimidation, and early Elections Clause legislation (approved by the Supreme Court) aimed at ensuring free and fair elections.<sup>413</sup>

*D. Who Is a “Legislature”?*

The most voluble recent Supreme Court jurisprudence on the Clause has addressed what once seemed like a quirky, ancillary issue. The Republican legislature challenged Arizona’s nonpartisan redistricting commission, which had been established by ballot measure under the state’s constitution.<sup>414</sup> The commission violated the Elections Clause, the lawsuit insisted, because only the “legislature” could set the “times, places, and manner” of balloting and districts—and the voters were not the legislature.<sup>415</sup> This argument, if successful, would have put at risk numerous other ballot measures in states across the country, especially in western states that joined the Union in the late nineteenth and early twentieth Centuries, with direct democracy as part of their constitutions.

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*,<sup>416</sup> by 5–4, the Court ruled that the Constitution did not bar the people of Arizona from direct democracy when it came to the method for drawing district lines. “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.”<sup>417</sup> Ominously for future jurisprudence, Justice Anthony Kennedy joined the majority. Chief Justice John Roberts wrote a stinging dissent, arguing that “legislature” must mean only the representative body.<sup>418</sup> Kennedy’s retirement augured a future Supreme Court ruling striking down dozens of state election procedures and provisions enacted by voters over the decades.

However, in *Rucho*, even as Roberts wrote that the courts could not police partisan gerrymandering, he acknowledged that Congress and state voters could. At length he cited with approval how

numerous . . . States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018,

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413. See *supra* Parts I–II.

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

415. *Id.* at 792–93.

416. 576 U.S. 787 (2015).

417. *Id.* at 813.

418. *Id.* at 825–50 (Roberts, C.J., dissenting).

voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines.<sup>419</sup>

These measures are constitutionally indistinguishable from the ones put at risk in Arizona.

Litigation on this question took center stage in the months leading up to, and following, the 2020 general elections. Faced with the difficulties of holding elections in the midst of the coronavirus pandemic, governors, secretaries of state, state election boards, county election administrators, and courts issued executive orders, rules, and interpretations to ensure that voters could safely cast ballots that would count. As a result, there were at least forty-three cases, in both federal and state court, in which parties challenged an election rule or procedure on the grounds that the entity issuing the regulation or interpretation was not entitled to make rules as to the times, places, or manner of federal elections under the Elections and/or Electors Clauses.<sup>420</sup> Opining on voting cases that bubbled up to the Supreme Court’s 2020 “shadow docket,” four justices indicated their support for the independent state legislature theory, under which only the formal legislative body of a state would be permitted to regulate federal elections under the Elections and Electors Clauses.<sup>421</sup> These views contradict the Court’s majority opinions in *Arizona Independent Redistricting Commission* and *Rucho*, the practice of election administration nationally, and the unmistakable original intent of the Elections Clause to *limit* the power of state lawmakers, whom the Framers fundamentally distrusted. Ultimately, the Court denied the petitions for certiorari arising from these cases.<sup>422</sup>

## CONCLUSION: THE ELECTIONS CLAUSE TODAY

One remarkable feature of the Founding-era debates on the Elections Clause is their resonance today. Madison’s well-known warning that partisan factions in the States would write laws to entrench themselves

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419. *Rucho v. Common Cause*, 588 U.S. \_\_\_, 139 S. Ct. 2484, 2507 (2019) (citation omitted).

420. *Voting Rights Litigation Tracker 2020*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020> [<https://perma.cc/TE5M-3QX5>] (last updated July 28, 2021).

421. See *supra* note 5 and accompanying text.

422. See *supra* note 6 and accompanying text.

still echoes profoundly: “Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould [sic] their regulations as to favor the candidates they wished to succeed.”<sup>423</sup>

For example, rules to limit ballot-access—including stricter voter identification requirements for in-person voting, stricter voter-registration requirements, and curtailment of early-voting opportunities—are advanced predominantly by one political party, often crafted to exclude some voters, and based on a premise about the relationship between turnout and electoral outcomes.<sup>424</sup> At the same time, partisan gerrymandering designed to entrench political parties has plagued Maryland, Michigan, North Carolina, Pennsylvania, and Wisconsin amidst the heightened partisanship of recent years,<sup>425</sup> consistent with Theophilus Parsons’ prediction that “in times of popular commotion, and when faction and party spirit run high,” States “would introduce such regulations as would render the rights of the people insecure and of little value” including making “unequal and partial division of the State into districts for the election of representatives.”<sup>426</sup> Indeed, even as the Supreme Court in *Rucho* ruled that claims of partisan gerrymandering are nonjusticiable, the Court acknowledged that electoral districting problems in part animated the Framers’ desire for the Elections Clause. And the Court squarely stated that “the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause.”<sup>427</sup> The Court pointed specifically to the For the People Act of 2019 as an example of proposed legislation that would create such districting regulations and noted that the avenue for reform “remains open” in Congress.<sup>428</sup>

Along with redistricting reform, the For the People Act and the Freedom to Vote Act include provisions related to methods of voter registration, early voting, restoration of eligibility to people with past

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423. See *supra* note 47 and accompanying text.

424. Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1370 (2015) (“[T]he single predictor necessary to determine whether a state will impose voter-access restrictions is whether Republicans control the ballot-access process. This is not intended as a normative claim, but simply as a real-world fact of life.”).

425. PEW RSCH. CTR., THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER 7 (2017), <https://www.people-press.org/wp-content/uploads/sites/4/2017/10/10-05-2017-Political-landscape-release-updt.pdf> [<https://perma.cc/J9BV-KC9Z>] (“The gap between the political values of Democrats and Republicans is now larger than at any point in Pew Research Center surveys dating back to 1994, a continuation of a steep increase in the ideological divisions between the two parties over more than a decade.”).

426. DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *reprinted in* VOL. 6: MASSACHUSETTS 3, *supra* note 55, at 1218.

427. *Rucho v. Common Cause*, 588 U.S. \_\_\_, 139 S. Ct. 2484, 2508 (2019).

428. *Id.*; see H.R. 1, 116th Cong. §§ 2401, 2411 (2019).

convictions, and election security.<sup>429</sup> Arguments that the Elections Clause is not broad enough to authorize these reforms would give the Framers and early members of Congress *déjà vu*. For example, the president of the Public Interest Legal Foundation testified that the Elections Clause “was only added” to the Constitution “when concerns were raised that the states would suffocate the power of the new government by refusing to establish procedures to elect federal officials”—a circumstance that “simply does not exist, and therefore should not justify a federal takeover of election procedures.”<sup>430</sup> Not only does this argument reflect a very narrow slice of the historical record, but it has been advanced and defeated—repeatedly. The Framers of the Constitution declined to adopt Rutledge and Pinckney’s proposed amendment to excise federal authority to alter state elections regulations. Then, during state ratification, six states tried and failed to amend the constitution to limit Congress’s power to apply only when States entirely failed to enact elections regulations. The first Congress likewise tried and failed to amend the Constitution to grant elections authority only in instances of state default. Rather than adopt such a limited construction, Madison, the Framers, and early Congresses understood (sometimes to their chagrin) that the Elections Clause contained “words of great latitude” and that Congress’s authority was *not* limited to circumstances in which states entirely refused to enact rules for congressional elections. The national self-preservation that the Elections Clause was intended to provide has *always* meant more than merely holding congressional elections.<sup>431</sup>

Partisan manipulation of district boundaries is just one tactic used to dilute the power of voters and suppress votes. Voters face myriad burdens and inconveniences, from strict voter identification laws and registration

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429. For the People Act, H.R. 1, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021).

430. *For the People Act: Hearing on H.R. 1 Before the H. Comm. on the Judiciary*, 116th Cong. 3 (2019) (statement of J. Christian Adams, President and General Counsel, Public Interest Legal Foundation), <https://docs.house.gov/meetings/JU/JU00/20190129/108824/HHRG-116-JU00-Wstate-AdamsJ-20190129-U1.pdf> [<https://perma.cc/N7KX-N2BN>].

431. *See, e.g.*, 1 ANNALS OF CONG. 800 (1789) (Joseph Gales ed., 1834) (“[A]s much injury might result to the Union from improper regulations, as from a neglect or refusal to many any.”); *see also* CONG. GLOBE, 27th Cong., 2d Sess. 407 (1842) (“[T]he Government is almost as much dissolved by a vicious representation as by no representation. In the latter case, to be sure, the whole fabric is destroyed; in the former, you preserve the show, the appearance, the form of our Government, but the spirit and lite are gone.”); CONG. GLOBE, 41st Cong., 3d Sess. 1283 (1871) (“Who does not know that if the State Legislature should choose to incur the exercise of this power with inconvenient or impossible conditions, and if the national Congress had not the power to overrule or alter such conditions, the nation would perish?”); *Ex parte Siebold*, 100 U.S. 371, 382 (1879) (“In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government.”).

requirements, to aggressive voter roll purges and limited voting hours and locations. Framers who worried that States, if unrestricted, would situate polling places at inconvenient locations would be unsurprised by the rash of polling place closures since 2013, when the Supreme Court gutted the federal government's most potent tool for fighting race-based voter suppression—the preclearance requirement of the Voting Rights Act.<sup>432</sup> Indeed, one essayist during the state ratification debates expressly warned that, without federal mediation, a State would “appoint[] a place for holding the elections, which would prevent some from attending, and burthen [sic] others with very great inconveniences.”<sup>433</sup>

It is disheartening that abuse of state power over elections, partisan manipulation of district lines, and myriad forms of voter intimidation and suppression (precisely the harms the Framers hoped to avoid by drafting the Elections Clause into the Constitution) persist. But there is reason for optimism. The historical record of the Elections Clause—at the nation's founding, in early Congresses, and in the courts—demonstrates that Congress and states have the power to deliver on the promise of free and fair elections that the Framers intended.

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432. See THE LEADERSHIP CONF. EDUC. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 12 (2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [<https://perma.cc/XVL3-A8XT>] (finding 1,688 polling place closures between 2012 and 2018 in jurisdictions formerly covered by the preclearance formula of the Voting Rights Act); *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (invalidating the formula that determined which states and jurisdictions were covered by section 5 of the Voting Rights Act and thus are required to undergo preclearance, effectively ending the preclearance requirement).

433. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *reprinted in* VOL. 5: MASSACHUSETTS 2, *supra* note 87, at 738.