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The Elections Clause and the Underenforcement of Federal Law

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ABSTRACT. H.R. 1 is proposed federal legislation that, if enacted, would address issues in voting, campaign finance, ethics, and legislative redistricting. Given its scope, it is unsurprising that the bill has encountered its fair share of critics, who portray the legislation as unprecedented and unduly intruding on the scope of state authority over elections. As this Essay argues, these concerns are unfounded because Congress has broad authority to regulate federal elections under the Elections Clause of Article I, Section 4 of the Constitution. This authority sometimes permits Congress to reach voter-qualification standards and state elections long considered to be the domain of the states. Congress has rarely used its power under the Clause, contributing to its underenforcement and also to misconceptions about the Clause's reach. But when utilized, the Clause has supported legislation, both enacted and proposed, that was much broader and more intrusive of state authority than H.R. 1. Even if H.R. 1 does not become law, it should serve as a model for future election reform bills enacted pursuant to Congress's authority under the Elections Clause.

INTRODUCTION

In January 2019, the 116th Congress introduced its very first bill in the House of Representatives, H.R. 1, aptly titled the "For the People Act of 2019." Relying on Congress's power under the Elections Clause,[1] the bill is an ambitious attempt to restructure the federal election system. It addresses campaign spending, expands voter registration, proposes independent redistricting commissions, prohibits felon disenfranchisement, and bolsters election security, among other

1. U.S. CONST. art. I, § 4 ("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.").

things.[2] The bill has already seen its fair share of opposition. In a recent report, the Heritage Foundation argued that H.R. 1 is unconstitutional because it interferes with the states' constitutional authority to determine voter qualifications and administer elections.[3] The report alleges that H.R. 1 would "[s]eize the authority of states to regulate voter registration and the voting process by forcing states to implement early voting, automatic voter registration, same-day registration, online voter registration, and no-fault absentee balloting."[4]

By upending the manner in which federal elections are traditionally regulated—which is primarily through state law—H.R. 1 is one of the most novel and expansive exercises of federal power over elections in decades.[5] Congress often encounters substantial opposition when it enacts legislation that has few modern parallels, usually because these laws touch on an area of significant political controversy and do not comfortably fit within Supreme Court precedent. For example, various parties filed litigation challenging the Affordable Care Act (ACA) because, for the first time, uninsured individuals were forced to obtain healthcare or pay a tax. Although the Supreme Court ultimately upheld the ACA as a lawful exercise of Congress's taxing power, the Chief Justice pointed to the individual mandate's unique regulation of inaction—here, the failure to obtain health insurance—in finding the Commerce Clause insufficient to justify its scope.[6] In advocating for the ACA's unconstitutionality, the dissenters emphasized its

2. H.R. 1, 116th Cong. (2019). In March 2019, the House passed H.R. 1 in a vote of 234 to 193, but Majority Leader Mitch McConnell has yet to bring the bill to the Senate floor. *See* Ella Nilsen, *House Democrats Just Passed a Slate of Significant Reforms to Get Money Out of Politics,* VOX (Mar. 8, 2019, 11:25 AM), https://www.vox.com/2019/3/8/18253609/hr-1-pelosi-house-democrats-anti-corruption-mcconnell [https://perma.cc/CJV8-NKMG] (describing H.R. 1 as "dead on arrival in the Senate").

3. *The Facts About H.R. 1—the For the People Act of 2019*, HERITAGE FOUND. (Feb. 1, 2019), https://www.heritage.org/sites/default/files/2019-02/FS_182_0.pdf [https://perma.cc/E85Q-HH2M].

4. *Id.* at 1.

5. Even the 'preclearance regime of the Voting Rights Act (VRA), which imposed federal oversight for certain state political systems, is not a perfect analogy because the Elections Clause, by giving Congress comprehensive power to regulate federal elections, does not require any continuing evidence of racial discrimination for federal oversight to remain valid. *See generally* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1228-33 (2012).

6. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552 (2012) ("Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation . . . .").

novelty, noting that a scheme in which individuals are forced into commerce embraces "a definition of market participants [that] is unprecedented."[7]

Similarly, the Heritage Foundation report foreshadows the challenges that H.R. 1 will face should it ever become law because the bill involves the expansive use of federal power to regulate federal elections, an area of significant controversy that will become even more contested as we enter the 2020 round of redistricting. The Court's precedents have not definitively resolved many of the objections raised by the report, creating fertile ground for challenges to not only H.R. 1 but also any federal election law that touches on the state's power over voter qualifications or its own elections.

Congress has regulated federal elections at various points in our history, although federal legislation has become relatively rare in recent decades as the Supreme Court has increasingly rejected the expansive exercise of federal authority. Most famously, the Voting Rights Act of 1965 (VRA), enacted pursuant to the Fifteenth Amendment, prohibits racial discrimination in voting regardless of whether an election is state or federal.[8] Congress has also regulated the procedure of federal elections under the Elections Clause, but this power has been utilized far less than the Fourteenth and Fifteenth Amendments (or the Commerce Clause) even though it is not similarly constrained by federalism concerns.[9] Such efforts unavoidably affect voter-qualification standards and state elections, generating significant controversy. For example, the Enforcement Acts of 1870 and 1871 created, for the first time, a system of oversight for federal elections that was so controversial that Congress's attempt to expand the system twenty years later through the proposed Federal Elections Bill of 1890 led to huge Republican losses in the 1892 elections.[10] Despite firm footing in the Elections Clause, all of these efforts were challenged as both partisan endeavors and unconstitutional exercises of federal authority.

This Essay argues that when constitutional text is underenforced and has comparatively few governing precedents, there is a high risk that federalism

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7. *Id.* at 656 (Scalia, J., dissenting); *see also id.* at 708 (Thomas, J., dissenting) (describing the government's claim that "it may regulate not only economic activity but also *inactivity*" as "unprecedented").

8. 52 U.S.C. § 10301 (2018).

9. *See, e.g.*, National Voter Registration Act of 1993 (NVRA), 52 U.S.C. §§ 20501-20511 (2018) (regulating voter registration for federal elections). *See* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 321 (2019) (arguing that federalism does not constrain Congress when it acts pursuant to the Elections Clause); *see also* Arizona v. Inter Tribal Council of Ariz., Inc. (*Ariz. Inter Tribal*), 570 U.S. 1, 14 (2013) (upholding the NVRA's regulation of voter registration because the federalism concerns are weaker when Congress acts pursuant to the Elections Clause).

10. *See* source cited *infra* note 53.

objections to the exercise of this authority appear more credible than they actually are, creating a false equivalence between unprecedented or novel lawmaking and unconstitutional lawbreaking. If enacted, H.R. 1 would be the most expansive exercise of federal power over elections since the VRA and the most aggressive assertion of federal authority under the Elections Clause since Reconstruction. In defending H.R. 1's constitutionality, this Essay proceeds as follows. Part I briefly discusses the case law to show that the distinction between manner regulations and voter-qualification standards is arbitrary and can be difficult to distinguish in practice. It concludes that this distinction may not always matter because Congress can regulate voter qualifications in certain limited circumstances under the Elections Clause. In particular, H.R. 1's provisions reflect that the Constitution permits Congress to approach the regulation of federal elections comprehensively, making it difficult to disaggregate state and federal power over elections. As illustrated in Part II, which discusses the Enforcement Acts of the 1870s as well as the proposed Federal Elections Bill of 1890, history bears out that a law is not *de facto* unconstitutional just because it is novel and touches on areas of state authority. Federalism objections could nonetheless lead a law's novelty—and implied unconstitutionality—to be confused with Congress's prerogative to push the limits of its lawful authority under an otherwise underenforced constitutional provision.[11]

I. AND THE TWO SHALL NEVER MEET?: DISAGGREGATING STATE AND FEDERAL POWER OVER ELECTIONS

Given increasing concerns about federalism by the most conservative Supreme Court in decades, questions have inevitably arisen as to whether the Court has to account for the practical difficulties of election administration in thinking about the scope of federal power under the Elections Clause.[12] States have broad

11. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (arguing that constitutional provisions are valid "to their full conceptual limits" even when the Court refuses to enforce them based on institutional concerns such as federalism). To be clear, this Essay does not object to the use of constitutional arguments to challenge measures under current law, despite their novelty. People who substantively oppose a measure should feel empowered to raise all credible arguments to challenge it in any available forum, including legislatures, courts of law, and the court of public opinion. Instead, this Essay seeks to identify how these federalism arguments manifest in the unique context of the Elections Clause. Thanks to Michael Morley for pushing me on this point.

12. *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992). As the Court recognized,

> It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." . . . It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot

authority to regulate voter qualifications and state elections. The Court typically views our system of federalism as requiring that states be able to regulate these domains free of federal interference, subject only to limited exceptions.[13] But the nature of election administration—where states generally use a uniform system of regulation for both state and federal elections—suggests that the Court should be somewhat pragmatic, rather than strictly doctrinal, in considering the scope of federal power over elections. Because federal law under the Elections Clause often touches on voter qualifications and state elections, this can create confusion about which level of government has constitutional authority to legislate. Such confusion tends to inflate federalism concerns, even when it is impossible to disentangle state and federal power in this area. In *Arizona v. Inter Tribal Council of Arizona*, for example, the Court found that the requirement in the National Voter Registration Act (NVRA) that voters affirm their citizenship in order to register to vote for federal elections preempted Arizona's documentary proof-of-citizenship requirement.[14] Nonetheless, the majority recognized that there could be instances in which the NVRA interfered with state power over voter qualifications, noting that, in those instances, states could use the Administrative Procedure Act to challenge the statute as applied to their elections.[15]

Despite this concession, some Justices insist that courts should not account for practical implementation when deciding cases under the Elections Clause. At least two Justices believe that any federal interference with the state's power over voter qualifications is unconstitutional. In *Arizona Inter Tribal*, Justices Thomas and Alito dissented on the grounds that the NVRA's affirmation-of-citizenship requirement impermissibly interfered with Arizona's ability to enforce its own requirement that voters present documentary proof of citizenship, which they deemed a voter qualification. Justice Thomas, in particular, argued that the Voter Qualifications Clause of Article I, Section 2, which allows states to determine the

> are absolute . . . . The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," § and the Court therefore has recognized that States retain the power to regulate their own elections . . . . Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."

Id. (citations omitted).

13. *See, e.g.*, U.S. CONST. amend. XIV (prohibiting denials or abridgments of the right to vote); *id.* amend. XV (prohibiting racial discrimination in voting).

14. *Ariz. Inter Tribal*, 570 U.S. 1, 14 (2013) ("Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent.").

15. *Id.* at 19-20.

electors for federal elections, prevented Congress from passing any regulation that undermined the states' "nearly complete control over voter qualifications."[16] Importantly, he dismissed precedents establishing that voter registration falls within the scope of Congress's power under the Elections Clause, distinguishing them as cases that "involved congressional redistricting, not voter registration."[17]

Similarly, Justice Alito rejected the Court's interpretation of the NVRA by focusing on state, rather than federal, authority under the Elections Clause. Pointing to the NVRA as an untraditional exercise of federal power, he would have imposed the equivalent of a clear-statement rule on Congress should it choose to exercise its authority to regulate the times, places, and manner of federal elections. He "presum[ed] that the States retain this authority [under the Elections Clause] unless Congress has clearly manifested a contrary intent," in order to protect Arizona's "compelling interest in preserving the integrity of its electoral process."[18]

The crux of these Justices' objections is that Congress's power to "make or alter" regulations that govern federal elections should have minimal or no impact on either state elections or the voter qualifications that states have primary authority to stipulate under Article I, Section 2. Like the Heritage report, Justices Thomas and Alito assume that, contrary to how the federal and state electoral systems interact in practice, federalism requires the complete disaggregation of state voter-qualification standards from the time, place, and manner regulations that Congress can enact pursuant to the Elections Clause and, also, that federal power has little or no impact on state elections.

A. The Unworkable Distinction Between Manner Regulations and Voter-Qualification Standards

The above view espoused by Justices Thomas and Alito miscomprehends the case law as well as the constitutional text and structure by trying to distinguish a voter-qualification standard set by the states from a manner regulation subject to federal authority in the absence of clear guidance.[19] For example, the Court has looked to the requirements of federal law to validate regulations that apply to both state and federal elections, making few distinctions between state and federal authority in those circumstances. In upholding Indiana's voter-identification law—a law that is not clearly a voter-qualification standard or a manner

16. *Id.* at 28 (Thomas, J., dissenting).

17. *Id.* at 34 (Thomas, J., dissenting).

18. *Id.* at 40 (Alito, J., dissenting).

19. Tolson, *supra* note 9.

regulation[20]—the Court justified the law by pointing to requirements imposed on the state by the NVRA and the Help America Vote Act (HAVA).[21] Both the NVRA and HAVA (which was also enacted pursuant to the Elections Clause) are prime examples of federal statutes that rely on state implementation and cooperation, making it difficult to deploy separate standards for each level of elections or to distinguish based on the category (voter-qualification standard or manner regulation) implicated. The NVRA establishes voter-registration criteria for federal elections and prohibits actions that would needlessly disenfranchise individuals;[22] if federal law sets one baseline for voter registration, it is difficult for states to set another. Similarly, HAVA requires state oversight of local election boards to avoid many of the voting problems that arose during the 2000 election.[23] H.R. 1 modifies and extends both laws,[24] making it even more difficult to limit their reach to only federal elections.

Practical concerns also muddy the scope of federal power over federal elections, which compounds the significance of these doctrinal gray areas.[25] Should the federal government want to impose a regulation that affects voter-qualification standards, it can only do so in limited circumstances.[26] If a state wants to regulate the time, place, and manner of federal elections, the federal government has significantly more authority to displace or alter state law. But what if a regulation has implications for both voter qualifications and the manner of federal elections? Proof-of-citizenship requirements to register for federal elections have presented this issue in a particularly stark fashion. After *Arizona Inter Tribal*, Kansas experienced difficulty trying to run parallel election systems when it sought to require proof of citizenship for voter registration but could only do so for state elections.[27] As the D.C. Circuit recognized, documentary proof-of-

20. Franita Tolson, *Congressional Authority to Protect Voting Rights After* Shelby County *and* Arizona Inter Tribal, 13 ELECTION L.J. 322, 323 n.6 (2014).

21. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008).

22. 52 U.S.C. § 20901 (2018).

23. *Id.* §§ 20901-21145.

24. *See, e.g.*, H.R. 1, 116th Cong., § 1001 (2019); *id.* § 1061.

25. For example, President Trump recently tweeted a call for federal legislation instituting national voter identification, but whether Congress has the authority to do so depends on whether voter identification is a voter-qualification standard or a manner regulation. Donald J. Trump (@realDonaldTrump), TWITTER (July 30, 2019, 9:41 AM), https://twitter.com/realdonaldtrump/status/1156243330952507394 [https://perma.cc/B6N8-CZBS] ("We should immediately pass Voter ID @voteridplease to insure the safety and sanctity of our voting system. Also, Paper Ballots as backup (old fashioned but true!). Thank you!").

26. *Ariz. Inter Tribal*, 570 U.S. 1, 26 (2013); Tolson, *supra* note 9.

27. *See* Fish v. Kobach, 840 F.3d 710, 716 (10th Cir. 2016) (upholding district court order granting plaintiff's motion for a preliminary injunction against enforcement of Kansas's documentary proof-of-citizenship law).

citizenship requirements that apply to state and local elections make it difficult to register voters for federal elections as well.[28] The Supreme Court has nonetheless upheld the NVRA's requirement that voters affirm their citizenship under the Elections Clause even though it inevitably affects voter qualifications and state elections,[29] creating another doctrinal gray area that contributes to the difficulty in delineating voter-qualification standards from manner regulations.

B. Congress's Limited Power to Regulate Voter Qualifications Under the Elections Clause

The artificial boundary between manner regulations and voter-qualification standards should not prevent Congress from using its authority under the Elections Clause to address a state's attempt to purposely circumscribe its electorate through its authority over voter qualifications. As I have argued in prior work, there are limited circumstances in which Congress can reach voter qualifications under the Elections Clause, including instances in which state regulations discourage voter turnout in federal elections.[30] For example, H.R. 1 prohibits the disenfranchisement of felons in federal elections after they have been released from custody, probably one of the most controversial parts of the bill.[31] Felony status has long been considered a voter qualification that states can use to exclude otherwise eligible voters. The Court has interpreted Section 2 of the Fourteenth Amendment to sanction felon disenfranchisement because it exempts felony status from the penalty of reduced representation imposed on any state that abridges or denies the right to vote.[32]

However, the Court has not resolved whether Congress can regulate felon disenfranchisement under the Elections Clause if states have abused their power in a way that, like documentary proof-of-citizenship requirements, affects turnout and participation in federal elections. Critics have attacked felon-

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28. League of Women Voters v. Newby, 838 F.3d 1, 8 (D.C. Cir. 2016).

29. *Ariz. Inter Tribal*, 570 U.S. 1, 14 (2013). *But see id.* at 40 (Alito, J., dissenting) ("In light of the States' authority under the Elections Clause of the Constitution, Art. I, § 4, cl. 1, I would begin by applying a presumption against pre-emption of the Arizona law requiring voter registration applicants to submit proof of citizenship.").

30. Tolson, *supra* note 9. This is not an argument that Congress has plenary power over voter qualifications under the Elections Clause; rather, Congress can reach voter qualifications under the Clause when states' control over voter qualifications threatens the health of federal elections. My scholarship identifies two circumstances in which this is likely: when states under-legislate with respect to voter qualifications in order to facilitate discrimination, and when states try to use this power to deter turnout and participation in federal elections. *Id.* at Part III.

31. Thanks to Benji Cover for emphasizing this point.

32. Richardson v. Ramirez, 418 U.S. 24 (1973).

disenfranchisement laws as being overbroad attempts to disenfranchise minority voters beyond what the framers of Section 2 envisioned.[33] Many states prohibit felons from voting long after they have been released from custody or, alternatively, require them to petition the state for the restoration of their voting rights after a term of years.[34]

Recently, Florida voters approved a state constitutional amendment that would have restored the voting rights of those previously incarcerated, but the state legislature passed a law that would curb its effectiveness by requiring all fines and fees to be paid prior to the restoration of voting rights.[35] H.R. 1 would prohibit states from barring individuals who are no longer in custody from voting, thereby deterring broad felon-disenfranchisement laws intended to indefinitely disenfranchise a significant percentage of the electorate. As the Court has recognized, Congress has the power under the Elections Clause to "protect the elections on which its existence depends"[36] and "to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself."[37] Regulations like Florida's statute requiring the payment of fines and fees regardless of ability to pay, as well as instances in which states disenfranchise based on an overly broad category of offenses, have significant implications for turnout and participation in federal elections, such that these efforts fall within the limited instances in which Congress can reach voter qualifications under the Clause.

Exceptions must exist because, unlike the Fourteenth and Fifteenth Amendments, federalism does not function as a constraint on congressional authority under the Elections Clause. Concerns about federalism have hampered voting-rights enforcement in recent decades, famously culminating in *Shelby County v. Holder*'s invalidation of Section 4(b) of the VRA, which subjected mostly

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33. Alec Ewald, *Escape from the "Devonian Amber": A Reply to* Voting and Vice, 122 YALE L.J.F. 319 (2013).

34. *Felony Disenfranchisement Laws in the United States*, SENTENCING PROJECT (Apr. 28, 2014), www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states [https://perma.cc/9PY7-MDLV].

35. *See* Voting Rights Restoration Efforts in Florida, BRENNAN CTR. FOR JUST. (May 31, 2019), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida [https://perma.cc/RQ72-T3ZD]. Recently, a federal district court granted a preliminary injunction blocking the Florida law requiring payment of all fines and fees before individuals with felony convictions could be reenfranchised. *See* Jones v. DeSantis, No. 19-cv-300 (N.D. Fla. Oct. 18, 2019) (order granting preliminary injunction), https://www.aclu.org/legal-document/order-1 [https://perma.cc/4HAW-WSMU].

36. *Ex parte* Yarbrough, 110 U.S. 651, 658 (1884).

37. *Id.* at 666.

southern jurisdictions with abysmal records on voting rights to federal oversight.[38] In contrast, the Supreme Court has interpreted the Elections Clause's text as allowing Congress to "make or alter" state regulations, and to implement "a complete code for congressional elections" that can displace state law for any reason or no reason.[39] Though the Elections Clause defaults to state power as an initial matter—which invites the conclusion, embraced by Justices Alito and Thomas, that congressional power is constrained—the text and structure of the Clause point to federal power that is robust, significant, and, most importantly, unencumbered by federalism.[40]

II. LAWS ARE NOT UNCONSTITUTIONAL BECAUSE THEY ARE NOVEL OR UNPRECEDENTED

Despite the Elections Clause's untapped potential, it has not been a source of much election-law legislation, which contributes to the perception that H.R. 1 is unprecedented and therefore unconstitutional. While the NVRA is the most recent regulation of voter registration under the Elections Clause, it is significantly less far-reaching than its predecessors, both proposed and enacted. The same is true of H.R. 1.

The Enforcement Act of 1870, typically categorized as Fifteenth Amendment legislation but also enacted pursuant to the Elections Clause, criminalized violations of state law that governed federal elections.[41] This exposed state officials to dual liability, created a category of nationally protected rights, and, in the process, raised significant questions about the scope of federal authority. Under the Act, election officials could be charged under federal law if they "hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify

38. 570 U.S. 529 (2013) (holding that Section 4(b)'s disparate application to mostly southern states and not equally culpable northern jurisdictions violated the equal sovereignty principle); *see also* Franita Tolson, *The Equal Sovereignty Principle as Federalism Sub-Doctrine: A Reassessment of* Shelby County v. Holder, *in* CONTROVERSIES IN AMERICAN FEDERALISM AND PUBLIC POLICY (Christopher P. Banks ed., 2018) (referring to the equal-sovereignty principle as "aggressive pro-federalism doctrine designed to shift previously delegated authority over elections from the federal government back to the states").

39. Smiley v. Holm, 285 U.S. 355, 366 (1932); *see also* Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2212 (2018) (arguing that Congress can commandeer state offices and state officials under the Elections Clause).

40. *Id.*

41. Enforcement Act of 1870, ch. 114, § 2, 16 Stat. 140, 140; *id.* § 22, 16 Stat. at 145-46; *see also* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011) (arguing that the President and Congress, not the Court, were the ones to abandon racial minorities during Reconstruction).

him to vote or from voting at any election."[42] This provision was a much more aggressive statement of federal power than the NVRA's requirement that states offer voter registration at all state offices that provide public assistance or, alternatively, H.R. 1's proposed requirement that states offer online voter registration.

The Enforcement Act of 1871 went further than its counterpart enacted a year earlier, instituting a system of federal oversight for congressional elections. This oversight system was designed to ferret out voter fraud and other behavior that prevented individuals from voting and had been prohibited by the 1870 Act.[43] Unlike the preclearance provisions of Sections 4(b) and 5 of the VRA, which applied to mostly southern jurisdictions, the 1871 Act applied to congressional districts nationwide. In contrast, the only oversight that would be created by H.R. 1 is a committee to oversee presidential inaugurations, a far cry from the system of oversight created by the 1871 Act. Effectively, both Enforcement Acts oversaw state elections and voter qualifications even though, by their terms, the oversight applied only to federal elections. These provisions were extremely controversial, with opponents questioning the statute's use of criminal penalties, its broad application to any denial of the right to vote, and its interference with state election systems.[44] Nonetheless, the Supreme Court upheld criminal prosecutions under

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42. Enforcement Act of 1870, ch. 114, § 4, 16 Stat. at 141. This particular provision was invalidated in *United States v. Reese*, 92 U.S. 214 (1875), because of its failure to criminalize only race-based disenfranchisement. *But see* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 424 (2014) (arguing that *Reese* was wrongly decided).

43. Enforcement Act of 1871, ch. 99, 16 Stat. 433, 433 (incorporating Section 20 of the 1870 Enforcement Act); *see also id.* § 2, 16 Stat. at 433-34 ("[W]henever in any city or town having upward of twenty thousand inhabitants, there shall be two citizens . . . of different political parties . . . who shall be designated as supervisors of election."); *id.* § 5, 16 Stat. at 434-35 ("That it shall be the duty of the said supervisors of election, and they, and each of them, are hereby authorized and required . . . to challenge any vote offered by any person whose legal qualifications the supervisors . . . shall doubt"); *id.* § 8, 16 Stat. at 436 (designating marshalls to protect the election supervisors and to arrest individuals who violate the Act).

44. CONG. GLOBE, 41st Cong., 2d Sess. app. at 355 (1870) (statement of Sen. William Hamilton) (disputing that Congress can impose criminal penalties under the Fifteenth Amendment because "the denial of the exercise of a certain power by the Constitution to a State does not thereby confer upon Congress power over the subject-matter of such denial"); *id.* at 473-74 (comments of Casserly) ("It is needless to pursue further the argument as to the powers of Congress under the fifteenth amendment, and as to what is 'appropriate legislation to enforce its provisions.' I leave this part of the subject with a single observation. That observation is as to the difference between legislation by Congress to execute an express power exclusive in itself, and legislation to enforce a limitation of a general power exclusive in the States. In the former case Congress may claim a liberal construction in the aid of its express exclusive power. In the latter case the State has a right to restrict Congress to the very terms of the prohibition. This is especially true when the prohibition affects the power of the State over a subject such as the suffrage.").

the 1870 and 1871 Acts, reading broadly congressional power under the Elections Clause to enact this legislation.[45]

The proposed Federal Elections Bill of 1890, which failed by only one vote, further suggests that the nature of the objections raised by the Heritage report (and Justices Thomas and Alito) are not reflective of how Congress generally viewed its power under the Elections Clause.[46] Extending the reach of the 1870 and 1871 Enforcement Acts, the Federal Elections Bill would have instituted federal supervision of congressional elections, from registration to certification of the winners, if one hundred people within any given congressional district requested federal intervention.[47] Critics called the legislation the "Lodge Force Act," a reference to one of its chief sponsors, Representative Henry Cabot Lodge, and the controversy surrounding the proposal.[48] The *New York Times* noted that the bill was so controversial that major issues were being neglected to focus on its potential passage.[49]

With the Federal Elections Bill, Congress sought to build on the earlier Enforcement Acts and favorable Supreme Court precedents that, in sustaining portions of the Acts, had explicitly recognizing that Congress has broad authority under the Elections Clause to protect federal elections.[50] Congress had ample support for its belief that the bill was constitutionally sound. Nonetheless, critics argued that the bill was not a regulation of the manner of federal elections that its sponsors contended; rather, they framed it as a usurpation of and unconstitutional interference with state power.[51] The controversy over the Acts and the

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45. *Ex parte* Clark, 100 U.S. 399 (1879); *Ex parte* Siebold, 100 U.S. 371 (1879).

46. Notably, the Supreme Court has also upheld exercises of federal authority under the Elections Clause even as it was invalidating similar exercises of power under the Fourteenth and Fifteenth Amendments.

47. Henry Cabot Lodge & T.V. Powderly, *The Federal Election Bill*, 151 N. AM. REV. 257, 266 (1890); *see* Federal Elections Bill of 1890, H.R. 10958, 51st Cong. (1st Sess. 1890); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 29-30 (1974).

48. Democrats referred to the Lodge Bill as a "Force Act" as a nod to an earlier voting-rights bill that had failed in 1875. *See* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 18 (1999); *see also* XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910, at 233-37 (1997) (noting that Republicans considered separating state and federal elections, or alternatively, taking the power of conducting congressional elections away from the states before settling on a regime of federal oversight).

49. *Gorman on the Stump: He Tells Truths About the Tariff and Force Bills*, N.Y. TIMES, Oct. 4, 1891, at 20.

50. Tolson, *supra* note 9.

51. 21 CONG. REC. 6854 (1890) (comments of Rep. Breckinridge) ("Any Federal election law, in my judgment, is unwise . . . . With the States controlling their elections there can be only local frauds and only temporary mischief. In the give and play of counteracting forces these frauds

Federal Elections Bill reveal that there are political risks attendant to legislating toward the outer limits of constitutional power, risks that tend to manifest at the ballot box, rather than within the legal system. Republicans would enact five enforcement acts in the early 1870s, which contributed to the 1874 defeat that cost them control of Congress for the first time since the Civil War.[52] Similarly, Republicans' support for the Federal Elections Bill cost them in the 1890 elections, with fissures in the Republican caucus ultimately leading to the bill's defeat in 1891, followed by huge Republican losses in the 1892 elections.[53] Democrats may face a similar fate with H.R. 1, but ultimately it should be the people, and not the Court, who determine the fate of novel federal legislation.

CONCLUSION

It is undisputed that the broad and comprehensive exercise of federal power over elections has been controversial. However, the juxtaposition of the controversy over H.R. 1 with the responses to its historical counterparts reveals that objections to broad federal power are often based on misplaced federalism concerns. Arguably, Congress has broad power under the Elections Clause to regulate federal elections, unchecked by the federalism concerns that have stymied

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will generally offset each other. The average result in a series of years will about be equal on either side . . . ."); *see id.* at 6858 (comments of Rep. Caruth) ("This is an effort here, Mr. Speaker, to perpetuate you Republicans in power. For the first time in quite a number of years the Republican party finds itself in possession of the executive office and of both bodies constituting the legislative department of the Government. The methods by which it secured this supremacy were, to say the least, questionable. The party fought with a desperation which seemed born of despair."). Contrary to these assertions, Lodge argued that the legislation would not disturb state election laws. *See* Lodge, *supra* note 47, at 258 ("The State systems, whether they provide for the secret and official ballot or otherwise, are all carefully protected under this law against any interference from United States officers."); *see also* WANG, *supra* note 48, at 234 (arguing that Lodge believed "the best way to eliminate southern suppression of black votes was to carry out comprehensive ballot reform").

52. WANG, *supra* note 48, at 110–13.

53. Richard M. Valelly, *Partisan Entrepreneurship and Policy Windows: George Frisbie Hoar and the 1890 Federal Elections Bill*, *in* FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING 127 (Stephen Skowronek & Matthew Glassman eds., 2007) (noting that the bill "died on January 26, 1891" and "[d]espite the passage of eighteen months time, Democrats actually ran against the Federal Elections Bill in 1892"); *Wanted, A Trusty Moses: Who Can Save the Perplexed Bay State Republicans*, N.Y. TIMES, June 3, 1891, at 3 ("There was no popular demand for the Force bill so persistently championed by Messrs. Hoar and Lodge. The voters of Massachusetts gave the measure only scant favor, and yet it was known that the Speaker secured the unanimous support of the Republican delegation for the tariff and other pet schemes in which he was interested by designating Mr. Lodge as their promoter and recognized sponsor on the floor of the House. The interests of the State as a manufacturing and purchasing community were therefore bartered and pledged in favor of a bill that evoked no enthusiasm among the thoughtful, but rather excited positive hostility.").

enforcement under the Fourteenth and Fifteenth Amendments. While Congress has used this authority sparingly, leading to confusion about its actual scope, there are historical precedents that go beyond H.R. 1 in their assertion of federal power. In any case, unprecedented or novel exercises of federal power should not be confused with unlawful uses of federal authority.

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