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Congressional Authority to Direct How States Administer Elections

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Summary

In the United States, states have primary responsibility for the administration of federal elections. The federal government, however, has significant authority to determine how these elections are run, and may direct states to implement such federal regulations as the federal government provides. This authority can extend to registration, voting, reporting of results, or even more fundamental aspects of the election process such as redistricting. This report focuses on Congress's constitutional authority to regulate how states administer elections.

Congress's authority to regulate a particular type of election may vary depending on whether that election is for the Presidency, the House, the Senate, or for state and local positions. Further, there may be variations in what aspects of elections are amenable to regulation. Consequently, evaluating Congress's authority to establish election procedures requires an examination of a variety of different proposals and scenarios.

Although the Constitution is silent on various aspects of the voting process, it seems to anticipate that states would be primarily responsible for establishing election procedures. Federal authority to regulate federal elections, however, is specifically provided for in the Constitution. There are two main provisions at issue—Article I, Section 4, cl. 1, which provides Congress the authority to set the "Times, Places and Manner" of congressional elections, and Article II, Section 1, cl. 4, which provides that Congress may designate the "Time" for the choosing of Presidential Electors.

Congress's power is broadest in the case of House elections, which have historically always been decided by a system of popular voting. Congressional power over Senate elections, while almost as broad as it is for House elections, contains one textual exception—that Congress may not regulate "the Places of chusing Senators." On the other hand, the power of Congress to regulate presidential elections is not as clearly established as the power over House and Senate elections. As noted above, the text of the Constitution provides Congress only the limited power to designate the "Time" of the choosing of Presidential Electors. It does appear that Congress's regulatory authority over presidential elections is more extensive than might appear based on the text of Article II, Section 1, cl. 4. How much more extensive, however, remains unclear.

There are also a variety of other constitutional provisions that provide Congress the power to regulate all elections. This includes Congress's authority under the Civil War Amendments—Thirteenth, Fourteenth, and Fifteenth—and the Nineteenth, Twenty-fourth, and the Twenty-sixth Amendments, which provide Congress the power to prevent various types of discrimination in access to voting. Further, to the extent that there are gaps in Congress's power to regulate federal, state, or local elections, Congress might use the Spending Clause to condition the receipt of federal monies upon compliance with federal requirements. This power would extend to nonfederal elections, over which Congress has little textual authority.

It should be further noted that legislation in this area may require state agencies to implement federal election mandates. Such mandates, however, do not appear to run afoul of the "anti-commandeering" requirements of the Tenth Amendment, as the Constitution appears to contemplate that states will bear the burden of administering federal election regulations.

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Background

In the United States, states have traditionally exercised primary responsibility for the administration of elections for federal and state offices. Because of this decentralized authority, there is often significant variation in how different states regulate elections. For instance, states are likely to use different methods to establish boundaries for electoral districts, to register voters, to administer elections, to report election results, and to otherwise regulate the electoral process. The federal government, however, also has significant authority to regulate how elections are run, and in many instances it has directed how states are to administer the election process.

For instance, in 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act.[1] This act was intended to ensure that members of the uniformed services and U.S. citizens who live abroad are able to register and vote in federal elections. The law was enacted to improve absentee registration and voting for this group of voters.[2] Similarly, in 1993, Congress passed the National Voter Registration Act ("Motor Voter Act")[3] with the intention of making it easier for all citizens to register to vote. The Motor Voter Act requires that, for federal elections, states must establish procedures so that eligible citizens are afforded the opportunity to register at the time they apply for or renew a driver's license, by mail, or in person.[4]

Congressional interest in the process of holding elections increased even more as a result of the disputed 2000 presidential elections. In 2002, Congress passed the Help America Vote Act of 2002 (HAVA).[5] HAVA provides federal requirements for several aspects of election administration, including voting systems, provisional ballots, voter information, voter registration, and the provision of identification by certain voters. For instance, HAVA requires that voting systems used in federal elections provide for error correction by voters (either directly or via voter education and instruction), manual auditing for the voting system, accessibility to disabled persons (at least one fully accessible machine per polling place) and alternative languages, and a method to meet federal machine error-rate standards.[6] Systems are also required to maintain voter privacy and ballot confidentiality, and states are required to adopt uniform standards for what constitutes a vote on each system.[7] HAVA also provides extensive regulation of the manner in which states maintain voter registration lists.[8]

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[1] 4 U.S.C. §§1973ff–1973ff-6, 39 U.S.C. §3406, 18 U.S.C. §§608–609.

[2] CRS Report RS20764, *The Uniformed and Overseas Citizens Absentee Voting Act: Overview and Issues*, by (name red acted).

[3] 42 U.S.C. §§1973gg et seq.

[4] CRS Report R40609, *The National Voter Registration Act of 1993: History, Implementation, and Effects*, by (name redacted). States that had no voter registration requirements or that allowed citizens to register to vote at polling places on election day were exempted from the act.

[5] 42 U.S.C. §§15301 et seq. *See* CRS Report RS20898, *The Help America Vote Act and Election Administration: Overview and Issues*, by (name redacted) and (name redacted).

[6] 42 U.S.C. §15301(a)(1)-(5).

[7] 42 U.S.C. §15301(a)(6).

[8] 42 U.S.C. §15483(a)(4). Under these provisions, a chief state election official must create a uniform centralized, computerized statewide-voter registration list, which must be coordinated with other agency databases within the state. The state election system must include systems to ensure that voter registration records in the state are accurate and are updated regularly. HAVA also requires that the chief state election official and the official responsible for the state motor vehicle authority enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to verify the accuracy of the information (continued...)

Various proposals have been made that would further this enhanced level of federal control over the administration of election procedures. For instance, suggestions have been made that state agencies be required to share information to facilitate accurate registration lists; to standardize mail-in and absentee balloting; to establish a uniform closing time for polls; to provide for multiple-day elections; and to standardize the number and accessibility of polling stations. Other suggestions include standardizing the supervision of voting; how votes are counted, compiled, and published; and how to allocate electoral votes within a state based on popular votes.

Congress could also decide to regulate even more fundamental aspects of federal elections. For instance, some states utilize commissions to establish the size and shape for electoral districts,[9] and Congress might require that states adopt some form of commission to inform this process. Or Congress might choose to regulate the primary process. For instance, it has been suggested that Congress could require states to hold "top-two" primaries, in which all candidates run on one slate, and the top two vote getters then oppose each other in a general election.[10] Further, suggestions have been made that the federal government could determine what form of voter identification can be required at the state level.[11]

This report focuses on Congress's constitutional authority to regulate how states establish and implement election procedures.[12] In evaluating any such proposals, an initial question to be asked is which elections will be affected. As noted, state and local authorities have a significant role in regulating state and federal elections. Congress, however, also has authority to regulate elections, and that authority may vary depending on whether the election is for the Presidency, the House, the Senate, or for state or local offices. Further, there may be variation in whether a particular aspect of an election, such as balloting procedures, is amenable to congressional regulation. Consequently, evaluating the authority of Congress to establish standardized election procedures would appear to require a consideration of a variety of different proposals and scenarios.

Relevant Constitutional Provisions

The authority of Congress to legislate regarding these various issues in different types of elections would appear to derive principally from four constitutional provisions:

(...continued)

provided on applications for voter registration.

[9] *See* Justin Levitt, *All About Redistricting*, at http://redistricting.lls.edu/who.php.

[10] Senator Chuck Schumer, *End Partisan Primaries, Save America,* The Opinion Pages, New York Times (July 21, 2014), available at http://www.nytimes.com/2014/07/22/opinion/charles-schumer-adopt-the-open-primary.html?_r=2.

[11] Barbara Taylor, *California Senator Mounts Fight To Counter Voter Photo ID Laws*, CBS San Francisco (October 23, 2014), available at http://sanfrancisco.cbslocal.com/2014/10/30/california-senator-mounts-fight-to-counter-voter-photo-id-laws/.

[12] The report does not address Congress's authority to regulate nonstate actors in regard to elections. Although Congress has significant authority to regulate the behavior of private individuals, organizations, or corporations as regards elections, such regulations may raise First Amendment free speech and free association issues that are beyond the scope of this report. *See, e.g.*, CRS Report R43719, *Campaign Finance: Constitutionality of Limits on Contributions and Expenditures*, by (name redacted).

The Elections Clause

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.
>
> U.S. Const. Article I, §4, cl. 1.

Day of Chusing Presidential Electors Clause

> The Congress may determine the Time of chusing the [Presidential] Electors, and the Day on which they shall give their votes; which Day shall be the same throughout the United States.
>
> U.S. Const. Article II, §1, cl. 4.

Fourteenth Amendment Equal Protection Clause

> No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
>
> U.S. Const. XIV, §§1 & 5.

Fifteenth Amendment

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> The Congress shall have power to enforce this article by appropriate legislation.
>
> U.S. Const. XV, §§1 & 2.

Power as Regards Different Types of Elections

Although the Constitution is silent on various aspects of the voting process, the Constitution seems to anticipate that states would be primarily responsible for establishing procedures for elections. Federal authority to direct how states administer these regulations, however, is also provided for in the Constitution. Congress's power is at its most broad in the case of House elections, which have historically always been decided by a system of popular voting.[13] Its power may be more limited in elections for Senators or President, and is at its narrowest as regards state elections.

[13] U.S. Const. Art. I, Section 2, cl. 1 states "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States...."

House Elections

As noted above, Article I, Section 4, cl. 1 states that Congress may determine "the Times, Places and Manner" for such elections. The Supreme Court and lower courts have interpreted the above language to mean that Congress has extensive power to regulate most elements of a congressional election.

For instance, the Supreme Court has noted that the right to vote for Members of Congress is derived from the Constitution and that Congress therefore may legislate broadly under this provision to protect the integrity of this right.[14] The Court has stated that the authority to regulate the times, places, and manner of federal elections:

> embrace[s] [the] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.... [Congress] has a general supervisory power over the whole subject.[15]

Consequently, it would appear that Congress has broad authority to further enhance its level of federal control over the administration of House election procedures.

Senate Elections

Unlike House elections, Senate elections were, until ratification of the Seventeenth Amendment, decided by a vote of the state legislatures, not by popular vote. This helps explain why congressional power over Senate elections, while almost as broad as it is for House elections, contains one exception—that Congress may not regulate "the Places of chusing Senators." As originally implemented, this language would have limited the authority of Congress to designate where state legislatures would meet for such votes. This deference to the prerogatives of state legislatures would appear to be obsolete now that all Senate elections are decided by popular vote. However, nothing in the Seventeenth Amendment explicitly repealed this restriction, and the meaning of the clause could arguably apply to congressional regulation of sites for popular voting.

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[14] Smiley v. Holm, 285 U.S. 355 (1932) (Congress may delegate authority to draw member districts to state legislatures, exclusive of governor's veto). For a history of congressional regulation of federal elections, see Congressional Research Service, Constitution of the United States, Analysis and Interpretation 127-131 (2012) (available at http://www.crs.gov/conan/details.aspx?mode=topic&doc=Article01.xml&t=1&s=4&c=1).

[15] *Smiley*, 285 U.S. at 366. *See* Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972) (state's authority to regulate recount of elections); United States v. Gradwell, 243 U.S. 476, 483 (1917) (full authority over federal election process, from registration to certification of results); United States v. Mosley, 238 U.S. 383, 386 (1915) (authority to enforce the right to cast ballot and have ballot counted); *In re* Coy, 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte* Yarbrough, 110 U.S. 651, 662 (1884) (authority to make additional laws for free, pure, and safe exercise of right to vote); *Ex parte* Clarke, 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis congressional elections). *See also* United States v. Simms, 508 F. Supp. 1179, 1183-1185 (W.D. La.1979) (criminalizing payments in reference to registration or voting does not offend Tenth Amendment); Prigmore v. Renfro, 356 F. Supp. 427, 430 (N.D. Ala.1972) (absentee ballot program upheld as applied to federal elections), *aff'd*, 410 U.S. 919 (1973); Fowler v. Adams, 315 F. Supp. 592, 594 (M.D. Fla.1970), *appeal dismissed*, 400 U.S. 986 (1971) (authority to exact 5% filing fee for congressional elections).

Arguably, if Congress attempted to establish legislation regulating where states must establish polling sites for Senate elections, such legislation might run afoul of textual limitations of this provision. On the other hand, for practical purposes, most states, if subjected to federal regulation for House elections establishing the location of polling places, would be likely to follow such directions for Senate elections occurring at the same time, if no other reason than administrative convenience.

Presidential Elections

The power of Congress to regulate presidential elections is not as clearly established as the power over House and Senate elections. First, the text of the Constitution provides a more limited power to Congress in these situations. Whereas Article I, Section 4, cl. 1 allows regulation of the "time, place and manner" of congressional elections, Article II, Section 1, cl. 4 provides only that Congress may determine the "time" of choosing presidential electors. Further, despite modern state practice providing for popular voting for electors, the appointment of presidential electors was historically and remains today a power of the state legislatures.[16] Consequently, principles of federalism might incline the Supreme Court to find the appointment of presidential electors less amenable to federal regulation. The major exception to this would be congressional authority under the Fourteenth and Fifteenth Amendments; these powers are addressed *infra*.

The case law on this issue is ambiguous, although Congress's regulatory authority over presidential elections does seem to be more extensive than it might appear based on the text of the Constitution. For instance, the Court has allowed congressional regulation of political committees which seek to influence presidential elections, arguing that such legislation is justified by the need to preserve the integrity of such elections. In *Burroughs v. United States*,[17] the Supreme Court reasoned that

> [w]hile presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.[18]

A question arises, however, whether *Burroughs*, which involves the regulation of third parties to elections, can be distinguished from the regulation of states directly regarding their administration of presidential elections. In *Burroughs*, the Court distinguished the legislation under consideration

[16] U.S. Const. Art. II, Section 1, cl. 2 provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

[17] 290 U.S. 534 (1934). See also Buckley v. Valeo, 424 U.S. 1, 67, 91 (1976) (upholding regulation of campaign financing by the Federal Election Campaign Act of 1971).

[18] *Burroughs*, 290 U.S. at 544-545.

(regulation of political committees) from legislation more directly dealing with state appointment of electors, noting that

> [t]he congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. It in no sense invades any exclusive state power.[19]

Under this language, procedures within the province of states, such as the allocation of electors by a state, would appear to fall outside of the doctrine established in *Burroughs*. Although the Court was not asked to evaluate whether Congress had the power to establish the manner in which the presidential electors were appointed, the language above would appear to indicate that the Court in *Burroughs* had not intended its decision to extend Congress's authority to regulate presidential elections so that it was coextensive with the power to regulate congressional elections.

Surprisingly, however, three U.S. Courts of Appeals, relying on *Burroughs,* reached precisely the opposite result. In upholding the validity of congressional regulation of registration procedures for federal elections under the National Voter Registration Act of 1993 (Motor Voter Act),[20] three federal circuits appeared to find that Congress had the same authority to regulate presidential elections as it did House and Senate elections.[21] However, of the three opinions, two made only passing references to the issue, and only the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) discussed it at any length. In *ACORN v. Edgar*, Chief Judge Posner of the Seventh Circuit wrote that

> Article I, section 4 [providing authority over congressional elections] ... makes no reference to the election of the President, which is by the electoral college rather than by the voters at the general election; general elections for President were not contemplated in 1787.... But these turn out not to be [a] serious omission[] so far as teasing out the modern meaning of Article I, section 4 is concerned. Article II provides [congressional authority over the Time of choosing Electors.] 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. *Burroughs v. United States*, 290 U.S. 534 (1934).[22]

It should be noted that the federal registration standards developed under Motor Voter could probably have been decided under Congress's power over congressional elections, so that the reasoning of these cases would not appear essential to their holdings. These broad holdings, however, do stand as some of the few modern interpretations of Article II, Section 1, cl. 4 and

[19] *Id.* at 543-544.

[20] 42 U.S.C. §§1973gg et seq.

[21] ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coalition v. Reno, 60 F.3d 1411, 1414 (9th Cir. 1995); ACORN v. Miller, 129 F.3d 833, 836 n.1 (1997).

[22] *Edgar*, 56 F.3d at 793.

Burroughs.[23] Those cases' interpretations, however, would appear to be at odds with the limiting language of *Burroughs* quoted previously.[24]

Resolution of this issue may ultimately be important to any determination of whether proposals to standardize election procedures could be specifically applied to presidential elections. Where congressional and presidential election procedures are likely to overlap, such as requirements for absentee balloting, uniform closing times, multiple-day elections, number and accessibility of polling stations, *etc*., regulation of congressional elections may be for practical purposes sufficient. However, where the issue at hand is unique to presidential elections (e.g., allocation of electors based on popular vote), the resolution of this issue may become essential.

Party Primaries

Political parties in the United States serve several functions, including, in most states, choosing nominees to stand for congressional elections and choosing state delegations to national party conventions that choose presidential nominees. As noted previously, Article I, Section 4, cl. 1 and Article II, Section 1, cl. 4 address Congress's authority over, respectively, congressional and presidential elections, and the Fourteenth Amendment supplies additional authority over state elections. In addition, it does appear that Congress's authority over a particular type of election may extend to the primaries for such election.

For a time, the Supreme Court held that congressional power over the selection of congressional and presidential candidates did not reach political parties.[25] Then, in *United States v. Classic*,[26] the Court reversed itself. In *Classic*, the Court considered federal indictments issued against Louisiana election commissioners for ballot fraud while conducting a primary election to nominate a candidate of the Democratic Party to be a Representative in Congress. Louisiana law mandated that party nominations for Congress be established by primaries, and limited the ability of candidates defeated in such primaries from running in the general election.[27] State law also mandated that the party primaries be conducted by the state at public expense, and be subject to numerous statutory regulations as to the time, place, and manner of conducting the election.

Based on this election scheme, the Court found that engaging in ballot fraud in connection with the Louisiana Democratic primary was interference with the choice of the voters at a stage of the election procedure when their choice could have a practical effect on the ultimate decision of who would represent the district. In effect, the Court found that the primary in Louisiana was an integral part of a two-step process that was created by the state to determine who was the most

[23] Further support for this position is seen in *Oregon v. Mitchell*, where Justice Black wrote "... it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." 400 U.S. 112, 124 (1970) (upholding federal statute lowering minimum age for voters). Although Justice Black wrote the opinion of the Court, no other Justice joined this portion of his opinion, as the other Justices instead focused on Congress's power under the Fourteenth Amendment.

[24] In fact, a careful reading of *Burroughs* reveals that the opinion is not even an interpretation of Article II, Section 1 at all (as presumed in the ACORN case and by Justice Black in *Oregon v. Mitchell*), but rather an interpretation (albeit uncited) of Article I, Section 8, cl. 18, the Necessary and Proper Clause. See quoted text accompanying note 14.

[25] Newberry v. United States, 256 U.S. 232 (1921) (plurality opinion holding that Congress did not have the authority to extend federal statutes limiting campaign expenditures to primary elections).

[26] 313 U.S. 299 (1941).

[27] *Classic*, 313 U.S. at 311.

popular choice to serve in Congress.[28] Noting the power of Congress under the Necessary and Proper Clause "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers ... ," the Court held that it was within the authority of Congress (and the states) to regulate the manner in which primaries were to be held.

For instance, the Court has held that political parties may be limited by a state to one candidate for each office on the ballot, and that persons affiliated with such party not seek an office outside of the party process.[29] Further, under state law, the Court has held that smaller parties can be directed to choose their nominees by convention rather than by primary election.[30] This latter case was decided in the context of an Equal Protection Clause challenge, based on the fact that major parties were permitted to choose their candidates by primary election. While noting that the procedures were different, the Court found that the convention method was not inherently burdensome on minority parties, while providing a state-sponsored primary for all parties would be burdensome on the states.[31]

It should be noted, however, that not all activities of political parties may be subject to state or congressional control. For instance, lower courts have rejected constitutional challenges to party rules based on the one person, one vote requirement under the Equal Protection Clause.[32] Or, in *Bachur v. Democratic National Party*,[33] the U.S. Court of Appeals for the Fourth Circuit rejected a challenge to a Democratic National Committee rule requiring proportional representation of women among delegates. The court reasoned that because primary votes are so removed from the choice of presidential party nominee, and because delegates perform a number of internal party functions besides choosing a nominee, rules applicable to general elections need not apply.[34]

Authority to Prevent Disenfranchisement in All Elections

Congress does not have general legislative authority to regulate the manner and procedures used for elections at the state and local level. Nor, as noted above, does it appear to have complete authority to regulate presidential elections. Congress does, however, have extensive authority to prevent voter disenfranchisement by a state or locality. For instance, the Civil War

[28] *Id.* at 313-316. "Unless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries.... The words of §§ 2 and 4 of Article I, read in the sense which is plainly permissible and in the light of the constitutional purpose, require us to hold that this primary election, which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it." *Id.* at 319-320.

[29] Storer v. Brown, 415 U.S. 724, 730-736 (1974) (upholding state law providing that a candidate who has been defeated in a party primary may not be subsequently nominated as an independent or a candidate of any other party).

[30] American Party of Texas v. White, 415 U.S. 767, 781 (1974).

[31] *White*, 415 U.S. at 781-782.

[32] *See, e.g.*, Ripon Society, Inc. v. National Republican Party, 525 F.2d 567, 581-587 (D.C. Cir. 1975).

[33] 836 F.2d 837 (1987).

[34] Richard L. Hasen, "*Too Plain for Argument?" The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 Nw. U. L. Rev. Colloquy 253, 295 (2008).

Amendments,[35] the Nineteenth Amendment,[36] the Twenty-fourth Amendment,[37] and the Twenty-sixth Amendment[38] all seek to prevent discrimination in access to voting, and authorize Congress to exercise power over federal, state, and local elections to implement these protections.[39] The most significant of these provisions is Congress's enforcement authority under the Fourteenth Amendment to provide for equal protection and under the Fifteenth Amendment to prevent disenfranchisement based on race.

Fourteenth Amendment and Equal Protection

The Fourteenth Amendment provides, among other things, that states shall not deprive citizens of equal protection of the laws, and Section 5 of that amendment provides that Congress has the power to legislate to enforce its provisions. This power has been used by Congress to expand access to the polls. For instance, in *Katzenbach v. Morgan*,[40] the Court held that Section 5 of the Fourteenth Amendment authorized Congress not just to enforce the doctrine of equal protection as defined by the courts, but also to help define its scope. In *Katzenbach*, the Court upheld a portion of the Voting Rights Act of 1965 which barred the application of English literacy requirements to persons who had reached sixth grade in a Puerto Rican school taught in Spanish.

In *Flores v. City of Boerne*,[41] however, the Court limited the reach of Congress's Section 5 authority in a way that may have implications for election law. The *Flores* case arose when the City of Boerne denied a church a building permit to expand, because the church was in a designated historical district. The church challenged this action, asserting that the city had not demonstrated a compelling interest in applying its zoning legislation to the church as required by Religious Freedom Restoration Act (RFRA).[42] RFRA, passed in response to the 1990 Supreme Court case of *Employment Division v. Smith*,[43] was an attempt by Congress to reinstate the compelling governmental interest test which had been used to challenge the application of generally applicable laws to religious institutions. In *Flores*, the Court struck down this application of RFRA as beyond the authority of Congress under Section 5 of the Fourteenth Amendment.[44]

In striking down this RFRA application, the Supreme Court held that there must be a "congruence and proportionality" between the injury to be remedied and the law adopted to that end. RFRA focused on no one area of alleged harm to religion, but rather broadly inhibited the application of all types of state and local regulations to religious institutions. Since the Court found no pattern of

[35] U.S. Const., Amend. XIII (prohibiting slavery), Amend. XIV (due process and equal protection) and Amend. XV (voting rights).

[36] "The right of citizens ... to vote shall not be denied ... on account of sex."

[37] "The right of citizens ... to vote ... shall not be denied ... by reason of failure to pay any poll tax...."

[38] "The right of citizens ... to vote shall not be denied ... on account of age."

[39] *See, e.g.*, Voting Rights Act of 1965, P.L. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§1971, 1973-1973bb-1 (1992)).

[40] 384 U.S. 641 (1966).

[41] 521 U.S. 507 (1997).

[42] 42 U.S.C. §§2000bb et seq.

[43] 494 U.S. 872 (1990) (neutral generally applicable laws may be applied to religious practices even if the law is not supported by a compelling governmental interest).

[44] It should be noted that RFRA may still be constitutionally applied to the federal government. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

the use of neutral laws of general applicability to disguise religious bigotry and animus against religion, it found RFRA to be an overbroad response to a relatively nonexistent problem.

Similarly, it might be difficult to justify an overall regulation of state and local elections based on the Fourteenth Amendment, absent a strong showing of systemic disenfranchisement of voters. Rather, *Flores* would seem to dictate that Congress would need to establish narrow proposals showing that particular voting procedures threatened constitutional rights, and that the legislation was a congruent and proportional response to such threat.

For instance, the question has been raised as to whether the case of *Bush v. Gore*,[45] which found Equal Protection concerns regarding the disparate treatment of voters, would support congressional legislation to standardize voting technologies and procedures in all elections, including presidential, state, and local. In *Bush v. Gore*, the Court found that a failure to provide a standard procedure for resolution of ballot disputes raised equal protection issues. A close examination of that case, however, would seem to indicate that the Supreme Court did not intend to significantly extend the application of the Equal Protection Clause, and consequently the Court may not be amenable to the expansion of congressional authority in this area.

In *Bush v. Gore*, a dispute arose regarding, among other things, how to count punch-card election ballots where the paper "chads" had not been fully dislodged. The Supreme Court held that the failure of the Florida Supreme Court to set standards for evaluating these ballots violated the Equal Protection Clause of the Fourteenth Amendment. On its face, this would appear to make it more likely that Congress could pass legislation under Section 5 of the Fourteenth Amendment to avoid these or similar problems. Under *Flores*, such laws would be valid only if Congress could establish that disparity in the use of voting technologies and procedures has historically resulted in violations of the Equal Protection Clause.[46]

In fact, it would be likely that Congress could establish a record of disparity in the application of voting technologies and procedures, as states have historically delegated authority over elections to lesser subdivisions such as electoral districts. These subdivisions, in turn, choose voting methods and procedures appropriate to their size, density and budget, with only general guidance from the state legislatures. Thus, significant variations in voting technologies and procedures probably do occur in most states. There is language in *Bush v. Gore*, however, which would make it unlikely that such variations would be found to be a violation of the Equal Protection Clause. In essence, this language appears to limit the holding in *Bush v. Gore* to only those election procedures that are under the control of a judicial officer.

> The recount process, in its features described here, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstance, for the problem of equal protection in election processes generally presents many complexities.... The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.

[45] 531 U.S. 98 (2000).

[46] *See, e.g.,* Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 369-370 (2001) (historical incidents of disparate treatment of disabled individuals did not rise to the level of constitutional violations).

> When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness be satisfied.

Based on the above language, disparity in voting procedures is only likely to rise to the level of constitutional violation when such disparate procedures are under the authority of single judicial officer, such as during a recount. It is not clear that Congress could establish a history of voting discrimination in these circumstances. Nor is it likely that the Court would find significant intrusions on state or local election district authority to set technology or procedure standards to be proportionate and congruent to such violations as have existed. Consequently, it would appear that the impact of the case of *Bush v. Gore* on the issue of congressional authority over elections would be minimal.

Fifteenth Amendment and Race Discrimination

Congress also has authority under the Fifteenth Amendment to address the narrower issue of voter discrimination based on race, although the Court has also established limits on this power. The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War, with the intent of ensuring the enfranchisement of former slaves. After nearly a century of continued voting discrimination, however, Congress passed the Voting Rights Act of 1965 (Voting Rights Act),[47] which is designed to prevent discrimination in voting.[48] The passage of this act was initially upheld by the Court as being within Congress's authority to enforce the Fourteenth Amendment.[49] In the case of *Shelby County v. Holder*,[50] however, the Supreme Court imposed limits on the most stringent part of the act, Section 5.

Section 5 requires certain states and jurisdictions with a history of voting discrimination to obtain preclearance approval from either the U.S. Attorney General or the U.S. District Court for the District of Columbia before implementing any change to a voting practice or procedure. Section 4(b) defined the jurisdictions subject to or "covered" by Section 5 as ones that had a voting test (such as a literacy test) or device (such as a poll tax) in place as of November 1, 1972, and less than 50% turnout for the 1972 presidential election. In 2006, Congress amended the act to extend the applicability of the preclearance requirements until 2031.[51]

In order to be granted preclearance, jurisdictions had the burden of proving that a proposed voting change would have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. A proposed change to voting procedures would be determined to have a discriminatory effect—and accordingly, preclearance would be denied—if it would lead to retrogression in minority voting strength.[52] In *Shelby County*, the Court found that the application of this scheme under the current formula for

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[47] 42 U.S.C. §§1973 et. seq.

[48] For background on the Voting Rights Act, see CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by (name redacted), and CRS Report R43626, *The Voting Rights Act of 1965: Background and Overview*, by (name redacted).

[49] *See, e.g.,* South Carolina v. Katzenbach, 383 U.S. 301 (1966); City of Rome v. United States, 446 U.S. 156 (1980).

[50] 133 S. Ct. 2612 (2013).

[51] P.L. 109-246, *codified at* 42 U.S.C. §1973b(a)(8).

[52] For background on the Voting Rights Act, see CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by (name redacted).

determining which jurisdictions are "covered" exceeded Congress's authority under the Fifteenth Amendment.[53]

In *Shelby County*, the Court noted that, except for the limited circumstance of admission to the union,[54] the federal government is not generally prevented from treating different states differently. The Court, however, also pointed out that the federal government does not have a general right to reject individual state enactments before they go into effect,[55] and that the states retain broad autonomy in structuring their legislative priorities. Thus, the Court applied a "fundamental principle of equal sovereignty" analysis to the Voting Rights Act, requiring that a "statute's disparate geographic coverage [be] sufficiently related to the problem that it targets."[56]

In *Shelby County*, the Court found that the coverage provisions of Section 4(b) were based on decades-old data and the prior existence of practices that had long been eradicated. For instance, the formula was based on whether states had literacy tests and low voter registration and turnout in the 1960s and early 1970s, despite the fact that such tests have been banned nationwide for over 40 years. Further, the Court found that voter registration and turnout numbers in the covered states had risen dramatically in the years since. Finally, the Court concluded that the specific racial disparity in voter participation that had justified the preclearance remedy and the coverage formula no longer existed.[57] Thus, the Court struck down the coverage formula, finding that the disparate treatment of states in the context of election regulation was not sufficiently related to the apparent governmental concern.

As regards the Voting Rights Act, *Shelby County* would appear to preclude the application of Section 5 unless Congress can reformulate Section 4(b) to more closely reflect current aspects of voter participation in various jurisdictions. It is not clear, however, whether *Shelby County* has significant implications for election regulations in other contexts. Most election law is national in scope, and does not contain geographical variations based on historical practice. Thus, "fundamental principle of equal sovereignty" may have limited impact outside of the Voting Rights Act context.

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[53] Before *Shelby County* was decided, the Supreme Court had signaled that Section 5 was vulnerable to constitutional challenge. In its 2009 decision of *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*, the Court cautioned that the VRA's preclearance regime and coverage formula "raise serious constitutional questions." 557 U.S. 193, 204 (2009). According to the Court, the voting discrimination that Section 5 was designed to address may not be concentrated in the covered states and jurisdictions that were currently subject to preclearance. Furthermore, the Court warned that the coverage formula was based on data that were more than 35 years old, and therefore failed to account for current political conditions. *Id*. at 203-204.

[54] Under the equal footing doctrine, Congress may not impose conditions on states upon admission that otherwise exceed Congress's authority. *Coyle v. Smith*, 221 U.S. 559 (1911) (Oklahoma not bound by the federal Oklahoma Enabling Act, which mandated the location of the state's capital). *But see* South Carolina v. Katzenbach, 383 U.S. at 328-329 (equal footing doctrine does not apply outside the context of conditions on state admission).

[55] The Court noted that a proposal to grant such authority was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. *See* 1 Records of the Federal Convention of 1787, pp. 21, 164-168 (M. Farrand ed. 1911); 2 *id.*, at 27-29, 390-392.

[56] *Shelby County*, 133 S. Ct. at 2622, *quoting Northwest Austin*, 557 U.S. at 203.

[57] *Shelby County*, 133 S. Ct. at 2627-2628.

Federalism and Election Regulation

Tenth Amendment

As noted, modern election law is mostly regulated at the state level, but there are a variety of federal laws that direct how states will implement certain aspects of elections. While concurrent jurisdiction between the states and federal government over a particular issue area is relatively common, it is less common for the federal government to direct how the states will exercise its authority in such area. In other contexts, the directing or "commandeering" of states to implement federal programs can raise Tenth Amendment concerns. This, however, does not appear to be the case with election laws.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Initially, the Supreme Court interpreted the Tenth Amendment to have substantive content, so that certain "core" state functions would be beyond the authority of the federal government to regulate. Thus, in *National League of Cities v. Usery*,[58] the Court struck down federal wage and price controls on state employees as involving the regulation of core state functions.[59] The Court, however, overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority.*[60] In sum, the Court in *Garcia* seems to have said that most disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions, and that the states should look for relief from federal regulation through the political process.[61]

The Court soon turned, however, to the question of how the Constitution limits the process by which the federal government regulates the states. In *New York v. United States*,[62] Congress had attempted to regulate in the area of low-level radioactive waste. In a 1985 statute, Congress provided that states must either develop legislation on how to dispose of all low-level radioactive waste generated within the state, or the state would be forced to take title to such waste, which would mean that it became the state's responsibility. The Court found that although Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it had only the power to regulate the waste directly. Here, Congress had attempted to require the states to perform the regulation, and decreed that the failure to do so would require the state to deal with the financial consequences of owning large quantities of radioactive waste. In effect, Congress sought to "commandeer" the legislative process of the states. In the *New York* case, the Court

[58] 426 U.S. 833 (1976).

[59] In *National League of Cities v. Usery*, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was undoubtedly within the scope of the Commerce Clause, but it cautioned that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

[60] 469 U.S. 528 (1985). Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations" in areas of traditional governmental functions had proven impractical, and that the Court in 1976 had "tried to repair what did not need repair."

[61] *See also* South Carolina v. Baker, 485 U.S. 505 (1988).

[62] 505 U.S. 144 (1992).

found that this power was not found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment.[63]

Thus, the question arises as to whether Tenth Amendment challenges can be brought when the federal government directs states on how to implement elections. For instance, there have been several challenges to the Motor Voter Act.[64] The Motor Voter Act provides that a state driver's license application contain information enabling it to also serve as an application to register to vote in federal elections; requires states to create a mail-order form for registering to vote; and provides that states designate all offices that dispense welfare or provide benefits to the disabled as voter registration agencies. In addition, the law requires that states assist voting by persons in certain vulnerable populations.

These provisions of the Motor Voter Act have been found to fall within the power of Congress.[65] As noted, Congress has the authority under Article I, Section 4, cl. 1 to provide for the "The Times, Places and Manner of holding Elections for Senators and Representatives." In *ACORN v. Edgar*,[66] for instance, the Seventh Circuit observed that the language of Article I, Section 4, cl. 1 "is broadly worded and has been broadly interpreted." The court noted that the phrase "Manner of holding Elections" has been interpreted to include registering voters,[67] and the power under the section has been held to extend beyond general federal elections to include even regulation of primaries.[68] Further, the court noted that such authority as is found in Article I, Section 4, cl. 1 is supplemented by the Necessary and Proper Clause.[69]

As noted, one might ask whether the principles of the Tenth Amendment would apply in this circumstance, so that directing state agencies to implement federal regulations would violate the "anti-commandeering" requirements of the Tenth Amendment. However, such a Tenth Amendment argument was rejected in *Edgar*. The court in that case noted that the Tenth Amendment has no application to Article I, Section 4, cl. 1 which clearly contemplates that states will have the burden of administering federal elections. Thus, this clause, unlike most other

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[63] A later case presented the question of the extent to which Congress could regulate through a state's executive branch officers. This case, *Printz v. United States*, 521 U.S. 898 (1997), involved the Brady Handgun Act. The Brady Handgun Act required state and local law-enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase. This portion of the act was challenged under the Tenth Amendment, under the theory that Congress was without authority to "commandeer" state executive branch officials. After a historical study of federal commandeering of state officials, the Court concluded that commandeering of state executive branch officials was, like commandeering of the legislature, outside of Congress's power, and consequently a violation of the Tenth Amendment.

[64] 42 U.S.C. §§1973gg et seq. The Motor Voter Act is discussed *supra*.

[65] ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coalition v. Reno, 60 F.3d 1411, 1414 (9th Cir. 1995); ACORN v. Miller, 129 F.3d 833, 836 n.1 (1997).

[66] 56 F.3d 791 (7th Cir. 1995).

[67] Smiley v. Holm, 285 U.S. 355, 366, (1932); *Ex parte* Siebold, 100 U.S. 371 (1879); United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 351-355 (E.D. La. 1965) (three-judge court).

[68] United States v. Classic, 313 U.S. 299 (1941) ("Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by [federal law].").

[69] *Edgar*, 56 F.3d at 794. U.S. Const., Art. I, §8. "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

provisions of the Constitution, is direct authority for Congress to regulate states as to the "Times, Places and Manner" of elections.[70]

The court in *Edgar* did note that there may be some theoretical limits to how Congress exercises its power under Article I, Section 4, cl. 1. For instance, the court contemplated that if Congress attempted to use that power to "destroy state government" by deeming all employees of the state full-time federal voting registrars in order to make sure that every eligible federal voter in every state was registered, then the limits of the authority might be considered. However, the court found that requirements imposed by the Motor Voter Act or similar proposals did not represent an extraordinary financial or administrative burden on the state.

Spending Power

The Spending Clause grants Congress the authority "to pay the debts and provide for the common defense and general welfare of the United States...." Under this power, Congress has expansive authority to spend money for the general welfare, which could encompass making monies available to state and local governments to modify their election procedures.[71] Further, the allocation of such grant monies could be conditioned on compliance by state or local officials with national standards for election procedures.[72] Such grant conditions need not be limited by the authority of Congress discussed above to directly legislate on the issue, but could address election procedures regardless of whether they were for the House, Senate, presidential, state, or local elections.[73] Considering the number of federal programs and the amount of federal funds provided to the states, this represents a significant power for Congress to exercise.[74]

Although most grant conditions by Congress are constitutionally uncontroversial, the Supreme Court has suggested that there are limits on the Spending Clause authority. In *South Dakota v. Dole*, Congress enacted the National Minimum Drinking Age Amendment of 1984, which directed the Secretary of Transportation to withhold a percentage of federal highway funds from states in which the age for purchase of alcohol was below 21 years. The state of South Dakota, which permitted 19-year-olds to purchase beer, brought suit, arguing that the law was an invalid exercise of Congress's power under the Spending Clause to provide for the "general welfare." The Supreme Court held that, as the indirect imposition of such a standard was directed toward the general welfare of the country, it was a valid exercise of Congress's spending power.

The Court did, however, note some limits to this power. First, a grant condition must be related to the particular national projects or programs to which the money was being directed. In *Dole*, the

[70] 56 F.3d at 796.

[71] U.S. Const., Art. I, Section 8, cl. 1 provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...."

[72] South Dakota v. Dole, 483 U.S. 203 (1987) (Congress may condition grants to states based on criteria related to the underlying grant scheme).

[73] *Dole*, 483 U.S. at 208-209.

[74] For instance, in HAVA (discussed above), states and territories were eligible to receive $2.3 billion in federal requirements payments once each jurisdiction had published a "state plan" in the *Federal Register*, followed by a 45-day public comment period and the filing of a certification with the Election Assistance Commission. See CRS Report RS20898, *The Help America Vote Act and Election Administration: Overview and Issues*, by (name redacted) and (name redacted), at 7.

congressional condition imposing a specific drinking age was found to be related to the national concern of safe interstate travel, which was one of the main purposes for highway funds being expended. Second, the Court suggested that in some circumstances, the financial inducements offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion," which would suggest a violation of the Tenth Amendment. In *Dole*, however, the percentage of highway funds that were to be withheld from a state with a drinking age below 21 was relatively small, so that Congress's program did not coerce the states to enact higher minimum drinking ages than they would otherwise choose.[75]

In the context of election regulation, it would appear that any proposed legislation to influence state behavior regarding elections would, under *Dole*, have to involve federal funds that are in some way related to the funding of elections. It is not clear, however, that the coercion analysis of *Dole* would be applicable in all cases. For instance, as noted previously in *ACORN v. Edgar*, the Supreme Court had found that Tenth Amendment commandeering limitations were not applicable to congressional authority over congressional elections, as the Constitution contemplates that Congress can dictate the manner in which the states administer such elections. Thus, it would appear that the Tenth Amendment limitations found in the coercion doctrine would apply only to those election contexts where Congress did not already have legislative authority to regulate that state.

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[75] The more recent case of *National Federation of Independent Business (NFIB) v. Sebelius* seems to suggest an alternative line of analysis regarding coercion. In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA), which, among other things, required states to expand Medicaid eligibility or lose Medicaid funding. The Court, in a controlling opinion by Chief Justice Roberts, found that the enforcement mechanism for the ACA Medicaid expansion, withdrawal of all Medicaid funds, was a violation of the Tenth Amendment. Justice Roberts's opinion in *NFIB*, however, addressed a slightly different question than *Dole*: whether a grant condition attached to a "new and independent" program (here, the Medicaid expansion) that threatened the funding of an existing program (here, Medicaid) violated the Tenth Amendment. Justice Roberts's opinion in *NFIB* held that, in the case of existing program funding being conditioned on the adoption of a "new and independent" program, the amount of federal funds at issue cannot represent a significant portion of a state's budget, or its withdrawal will be found to be unconstitutionally coercive under the Tenth Amendment. Justice Roberts concluded that withdrawal of federal program funds which made up 10% of an average state's budget, such as Medicaid, was unconstitutional because it represented a "gun to the head" and was a form of "economic dragooning."