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# ELECTIONS

## The Scope of Congressional Authority in Election Administration



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<b>Abstract</b> Events surrounding the last presidential election have led to intense national interest in voting processes and the administration of elections. As part of the broad congressional interest in this issue, we received a joint inquiry from Senator Trent Lott, Republican Leader; Senator Tom Daschle, Democratic Leader; Senator Mitch McConnell, Chairman, and Senator Christopher Dodd, Ranking Member, of the Senate Committee on Rules and Administration. The Senators asked that we review the current federal role, and limitations thereof, in the administration of elections.		<b>Monitoring Agency Acronym</b>
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The President of the Senate  
The Speaker of the House of Representatives

Events surrounding the last presidential election have led to intense national interest in voting processes and the administration of elections. As part of the broad congressional interest in this issue, we received a joint inquiry from Senator Trent Lott, Republican Leader; Senator Tom Daschle, Democratic Leader; Senator Mitch McConnell, Chairman, and Senator Christopher Dodd, Ranking Member, of the Senate Committee on Rules and Administration. The Senators asked that we review the current federal role, and limitations thereof, in the administration of elections.

In order to address the federal role in election administration, we reviewed: (1) the constitutional framework for the administration of elections, focusing on Congress' authority to regulate congressional, presidential, and state and local elections, as well as its authority to provide grants to support election processes; and (2) major federal statutes enacted in the area of election administration.

In summary, the constitutional framework for elections contemplates both state and federal roles. States are responsible for the administration of both their own elections and federal elections. States regulate various phases of the elections process and in turn incur the costs associated with these activities.

Notwithstanding the state role in elections, Congress has authority to affect the administration of elections in certain ways. Congressional authority to legislate in this area derives from various constitutional sources, depending upon the type of election. With regard to the administration of federal elections, Congress has constitutional authority over both congressional and presidential elections.

- Congress' authority to regulate congressional elections derives primarily from Article I, Section 4, Clause 1 of the Constitution (known as the Elections Clause). The Elections Clause provides that the states will prescribe the "Times, Places and Manner" of congressional elections, and that Congress may "make or alter" the states' regulations at any time, except as to the places of choosing Senators. The courts

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have held that the Elections Clause grants Congress broad authority to override state regulations in this area. Therefore, while the Elections Clause contemplates both state and federal authority to regulate congressional elections, Congress' authority is paramount to that of the states.

- With respect to presidential elections, the text of the Constitution is more limited. Specifically, Article II, Section I, Clause 4, provides that “Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” Despite this limited language, the Supreme Court and federal appellate courts have upheld certain federal statutory provisions regulating presidential elections that go beyond regulating the “time” of choosing the electors. However, because federal legislation that relates solely to the administration of presidential elections has been fairly limited, case law on this subject has been sparse. Consequently, the precise parameters of Congress' authority to pass legislation relating to presidential elections have not been clearly established.

For state and local elections, Congress does not have general constitutional authority to legislate regarding the administration of these elections. However, Congress has the authority, under a number of constitutional amendments, to enforce prohibitions against specific discriminatory practices in all elections, including federal, state and local elections. For example, constitutional amendments prohibit voting discrimination on the basis of race, color, or previous condition of servitude (Fifteenth Amendment), sex (Nineteenth Amendment), and age (Twenty-sixth Amendment). In addition, the Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” Each of these Amendments contains an enforcement clause, allowing Congress to pass legislation to enforce the substantive rights promised in the Amendment. In addition to direct regulation of the administration of elections, Congress may, in the exercise of its spending power, encourage state action by attaching certain conditions to the receipt of federal funds.

Congress has passed legislation relating to the administration of both federal and state elections, pursuant to its various constitutional powers. Federal legislation has been enacted in several major functional areas of the voting process, as described in more detail below. These areas include the timing of federal elections; voter registration; absentee voting requirements; accessibility provisions for the elderly and handicapped; and prohibitions against discriminatory voting practices.

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## Constitutional Framework

The constitutional framework for elections contemplates both state and federal roles. States, in the first instance, regulate the elections process, including, for example, ballot access, registration procedures, absentee voting requirements, establishment of polling places, provision of election day workers, and counting and certification of the vote. The states in turn incur the costs associated with these activities. As described by the Supreme Court, “the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.”<sup>1</sup> While election policy and procedures are legislated primarily at the state level, states typically have decentralized this process so the details of administering elections are carried out at the city or county levels, and voting is done at the local level.

Although the states are responsible for running elections, Congress has authority to affect the administration of elections. Congress’ authority to regulate elections derives from various constitutional sources, depending upon the type of election. With regard to federal elections, Congress has constitutional authority over both congressional and presidential elections. Article I, Section 4, Clause 1, known as the Elections Clause, provides Congress with broad authority to regulate congressional elections:

“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.”

Article II, Section 1, Clause 4, pertains to Congress’ power to set the time of choosing of presidential electors:

“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”

In addition, with respect to federal, state and local elections, a number of constitutional amendments authorize Congress to enforce prohibitions against specific discriminatory practices.

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## Congress' Authority to Regulate Congressional Elections

Congress' authority to regulate congressional elections derives primarily from the Elections Clause, quoted above. The Elections Clause requires, in the first instance, that the states are to prescribe the times, places and manner of holding elections for Senators and Representatives.<sup>2</sup> Congress, under the Elections Clause, "may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."<sup>3</sup>

The Elections Clause is broadly worded and has been broadly interpreted by the courts. As early as 1879, in Ex Parte Siebold, the Supreme Court found Congress' powers to regulate congressional elections to be plenary and paramount.<sup>4</sup> The Court in Siebold upheld the power of Congress to impose penalties for the violation of state election laws regulating the election of members to the House of Representatives. Petitioners in the case (who were election officials convicted under the statute) argued that Congress had no constitutional power to make partial regulations intended to be carried out in conjunction with regulations made by the state. They argued that, under the Elections Clause, when Congress makes any regulation on the subject, it must assume exclusive control of the whole subject.<sup>5</sup> The Court rejected this argument, stating that the power to regulate congressional elections "may be exercised as and when Congress sees fit to exercise it" and "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to 'make or alter.'" <sup>6</sup>

Similarly, in 1884, the Supreme Court, in Ex Parte Yarbrough, upheld the authority of Congress under the Elections Clause to enact federal criminal code provisions protecting the act of voting in congressional elections from violence and intimidation.<sup>7</sup> The Court, noting that it was not until 1842 that Congress took any action under the Elections Clause, stated that "it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted."<sup>8</sup> Referring to previous actions Congress had taken to protect the integrity of the elections process, the Court stated that when Congress "finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground and are to be upheld for the same reasons."<sup>9</sup>

In the Supreme Court's 1932 decision in Smiley v. Holm, the Court dealt with the legislative procedures states must follow in reapportioning congressional districts.<sup>10</sup> The Court wrote that Congress has a general supervisory power over the whole subject of congressional elections, and stated that in exercising this power Congress "may supplement...state

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regulations or may substitute its own.”<sup>11</sup> In frequently quoted dicta, the Court found the “comprehensive words” of the Elections Clause to:

“ . . . embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”<sup>12</sup>

Subsequent decisions have similarly acknowledged Congress’ broad powers under the Elections Clause. In 1941, the Supreme Court, in United States v. Classic, construed the Elections Clause, as a means of protecting the integrity of elections, to grant Congress the authority to regulate congressional primary elections.<sup>13</sup> The Court in Classic held that where state law makes the primary election a “necessary step” of choosing representatives, such an election is an election within Congress’ power to regulate under the Elections Clause.<sup>14</sup>

As recently as 1997, the Supreme Court reiterated in Foster v. Love that the Elections Clause invests the states with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices.<sup>15</sup> The Court in Foster found that the regulation of the time of elections for Representatives and Senators was a matter on which the Elections Clause explicitly gave Congress the final say, and thereby voided a conflicting state statutory scheme.<sup>16</sup> It is well settled, wrote the Court, that the “Elections Clause grants Congress ‘the power to override state regulations’ by establishing uniform rules for federal elections, binding on the States.”<sup>17</sup>

Federal appellate courts have also interpreted the Elections Clause as conferring broad authority on Congress, in the context of challenges to the National Voter Registration Act of 1993 (NVRA), known as the “motor voter” law.<sup>18</sup> The three U.S. Court of Appeals cases discussed below upheld the constitutionality of the NVRA, and in doing so addressed the extent to which Congress may use the states to implement regulations enacted under the Elections Clause.

The NVRA requires states to establish certain procedures to facilitate the registration of voters in federal elections, both congressional and presidential. Among other duties imposed on the states, the Act requires states to allow registration by mail, in person during application for a

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driver's license, and in person at various types of state agencies and offices. Three states—Illinois, California, and Michigan—refused to comply with NVRA, arguing that Congress overstepped its authority to regulate federal elections. The appellate courts rejected their claims in ACORN v. Miller, 129 F.3d 833 (6th Cir. 1997) (Michigan); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996) (California); and ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995) (Illinois).

In all three cases, the courts found that the NVRA was a permissible exercise of Congress' broad authority to "make or alter" regulations regarding federal elections under the Elections Clause.<sup>19</sup> Thus, for example, the court in Wilson stated that "the Supreme Court has read the grant of power to Congress in Article 1, section 4, as quite broad,"<sup>20</sup> and that NVRA, "on its face, fits comfortably within its grasp."<sup>21</sup>

The courts rejected arguments advanced by the states that Congress was prohibited by the Tenth Amendment<sup>22</sup> from imposing upon states the burden of administering the federal voter registration program. The states relied primarily on New York v. United States, in which the Supreme Court held that Congress was not authorized under the Commerce Clause to directly compel the states to enact and enforce a federal regulatory program.<sup>23</sup> In rejecting the Tenth Amendment arguments advanced by the states, the NVRA courts, in general, distinguished New York on the basis that the Elections Clause, unlike the Commerce Clause, empowers Congress to impose on the states precisely the burden at issue.<sup>24</sup> As described by the court in Edgar,

"[The Elections Clause] does not authorize Congress only to establish a system of federal voter registration. The first sentence, remember, requires the states to create and operate such a system and the second authorizes Congress to alter the state's system—but it is still the state's system, manned by state officers and hence paid for by the state."<sup>25</sup>

The court in Miller likewise observed that the Elections Clause "explicitly grants Congress the authority to force states to alter their regulations regarding federal regulations, and does not condition its grant of authority on federal reimbursement."<sup>26</sup>

The NVRA cases did, however, suggest that Congress' power under the Elections Clause may not be limitless. For example, the court in Edgar recognized that there could be circumstances where Congress might go so far in regulating state activity that it would be beyond "merely altering the

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state's regulation of federal elections."<sup>27</sup> This court posited what it referred to as the "extraordinarily unlikely" scenario whereby Congress might conscript "all employees of the state [to be] full-time federal voting registrars in order to make sure that every eligible federal voter in every state was registered."<sup>28</sup> In addition, while the court in Wilson recognized Congress' broad powers under the Elections Clause, it expressed sensitivity to the significant costs that states may incur in carrying out congressional election regulations.<sup>29</sup>

While the Constitution contemplates broad state and federal authority to regulate congressional elections, Congress' authority under the Elections Clause has been interpreted to be paramount to that of the states.<sup>30</sup> The Supreme Court has clearly stated that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the States.<sup>31</sup>

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## Congress' Authority to Regulate Presidential Elections

While Congress has the explicit authority under the Elections Clause to regulate the times, places, and manner of congressional elections, with respect to presidential elections, Article II, Section 1, Clause 4 simply provides that the "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." At the time of the Constitution's adoption in 1787, general elections for President were not contemplated.<sup>32</sup> The Constitution provides, instead, for the election of the President by electors appointed by each state.<sup>33</sup> The state legislatures are empowered to direct the manner in which the electors shall be appointed,<sup>34</sup> and all 50 states and the District of Columbia, in turn, currently provide that presidential electors be elected by popular vote.

The Supreme Court and federal appellate courts have construed Congress' authority to regulate presidential elections as being broader than merely regulating the time of choosing presidential electors.<sup>35</sup> However, as discussed below, the precise parameters of Congress' authority to pass legislation relating to presidential elections have not been clearly established.

A key ruling in the area of congressional regulation of presidential elections is the Supreme Court's 1934 decision in Burroughs v. United States.<sup>36</sup> In Burroughs, the Court addressed the constitutionality of the Federal Corrupt Practices Act, which imposed various bookkeeping and reporting requirements on political committees accepting contributions or making expenditures to influence presidential elections. The Act also

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contained criminal penalties. In upholding a prosecution under the Act, the Court recognized the power of Congress to regulate certain aspects of presidential elections, reasoning, in part, that the narrow view of limiting Congress' authority to only that of determining the time of choosing the electors, and the day on which they shall give their votes, "is without warrant."<sup>37</sup> In light of the federal functions that presidential electors serve and the importance of the presidency, the Court reasoned that:

"While 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."<sup>38</sup>

The Court also recognized that the legislation did not interfere with the states' constitutional powers to determine the manner in which it appoints presidential electors.<sup>39</sup> In particular, the Court found that "[n]either 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," but instead regulated the operation of national political committees, which were, "if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately."<sup>40</sup>

Although the Burroughs case dealt with legislation that regulated third parties, as opposed to direct regulation of the states, federal courts have relied on the Supreme Court's decision for the proposition that Congress has the authority to regulate presidential elections. The three federal appellate court cases addressing challenges to the NVRA, discussed above, each rely on Burroughs for the proposition that Congress has such authority. For example, the court in Voting Rights Coalition v. Wilson stated that, under Burroughs, "[t]he broad power given to Congress over congressional elections has been extended to presidential elections," while the court in ACORN v. Edgar cited Burroughs for the proposition that Congress' authority over presidential elections is "coextensive" with Congress' Election Clause authority over congressional elections.<sup>41</sup>

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The precise parameters of Congress' authority to pass legislation relating to presidential elections are not as clearly established as Congress' authority over its own elections. Congress' constitutional authority over presidential elections is textually more limited than its authority over its own elections. More specifically, whereas Congress' authority under the Elections Clause provides for the regulation of times, places, and manner of congressional elections, its authority over presidential elections, at Article II, Section 1, Clause 4, simply provides that Congress may determine the time of choosing presidential electors. Despite this distinction, Congress' authority to regulate presidential elections is clearly not confined only to matters related to timing. However, federal legislation relating solely to the administration of presidential elections has been fairly limited and, therefore, federal case law on the subject is also rather sparse.

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### Congress' Authority to Regulate State and Local Elections

Congress does not have general authority under the Constitution to legislate regarding the administration of state and local elections. However, Congress has the authority under a number of constitutional amendments to enforce prohibitions against specific discriminatory practices in all elections, including federal, state and local elections. These constitutional amendments prohibit voting discrimination on the basis of race, color, or previous condition of servitude (Fifteenth Amendment), sex (Nineteenth Amendment), any poll tax or other tax (Twenty-fourth Amendment), and age (Twenty-sixth Amendment). In addition, the Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Each of these Amendments contains an enforcement clause, which grants Congress legislative authority to enforce the substantive rights promised by the Amendment.

The major piece of federal legislation that prohibits states from engaging in discriminatory voting practices is the Voting Rights Act of 1965, as amended.<sup>42</sup> In a string of cases addressing the constitutionality of the Voting Rights Act, the Supreme Court has mapped out the Fourteenth and Fifteenth Amendment contours of federal authority to enact nondiscrimination legislation in the voting context. The Court has upheld numerous provisions of the Act against federalism challenges. See South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the requirement for federal preclearance<sup>43</sup> of state election law changes, the appointment of federal election examiners, and the suspension of literacy tests as a voting prerequisite in covered jurisdictions); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding the abolition of English-language literacy tests as a

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voting prerequisite); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding the suspension of literacy tests nationwide, the abolition of state durational residency requirements as a prerequisite to voting in presidential elections, the requirement for absentee balloting in presidential elections, and the enfranchisement of eighteen-year olds in federal elections); City of Rome v. United States, 446 U.S. 156 (1980) (upholding a preclearance requirement that proposed election law changes have neither a discriminatory purpose nor effect); and Lopez v. Monterey County, 525 U.S. 266 (1999) (upholding a requirement for federal preclearance of election law changes in covered localities, notwithstanding that a noncovered state mandated the change). However, the Supreme Court has invalidated one provision of the Voting Rights Act. In Oregon v. Mitchell, the Court found that Congress exceeded its authority by enfranchising eighteen-year olds in state and local (as opposed to federal) elections. A review of the above decisions indicates that Congress may subject states and localities to voting legislation, provided that the legislation deters discrimination of the type contemplated by the Fourteenth and Fifteenth Amendments.

A recent Supreme Court application of constitutional standards in the voting rights context is contained in Bush v. Gore.<sup>44</sup> The Court, in determining whether manual recount procedures adopted by the Florida Supreme Court were consistent with the obligation to avoid arbitrary and disparate treatment of the electorate, found a violation of the Equal Protection Clause of the Fourteenth Amendment. In the 5-4 ruling, the per curiam opinion stated, “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”<sup>45</sup> However, the opinion explicitly limited the analysis to the set of facts presented, specifically “the special instance of a statewide recount under the authority of a single state judicial officer.”<sup>46</sup> It remains to be seen how far the courts will go in the future with the application of equal protection in the voting context.

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## Other Congressional Authorities

Aside from the direct regulation of election administration, Congress may, in exercising its spending power,<sup>47</sup> encourage state action by attaching conditions to the receipt of federal funds.<sup>48</sup> In South Dakota v. Dole, for example, the Supreme Court held that Congress could withhold federal highway funds from states failing to adopt Congress’ choice of a minimum drinking age.<sup>49</sup> The Court found that Congress could act indirectly under its spending power to encourage state action even if Congress lacked the

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power to regulate directly.<sup>50</sup> The Court, however, in noting that the spending power is not unlimited, enumerated the following restrictions on the spending power: (1) the exercise of the spending power must be in pursuit of the general welfare; (2) such conditional grants must be done in an unambiguous manner whereby states can exercise their choice knowingly, cognizant of the consequences of their participation; (3) conditions on federal grants must be related to the federal interest in particular national projects or programs; and (4) other constitutional provisions may provide an independent bar to the conditional grant of funds.<sup>51</sup> The Court also recognized that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>52</sup> Nonetheless, the Court recognized that “the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.”<sup>53</sup>

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## Major Federal Statutes

Congress has legislated regarding the administration of elections, both for federal elections and in certain cases at the state level. The authority for such legislation is grounded in the Constitution, as discussed earlier. However, attempting to categorize particular election laws according to their constitutional underpinnings can be challenging, given that more than one source of authority may potentially apply.<sup>54</sup> Therefore, the following discussion of major federal election administration statutes is presented by functional areas in the voting process: (1) timing of federal elections; (2) voter registration; (3) absentee voting requirements; (4) accessibility provisions for the elderly and handicapped; and (5) prohibitions against discriminatory voting practices.<sup>55</sup>

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## Timing of Federal Elections

Congress has passed several pieces of legislation with respect to the timing of congressional and presidential elections. In 1872, under its Elections Clause authority, Congress first set a date for the popular election of Representatives.<sup>56</sup> After the method of selecting Senators was changed by the Seventeenth Amendment in 1913 from being chosen by the state legislatures to being chosen by popular vote, Congress in 1914 set the same date for the election of Senators.<sup>57</sup> Congress has also established a date for the selection of presidential electors<sup>58</sup> under its Article II, Section 1 authority to determine the time of choosing of presidential electors.<sup>59</sup> These statutory provisions, in concert, mandate “holding all elections for Congress and the Presidency on a single day throughout the Union.”<sup>60</sup>

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The Supreme Court has held that federal laws regulating the time of elections for Representatives and Senators is a matter on which the Elections Clause gives Congress the final say. In its 1997 decision, Foster v. Love, the Supreme Court struck down a Louisiana state statutory scheme because it conflicted with federal laws regulating the time of federal elections.<sup>61</sup> The Court noted that its judgment was “buttressed by an appreciation of Congress’s object ‘to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States.’”<sup>62</sup> The Foster Court indicated that Congress was concerned with both the “distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States,” and “the burden on citizens forced to turn out on two different election days to make final selections of federal officers in Presidential election years.”<sup>63</sup>

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## Voter Registration

As discussed earlier, one of the key pieces of federal legislation in the area of registration is the National Voter Registration Act of 1993 (NVRA).<sup>64</sup> Congress enacted NVRA to establish registration procedures designed to “increase the number of eligible citizens who register to vote in elections for Federal office,” without compromising “the integrity of the electoral process” or the maintenance of “accurate and current voter registration rolls.”<sup>65</sup>

NVRA requires all states to adopt the federal voter registration procedures detailed in the Act, except for those states that have no registration requirements or that permit election-day registration with respect to federal elections.<sup>66</sup> The centerpiece of NVRA is the requirement that states must allow applicants for driver’s licenses to register to vote on the same form.<sup>67</sup> In addition, NVRA requires states to provide voter registration forms and accept completed applications at various state agencies, including any office in the state providing public assistance, any office in the state that provides state-funded disability programs, and other agencies chosen by the state, such as state licensing bureaus, county clerks’ offices, public schools and public libraries.<sup>68</sup> NVRA also requires the Federal Election Commission to develop a national mail-in voter registration form, which states must use and accept.<sup>69</sup> Under NVRA, states must designate a chief election official responsible for implementing the requirements of the Act.<sup>70</sup>

NVRA also contains detailed requirements regarding when a state may purge a voter from the federal registration rolls. These requirements are designed to ensure that any state purge program is uniform,

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nondiscriminatory, and consistent with the Voting Rights Act and does not exclude a voter from the rolls solely because of his or her failure to vote.<sup>71</sup>

Three federal appellate courts, as discussed earlier, have upheld the constitutionality of the NVRA's voter registration provisions for federal elections principally based on Congress' Elections Clause authority. These courts each cite the Supreme Court's decision in Burroughs v. United States for the proposition that Congress has the authority to regulate presidential elections.<sup>72</sup>

Along with the registration requirements contained in NVRA, states are also required to follow certain other restrictions related to registration. For example, Section 202 of the Voting Rights Act permits otherwise qualified residents of a state to vote in presidential elections regardless of any state durational residency requirement, provided such residents apply for registration no later than 30 days prior to the election (or a lesser period if state law permits).<sup>73</sup> The Act also requires that if a citizen moves to another state after the 30th day preceding a Presidential election, that person may vote in his or her former state.<sup>74</sup>

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## Absentee Voting Requirements

Congress has provided statutory protections for the rights of certain individuals to register and vote absentee in federal elections. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)<sup>75</sup> requires states to permit (1) uniformed services voters and all other voters living overseas, and (2) uniformed services voters and their dependents within the U.S., but living out of their voting jurisdictions, to vote by absentee ballot in federal elections. States must process all valid voter registration applications received 30 days or more before the election.<sup>76</sup>

UOCAVA provides for a presidential designee, currently the Secretary of Defense, to carry out the Act and authorizes the Attorney General to bring civil actions to enforce its requirements.<sup>77</sup> The Secretary of Defense implements his UOCAVA responsibilities through the Federal Voting Assistance Program. Among other things, UOCAVA requires the designated official to compile and distribute information on state absentee registration and voting procedures. The official is required to write a report to the President and the Congress after each Presidential election evaluating the effectiveness of assistance to voters provided under UOCAVA, including a statistical analysis of voter participation and a description of state-federal cooperation.<sup>78</sup>

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UOCAVA requires the designated official to prescribe a federal write-in absentee ballot for all overseas voters in federal elections. The ballot is to be used if the overseas voter applies for, but does not receive, a state absentee ballot.<sup>79</sup> While state law, in general, governs the processing of these federal write-in ballots, UOCAVA requires that states permit their use in federal elections.<sup>80</sup> UOCAVA sets forth several federal requirements concerning federal write-in ballots. First, the ballots may not be counted if they are submitted from anywhere in the U.S., or if state election officials have not received an application for a state absentee ballot at least 30 days before the election, or if state election officials receive a timely state absentee ballot.<sup>81</sup> Second, the overseas voter may write in a candidate's name or political party, and the vote must be counted regardless of minor variations in the name of the candidate or party if the intent of the voter can be ascertained.<sup>82</sup>

UOCAVA has been challenged, unsuccessfully, on a variety of constitutional grounds. Most notably, the Act has been challenged in several cases under the Equal Protection Clause. In each of these cases, federal courts have looked to whether there is a rational basis for distinguishing between citizens who move from one state or U.S. territory to another and citizens who move overseas. See Romeu v. Cohen, 121 F.Supp.2d 264 (S.D.N.Y. 2000); Howard v. State Administrative Board of Election Laws, 976 F.Supp. 350 (D.Md. 1996); Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994). In these cases, the courts concluded that UOCAVA did not violate the Equal Protection Clause because the distinction between voters who moved outside the United States versus those who moved within the country was rational, given that voters who moved overseas could lose their right to vote in federal elections while voters who moved within the United States were still eligible to vote at their new place of residence.

In addition, there are other federal requirements with regard to absentee voting. Section 202 of the Voting Rights Act contains protections for citizens to vote absentee in elections for President and Vice President.<sup>83</sup> The provision requires, among other things, that each state provide by law for the casting of absentee ballots in elections for President and Vice President by qualified residents who may be absent from their election district on the day of the election, if application is made not later than seven days immediately prior to the election and the ballot is returned not later than the time of poll closing in the state on election day.<sup>84</sup>

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## Accessibility Provisions for the Elderly and Handicapped

Congress has passed legislation intended to improve access for elderly and handicapped individuals to registration facilities and polling places for federal elections. The Voting Accessibility for the Elderly and Handicapped Act of 1984 requires, with some exceptions, that political subdivisions within each state that are responsible for conducting elections assure that polling places and registration sites are accessible to handicapped and elderly voters.<sup>85</sup> If the political subdivision is unable to provide an accessible polling place, it must provide an alternate means for casting a ballot on election day upon advance request by the voter.<sup>86</sup> The Act's requirements also include, for example, that each state or political subdivision provide a reasonable number of accessible permanent registration facilities, and that each state make available certain types of voting and registration aids such as large-type instructions and information by telecommunication devices for the deaf.<sup>87</sup> The Act has not been the subject of court challenges related to federalism issues.

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## Prohibitions Against Discriminatory Voting Practices

Congress has authority under various constitutional amendments to enforce prohibitions against specific discriminatory practices. The Voting Rights Act of 1965<sup>88</sup> codifies and effectuates the Fifteenth Amendment<sup>89</sup> guarantee that no person shall be denied the right to vote on account of race or color. In addition, subsequent amendments to the Act expanded it to include protections for members of language minority groups, as well as other matters regarding voting registration and procedures. Some parts of the Act apply to all elections nationwide, certain provisions apply nationwide in the context of presidential general elections, and other provisions apply only to elections in covered jurisdictions.

Section 2 of the Voting Rights Act establishes a nationwide ban against any state or local election law that results in the denial or abridgement of any citizen's right to vote on account of race, color, or membership in a language minority group.<sup>90</sup> The Voting Rights Act provides that plaintiffs may establish a violation of Section 2 by demonstrating that "the political processes leading to nomination or election" deny members of the protected classes an equal opportunity to participate in the political process and to elect representatives of their choice. A court, under the Voting Rights Act, may also consider the extent to which members of the protected class have been elected to office in the jurisdiction, though Congress made clear that Section 2 does not confer upon protected classes a right to proportional representation.<sup>91</sup>

Section 201 of the Voting Rights Act prohibits all states and localities from using any "test or device" to establish voter eligibility.<sup>92</sup> The Act generally

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defines a “test or device” to mean proof of literacy, other educational achievement, or good moral character.<sup>93</sup>

Unlike the above sections, which are permanent provisions that apply to all jurisdictions, Section 5 of the Voting Rights Act only applies to “covered” jurisdictions for a specified duration. The jurisdictions targeted for coverage are those evidencing discriminatory voting practices, based upon a triggering formula, as defined in Section 4. According to this formula, a jurisdiction is covered if it maintained “any test or device” as a prerequisite to voting as of November 1, 1964, 1968, or 1972, and if less than half of its electorate either registered or voted in that year’s presidential election.<sup>94</sup> The Act presumes that a jurisdiction used a literacy test on November 1, 1972 if more than 5 percent of its electorate comprised a single language minority and the jurisdiction did not provide bilingual election materials and assistance.<sup>95</sup> The Attorney General and the Director of the Census have responsibility for determining which jurisdictions are covered by the triggering formula, and their determinations are not reviewable in any court and are effective upon publication in the Federal Register.<sup>96</sup>

Under Section 5 of the Act, “covered” jurisdictions may not change their election practices or procedures until they obtain federal “preclearance” for the change. The Act provides for either judicial or administrative preclearance. Under the judicial mechanism, covered jurisdictions may seek declaratory judgment from the United States District Court for the District of Columbia that the change has neither the purpose nor the effect of discriminating against protected minorities in exercising their voting rights. Under the administrative mechanism, covered jurisdictions may seek the same determination from the Attorney General. The Attorney General may deny preclearance by interposing an objection to the proposed change within 60 days of its submission.<sup>97</sup>

The Voting Rights Act provides for the appointment of federal examiners to enforce voting rights and federal observers to oversee the conduct of elections. Federal examiners help to register voters by determining whether a citizen meets state eligibility requirements and must be included in the registration rolls.<sup>98</sup> States and localities may only challenge an examiner’s eligibility determination through a federal review procedure.<sup>99</sup> Federal election observers monitor elections and report whether persons entitled to vote were allowed to vote and whether their votes were properly counted.<sup>100</sup>

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A federal court, under the Voting Rights Act, may order the appointment of federal examiners to any jurisdiction sued for a voting rights violation under the Fourteenth or Fifteenth Amendment.<sup>101</sup> “Covered” jurisdictions are also subject to the appointment of examiners where the Attorney General certifies that he has received at least twenty meritorious written complaints of voting discrimination or that he otherwise believes that the appointment of examiners is necessary to protect voting rights.<sup>102</sup> Observers may be appointed in any jurisdiction where an examiner is serving, upon request of the Attorney General.<sup>103</sup>

Covered jurisdictions may seek release (“bail-out”) from coverage by filing a declaratory judgment action in the United States District Court for the District of Columbia.<sup>104</sup> To prevail in such an action, the jurisdiction must establish that it has met specific conditions during the previous ten years.<sup>105</sup> Regardless of whether a jurisdiction is released from coverage, the Voting Rights Act does not impose coverage indefinitely on targeted jurisdictions. Rather, the special restrictions applicable to covered jurisdictions (*i.e.*, the requirement for federal preclearance of election-law changes and the imposition of federal election examiners and observers at the authorization of the Attorney General) expire in 2007, unless Congress amends the Act to extend coverage.<sup>106</sup>

The Voting Rights Act contains another requirement that, absent amendment, will expire in 2007: a requirement for bilingual elections in selected jurisdictions.<sup>107</sup> Under Section 203 of the Act, certain states or localities must provide bilingual election materials and assistance, depending upon the concentration and literacy level of the language minorities residing within the jurisdiction.<sup>108</sup> A state or locality may obtain release from coverage in federal court by showing that the illiteracy rate of the applicable language minority group is equal to or less than the national illiteracy rate.<sup>109</sup>

Regardless of whether the Act’s bilingual-election requirements apply, all jurisdictions must comply with another provision of the Voting Rights Act, which protects the rights of certain foreign-language voters. Under Section 4(e) of the Act, states may not deny, based on an English-language literacy requirement, voting rights to any person who has successfully completed the sixth grade in a foreign-language, American-flag school.<sup>110</sup>

As discussed earlier, the Supreme Court has upheld numerous provisions of the Voting Rights Act against federalism challenges. The Court first addressed the constitutionality of the Voting Rights Act in South Carolina v. Katzenbach, in which South Carolina challenged various

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provisions of the Act, including the suspension of literacy tests in states, such as South Carolina, with a legacy of voting discrimination.<sup>111</sup> South Carolina argued that it had the right to enforce its election laws absent a determination that these laws violated the Fifteenth Amendment, and that the power to make such a determination rested with the federal courts, not with Congress, as it had effectively done through the Voting Rights Act. The Court disagreed, finding that the enforcement clause of the Fifteenth Amendment gave Congress the power to enact appropriate legislation to guarantee voting rights. The Court held that the basic test to be applied when Congress exercised its enforcement power under the Fifteenth Amendment was whether the legislation was plainly adapted to carry out the objects of the Amendment. Applying this test, the Court found evidence that South Carolina and other states had used literacy tests to disenfranchise racial minorities and that Congress had appropriately exercised its enforcement power to suspend such tests in these states, without the need for case-by-case adjudication.<sup>112</sup>

In Katzenbach v. Morgan, the Supreme Court upheld Congress' authority under the Fourteenth Amendment enforcement clause to prohibit states from imposing an English-language literacy requirement to disenfranchise citizens educated in foreign-language, American-flag schools (in Morgan, Puerto Rican schools).<sup>113</sup> As in South Carolina v. Katzenbach, the Supreme Court rejected New York's argument that Congress could not exercise its enforcement power until the judicial branch determined whether the specific state law was unconstitutional. The Court held that the constitutionality of the English-language literacy ban turned on whether it was legislation plainly adapted to carry out the objects of the Equal Protection Clause. The Court further observed that the enforcement clause represented a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."<sup>114</sup> The Court then held that the English-language literacy ban was an appropriate enactment under the Fourteenth Amendment because it served to enhance minority political power and thus minority access to nondiscriminatory public services.<sup>115</sup> In addition, the Court held that the ban was an appropriate method of ending an invidious discrimination in establishing voter qualifications.<sup>116</sup>

In Oregon v. Mitchell, the Supreme Court addressed challenges to various provisions of the Voting Rights Act Amendments of 1970.<sup>117</sup> Among other things, the 1970 Amendments reduced the minimum voting age in any state or local election from twenty-one years to eighteen years of age. Congress claimed authority to enact this requirement under the Fourteenth

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Amendment, asserting that state laws setting the franchise at twenty-one years of age denied due process and equal protection rights to eighteen-year olds. While there was no single or majority opinion of the Court in Mitchell, five of the Justices (in a 5-4 split) struck down the minimum voting age provision as applied to state and local elections.<sup>118</sup> These Justices found that the Constitution reserved to the states the power to determine voter qualifications in state and local elections, subject only to the express limitations imposed by constitutional amendments. These Justices further found that the Equal Protection Clause does not protect people between eighteen and twenty-one years from voting discrimination and that Congress lacked authority to create a substantive constitutional right on behalf of such a class.<sup>119</sup>

In City of Rome v. United States, the Supreme Court turned its attention to the standard of proof for obtaining federal preclearance of a proposed election law change.<sup>120</sup> The Voting Rights Act requires covered jurisdictions to establish that a proposed election law change has neither a discriminatory purpose nor effect prior to implementation. The Court stated that, even if the Fifteenth Amendment prohibited only purposeful discrimination, Congress could still prohibit election law changes that were unintentionally discriminatory. The Court stated that Congress, in enforcing the Fifteenth Amendment, may prohibit practices that do not themselves violate the Amendment, so long as the prohibition is an “appropriate” method of promoting the Amendment’s purposes.<sup>121</sup> The Court further held that the Fourteenth and Fifteenth Amendments were “specifically designed as an expansion of federal power and an intrusion on state sovereignty,” such that Congress’ power to enforce those Amendments overcame principles of federalism that might otherwise apply.<sup>122</sup>

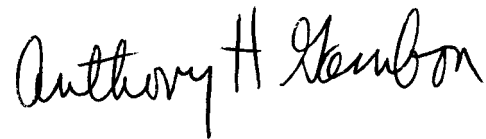
Finally, in Lopez v. Monterey County, the Supreme Court again considered a matter related to the constitutionality of the federal preclearance requirement.<sup>123</sup> Lopez involved an election law change proposed by a noncovered state (California) to be effective in a covered locality (Monterey County), and the Court determined as a threshold matter that Congress intended the covered locality to seek preclearance, even though a noncovered state proposed the change.<sup>124</sup> Upon reaching this conclusion, the Court then considered whether such an interpretation violated principles of federalism, given that the state was noncovered and was therefore not guilty of voting rights discrimination. The Court nevertheless concluded that such an intrusion on state power was constitutionally permissible. Citing South Carolina v. Katzenbach and City of Rome, the Court noted that it had previously upheld Congress’s authority to impose a

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federal preclearance requirement upon covered jurisdictions and to protect against election law changes that have a discriminatory effect in those jurisdictions. As a result, the Court found no merit to the argument that Congress lacked Fifteenth Amendment authority to require federal preclearance of a state law that may have a discriminatory effect in a covered county.<sup>125</sup>

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Please contact me on (202) 512-5400, or Lynn Gibson, Associate General Counsel, on (202) 512-5156, if you have any questions concerning this analysis. Jan Montgomery, Assistant General Counsel, and Geoffrey Hamilton, Christine Davis, and Judy Clausen, Senior Attorneys, also made key contributions to this analysis.



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## ENDNOTES

<sup>1</sup> Storer v. Brown, 415 U.S. 724, 730 (1974). State regulation of the elections process must involve “generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983). The states are empowered by Article I, Section 2, and the Seventeenth Amendment, to establish voter qualifications determining who may vote in congressional elections. See generally Katzenbach v. Morgan, 384 U.S. 641, 647 (1966). The states generally require U.S. citizenship as a condition of voting.

<sup>2</sup> U.S. Const. art. I, sec. 4, cl. 1. The policy of entrusting the conduct of elections to state laws, administered by state officers, according to some of the Framers of the Constitution, was deemed necessary because the fixing of the time, place, and manner of such elections in the Constitution was found to be impossible. See United States v. Gradwell, 243 U.S. 476, 484 (1917), citing to the Records of the Federal Convention, Farrand, vol. 3, p. 311. A reply of Madison to Monroe in the debates in the Virginia Convention further elaborates that, “It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution.” Id.

<sup>3</sup> U.S. Const. art. I, sec. 4, cl. 1. With respect to Senators, the Constitution originally provided that Senators were to be chosen by state legislatures. U.S. Const. art. I, sec. 3. The ratification of the Seventeenth Amendment in 1913 changed the method of choosing Senators to that of being chosen by popular vote. The Seventeenth Amendment did not, however, repeal the language excepting the “Places of choosing Senators” from congressional regulatory authority.

<sup>4</sup> Ex Parte Siebold, 100 U.S. 371, 384, 388 (1879).

<sup>5</sup> Id. at 382-84.

<sup>6</sup> Id. at 384.

<sup>7</sup> Ex Parte Yarbrough, 110 U.S. 651 (1884).

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<sup>8</sup> Id. at 662. The Yarbrough Court noted that it was not until 1842 that Congress took any action under the Elections Clause to regulate elections for the House of Representatives by requiring the election of Representatives by districts. Id. at 660-661. This law ended a practice in some states “of electing on a single state ticket all of the Members of Congress to which the State was entitled.” United States v. Gradwell, 243 U.S. at 482.

<sup>9</sup> Ex Parte Yarbrough, 110 U.S. at 662.

<sup>10</sup> Smiley v. Holm, 285 U.S. 355 (1932).

<sup>11</sup> Id. at 366-67.

<sup>12</sup> Id. at 366.

<sup>13</sup> United States v. Classic, 313 U.S. 299 (1941).

<sup>14</sup> Id. at 320. The Court has noted, on occasion, that Congress’ Election Clause authority to regulate congressional elections is augmented by the Necessary and Proper Clause. The Court did so in Classic, stating that in addition to Congress’ authority under the Elections Clause, under the Necessary and Proper Clause, “Congress is given authority ‘to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States.’” Id. (quoting U.S. Const. art. I, sec. 8, cl. 18).

<sup>15</sup> Foster v. Love, 522 U.S. 67 (1997).

<sup>16</sup> Id. at 72.

<sup>17</sup> Id. at 69 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832-833 (1995)).

<sup>18</sup> National Voter Registration Act of 1993, 42 U.S.C. 1973gg to 1973gg-10.

<sup>19</sup> In addition, as discussed below, the courts noted that Congress’ authority to regulate elections also extends to presidential elections.

<sup>20</sup> Voting Rights Coalition v. Wilson, 60 F.3d at 1413.

<sup>21</sup> Id. at 1414.

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<sup>22</sup> The Tenth Amendment provides that, “The 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.”

<sup>23</sup> New York v. United States, 505 U.S. 144 (1992) (holding that a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 violated the Tenth Amendment in that it commandeered the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program).

<sup>24</sup> ACORN v. Miller, 129 F.3d at 836-37; Voting Rights Coalition v. Wilson, 60 F.3d at 1415; ACORN v. Edgar, 56 F.3d at 794.

<sup>25</sup> ACORN v. Edgar, 56 F.3d. at 795.

<sup>26</sup> ACORN v. Miller, 129 F.3d at 837. In addition, the states argued that the NVRA violated state sovereignty under the Tenth Amendment, asserting that the NVRA’s federal voter registration procedures would necessarily affect state procedures which are within the states’ exclusive domain. The court in Miller rejected this argument, stating that the NVRA does not require any change to state or local election procedures, nor does it prohibit states from adopting separate procedures for the election of state officials. ACORN v. Miller, 129 F.3d at 837. The courts in Edgar and Wilson did not dismiss the states’ arguments outright, but instead found that the states had not shown that NVRA’s impact on state or local election procedures was so burdensome as to impinge on the legitimate retained sovereignty of the states. Voting Rights Coalition v. Wilson, 60 F.3d at 1415-16; ACORN v. Edgar, 56 F.3d at 794-95.

<sup>27</sup> ACORN v. Edgar, 56 F.3d at 796.

<sup>28</sup> Id.

<sup>29</sup> The court in Wilson, in discussing implementation of the NVRA, noted that the costs to the states could be significant. Voting Rights Coalition v. Wilson, 60 F.3d at 1415-16. The court stated that the significance of the cost burden does not “change the principle which is embodied” in the Elections Clause, but that it does “dictate that the implementation of the Act be done sensitively.” Id. at 1415.

<sup>30</sup> As noted earlier, while the Seventeenth Amendment changed the method of choosing Senators from being chosen by State legislatures to being chosen by popular vote, it did not, however, repeal the language excepting the “Places of chusing Senators” from congressional authority.

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<sup>31</sup> See, e.g., Foster v. Love, 522 U.S. at 69.

<sup>32</sup> See generally ACORN v. Edgar, 56 F.3d at 793.

<sup>33</sup> U.S. Const. art. II, sec. 1.

<sup>34</sup> Id.

<sup>35</sup> For example, Section 202 of the Voting Rights Act contains certain minimum residency requirements for both registration and absentee voting in the context of presidential elections. 42 U.S.C. 1973aa-1. These provisions were upheld by the Supreme Court in Oregon v. Mitchell, 400 U.S. 112 (1970). Although it was an 8-1 ruling, the Justices applied various rationales. Justice Black cited to Congress' authority under the Court's decision in Burroughs v. United States, 290 U.S. 534(1934) and the Necessary and Proper Clause; Justices Brennan, White and Marshall relied on the Enforcement Clause of the Fourteenth Amendment as a legitimate basis to protect citizens' rights to unhindered interstate travel and settlement; Justice Douglas relied on the Enforcement Clause of the Fourteenth Amendment as a legitimate basis to protect the right to vote for national offices as a privilege and immunity of national citizenship; and Chief Justice Burger and Justices Stewart and Blackmun relied on the Necessary and Proper Clause.

<sup>36</sup> Burroughs v. United States, 290 U.S. 534 (1934).

<sup>37</sup> Id. at 544.

<sup>38</sup> Id. at 545.

<sup>39</sup> Id. at 544. Article II, Section 1, Clause 2 of the Constitution 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."

<sup>40</sup> Burroughs v. United States, 290 U.S. at 544-45.

<sup>41</sup> Voting Rights Coalition v. Wilson, 60 F.3d at 1414; ACORN v. Edgar, 56 F.3d at 793. The court in ACORN v. Miller, also citing Burroughs, wrote that "[w]hile Article I section 4 mentions only the election of Senators and Representatives, Congress has been granted authority to regulate presidential elections." 129 F.3d at 836 n.1.

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<sup>42</sup> The Voting Rights Act of 1965, as amended, 42 U.S.C. 1971, 1973 to 1973bb-1.

<sup>43</sup> Preclearance is a federal review process, discussed in more detail in the section on federal statutes.

<sup>44</sup> Bush v. Gore, 531 U.S. \_\_\_, No. 00-949, slip op. (U.S. Dec. 12, 2000).

<sup>45</sup> Id. at 6 (per curiam).

<sup>46</sup> Id. at 10 (per curiam).

<sup>47</sup> Article I, Section 8, Clause 1 of the Constitution provides, in part, 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....”

<sup>48</sup> New York v. United States, 505 U.S. at 167; South Dakota v. Dole, 483 U.S. 203, 206 (1987).

<sup>49</sup> South Dakota v. Dole, 483 U.S. at 210-12.

<sup>50</sup> Id. at 206, 212. The state, citing to the Twenty-first Amendment’s prohibition of direct regulation of drinking ages by Congress, argued that Congress could not use the spending power to regulate that which it is prohibited from regulating directly.

<sup>51</sup> Id. at 207-208. The Court stated that the “independent constitutional bar” limitation on the spending power “is not a prohibition of the indirect achievement of objectives which Congress is not empowered to achieve directly,” but instead “stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.” Id. at 210. In addition, some commentators have noted that the doctrine of unconstitutional conditions, which, with respect to individuals, operates to prohibit the government from offering certain benefits conditioned upon the recipient foregoing a constitutionally protected right, could possibly be applied in the future to place additional limitations on the exercise of the spending power in influencing states’ policy choices. See Angel D. Mitchell, *Conditional Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 Kan. L. Rev. 161 (1999); see also, Lynn Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911

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(1995); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989).

<sup>52</sup> South Dakota v. Dole, 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

<sup>53</sup> Id. at 209.

<sup>54</sup> For example, in Oregon v. Mitchell, 400 U.S. 112 (1970), the Supreme Court upheld an amendment to the Voting Rights Act that eliminated state residency requirements for presidential elections. However, as discussed in endnote 35, the justices cited various rationales for why the law was constitutional.

<sup>55</sup> This description of federal statutes regarding election administration does not include analysis of applicable criminal provisions or campaign finance laws. For a description of the criminal statutes related to elections, including campaign financing fraud violations, see “Federal Prosecution of Election Offenses,” U.S. Department of Justice, Criminal Division, Public Integrity Section (6<sup>th</sup> ed. Jan. 1995). There are numerous criminal provisions which apply to election-related conduct. For example, the National Voter Registration Act (NVRA) contains criminal prohibitions on fraudulent registration and voting. 42 U.S.C. 1973gg-10(2).

<sup>56</sup> 2 U.S.C. 7.

<sup>57</sup> 2 U.S.C. 1.

<sup>58</sup> 3 U.S.C. 1.

<sup>59</sup> Article II, Section 1 of the Constitution provides that, “Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”

<sup>60</sup> Foster v. Love, 522 U.S. at 70.

<sup>61</sup> Id. at 69. The Court found that the state statute, in essence, allowed for the final selection of United States Representatives and United States Senators prior to federal election day whereby “[a]fter a declaration that a candidate received a majority in the open primary, state law requires no further act by anyone to seal the election; the election has already occurred.” Id. at 73.

<sup>62</sup> Id. at 73 (citing Ex Parte Yarbrough, 110 U.S. at 661).

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<sup>63</sup> Id.

<sup>64</sup> National Voter Registration Act of 1993, 42 U.S.C. 1973gg to 1973gg-10.

<sup>65</sup> Id. 1973gg(b). In the House Report accompanying the final bill, the House Administration Committee wrote that the Voting Rights Act of 1965 “eliminated the more obvious impediments to registration, but left a complicated maze of local laws and procedures” that continued to deter eligible citizens from registering, particularly racial minorities and the disabled. H.R. Rep. No. 103-9, at 3 (1993), reprinted in 1993 U.S.C.C.A.N. 105, 106-107. The Committee wrote that NVRA was to continue the election reforms begun by the Voting Rights Act by giving eligible citizens who wished to register ready access to registration applications. Id. at 3, 5, reprinted in 1993 U.S.C.C.A.N. 105, 107, 109. In addition, the Senate Report addressed the constitutional authority to regulate federal voter registration, citing the Elections Clause, the Necessary and Proper Clause, and the Fourteenth Amendment as the basis for Congress’ power to enact federal election laws. S. Rep. No. 103-6 (1993), at 3-4.

<sup>66</sup> 42 U.S.C. 1973gg-2.

<sup>67</sup> Id. 1973gg-3(a).

<sup>68</sup> Id. 1973gg-5(a)(2), (a)(3), (a)(4), (a)(6)(A)(i).

<sup>69</sup> Id. 1973gg-4(a)(1); 1973gg-7(a)(2).

<sup>70</sup> Id. 1973gg-8.

<sup>71</sup> Id. 1973gg-6(b).

<sup>72</sup> See Burroughs v. United States, 290 U.S. 534 (1934).

<sup>73</sup> 42 U.S.C. 1973aa-1(d). These limitations on state residency requirements in presidential elections were upheld by the Supreme Court in Oregon v. Mitchell, 400 U.S. 112 (1970).

<sup>74</sup> 42 U.S.C. 1973aa-1(e).

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<sup>75</sup> The Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. 1973ff to 1973ff-6. Several federal laws have been enacted since the 1940's designed to protect the federal voting rights of the military. In addition, the courts have, on occasion, reviewed state restrictions on voting by members of the armed services. For example, in 1965, the Supreme Court struck down as unconstitutional a provision of the Texas Constitution that prohibited any member of the Armed Forces who moved his home to Texas during the course of military duty from ever voting in any election in Texas as long as he was a member of the Armed Forces. Carrington v. Rash, 380 U.S. 89 (1965). The Court found that the provision violated the Equal Protection Clause of the Fourteenth Amendment.

<sup>76</sup> Id. 1973ff-1.

<sup>77</sup> Id. 1973ff(a); 1973ff-4.

<sup>78</sup> Id. 1973ff(b)(5), (6). The report is due not later than the end of each year after a Presidential election year.

<sup>79</sup> Id. 1973ff-2(a).

<sup>80</sup> Id. 1973ff-1(3).

<sup>81</sup> Id. 1973ff-2(b).

<sup>82</sup> Id. 1973ff-2(c).

<sup>83</sup> 42 U.S.C. 1973aa-1.

<sup>84</sup> Id. 1973aa-1(d).

<sup>85</sup> The Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA), 42 U.S.C. 1973ee to 1973ee-6. VAEHA defines a "federal election" subject to the Act as including a general, special, primary, or runoff election for the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress. Id. 1973ee-6(3).

<sup>86</sup> Id. 1973ee-1(b)(2)(B)(ii).

<sup>87</sup> Id. 1973ee-2, 1973ee-3.

<sup>88</sup> The Voting Rights Act of 1965, 42 U.S.C. 1973 to 1973bb-1.

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<sup>89</sup> The Fifteenth Amendment provides, in part, “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.”

<sup>90</sup> 42 U.S.C. 1973, 1973b(f)(2).

<sup>91</sup> Id. 1973.

<sup>92</sup> Id. 1973aa.

<sup>93</sup> Id. 1973b(c).

<sup>94</sup> Id. 1973b(b).

<sup>95</sup> Id. 1973b(f)(3).

<sup>96</sup> Id. 1973b(b).

<sup>97</sup> Id. 1973c.

<sup>98</sup> Id. 1973e.

<sup>99</sup> Id. 1973g(a).

<sup>100</sup> Id. 1973f.

<sup>101</sup> Id. 1973a(a).

<sup>102</sup> Id. 1973d.

<sup>103</sup> Id. 1973f.

<sup>104</sup> Id. 1973b(a)(1).

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<sup>105</sup> The jurisdiction, in general, must establish that during the previous ten years it has: (1) not used a discriminatory test or device to establish voter qualifications; (2) not been judged in a court case to have denied or abridged voting rights, nor agreed through a consent decree to discontinue any discriminatory voting practices; (3) obtained federal preclearance for all election law changes; (4) not received any federal objections to an election law change submitted for preclearance; (5) not been assigned a federal examiner; (6) promoted political participation by racial or language minorities; and (7) presented evidence of minority registration, voting, and other political participation. Id. 1973b(a).

<sup>106</sup> Id. 1973b(8).

<sup>107</sup> Id. 1973aa-1a(b)(1).

<sup>108</sup> Id. 1973aa-1a(b)(2).

<sup>109</sup> Id. 1973aa-1a(d).

<sup>110</sup> Id. 1973b(e).

<sup>111</sup> South Carolina v. Katzenbach, 383 U.S. 301 (1966). Congress later amended the Voting Rights Act to ban literacy tests nationwide. The Supreme Court upheld this nationwide suspension in Oregon v. Mitchell, 400 U.S. 112 (1970).

<sup>112</sup> South Carolina v. Katzenbach, 383 U.S. at 324-327. The Court also upheld Congress' authority to require federal preclearance of any election law changes and its authority to appoint federal election examiners to covered jurisdictions. As with the suspension of literacy tests, the Court found that Congress could adopt remedies that anticipated possible voting discrimination in these jurisdictions, without the need for case-by-case adjudication. Id. at 334-337.

<sup>113</sup> Katzenbach v. Morgan, 384 U.S. 641 (1966).

<sup>114</sup> Id. at 650-51.

<sup>115</sup> Id. at 652.

<sup>116</sup> Id. at 654-656.

<sup>117</sup> Oregon v. Mitchell, 400 U.S. 112 (1970).

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<sup>118</sup> In contrast, a differently composed majority of Justices (in a 5-4 split) upheld the Act's minimum voting age provision as applied to federal elections. However, there was no majority regarding the constitutional justification for this result.

<sup>119</sup> Oregon v. Mitchell, 400 U.S. at 125-126, 130 (Black, J., announcing the judgment of the Court), 212-213 (Harlan, J., concurring in part, dissenting in part), and 294-296 (Stewart, J., Burger, C.J., Blackmun, J., concurring in part and dissenting in part). Following Mitchell, Congress proposed, and the states ratified, the Twenty-sixth Amendment to the Constitution, which guarantees that neither the United States nor any state may deny or abridge the right to vote of any citizen older than eighteen years on account of age.

<sup>120</sup> City of Rome v. United States, 446 U.S. 156 (1980).

<sup>121</sup> Id. at 177.

<sup>122</sup> Id. at 179.

<sup>123</sup> Lopez v. Monterey County, 525 U.S. 266 (1999).

<sup>124</sup> Id. at 282.

<sup>125</sup> Id. at 282-284.

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