Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act

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INTRODUCTION

The legal landscape has changed significantly since Congress passed the Voting Rights Act of 1965 ("VRA" or "the Act"). Even though Congress amended the Act in 2006, these amendments have done little to address the new obstacles faced by minority communities who seek to expand their electoral opportunities.[1] Some of these obstacles are political, as partisan forces have often manipulated the Act for electoral gain,[2] but the greatest obstructions have been judicial. The Supreme Court has strongly implied that Congress might violate principles of federalism by requiring states to preclear their redistricting plans with the Department of Justice;[3] has held that states are not required to maximize electoral opportunities for minority voters;[4] and has deferred to the states in the face of conflicting federal and state statutory mandates over redistricting.[5]

1. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, §§ 4–5, 120 Stat. 577, 580–81 (2006) (codified as amended at 42 U.S.C. § 1973c).

2. *See, e.g.*, Steve Bousquet, *Gov. Rick Scott Stalls New Voter–Approved Redistricting Standards*, ST. PETERSBURG TIMES, Jan. 26, 2011, http://www.tampabay.com/news/politics/gubernatorial/gov–rick–scott–stalls–new–voter–approved–redistricting–standards/1147578 (stating that Governor Scott withdrew Florida's request for section 5 preclearance of voter-approved ballot initiatives that would require nonpartisan standards to be instituted for legislative redistricting).

3. Nw. Austin Mun. Dist. No. One v. Holder (*NAMUDNO v. Holder*), 129 S. Ct. 2504, 2511 (2009).

4. Bartlett v. Strickland, 556 U.S. 1, 24–25 (2009).

5. Riley v. Kennedy, 553 U.S. 406, 428 (2009).

These decisions and others have rendered the once successful VRA[6] legally impotent to address the new challenges faced by minority voters and have called its constitutionality into question.[7]

The inconsistency between the Act as written and the Act as implemented surfaces because the Supreme Court presumes that the states' authority over elections is sovereign. The Elections Clause gives states the ability to choose the "time, place, and manner" of elections but reserves to Congress the power to veto state electoral schemes. As evident from the text, the states have autonomy, defined here as the ability to make policy in the absence of congressional action, over their electoral mechanisms.[8] In contrast, the states lack true sovereignty—or final policymaking authority—over elections because Congress can veto state action. The Elections Clause has, in effect, its own Supremacy Clause that emphasizes the primacy of federal law.[9]

As the constitutional text and history show, the Elections Clause has less to do with federalism, as that term is typically understood,[10] and more to do with providing an organizational structure that gives the states broad power to construct their electoral systems while retaining final policymaking authority for Congress. The Elections Clause, when combined with Congress's ability to

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6. STEVEN ANDREW LIGHT, THE LAW IS GOOD: THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS, at ix (2010) ("In 1964, there were only about 300 black elected officials in the U.S. Today there are over 9,000 . . . . The number of Asian Americans has tripled in recent years, and in large part due to the VRA, more than 6,000 Latinos now serve in elected or appointive office.").

7. *See* Michael Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 905 (2008) (describing current VRA enforcement as an "Era of Maintenance" because of judicial refusal to maximize minority opportunities and instead focus on maintaining minority political strength at its current levels).

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

9. *See Ex Parte* Siebold, 100 U.S. 371, 386 (1880) ("[I]n the case of laws for regulating the elections of representatives to Congress, the State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.").

10. MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 20 (2008) ("[F]ederalism grants subunits of government a final say in certain areas of governance . . . ."). Of course, this is not the only definition of federalism. *See* S. RUFUS DAVIS, THE FEDERAL PRINCIPLE: A JOURNEY THROUGH TIME IN QUEST OF A MEANING (1978) (providing an analysis of the meanings of federalism over time).

enforce the mandates of the Fourteenth and Fifteenth Amendments,[11] provides ample constitutional justification for the VRA. The Act represents an appropriate use of congressional power to alter or modify state electoral schemes that govern federal elections and implicate the constitutional right to vote.[12] Moreover, since the Fourteenth and Fifteenth Amendments changed the balance of federalism in our system, at best the states retain a limited sovereignty over state practices that do not run afoul of these provisions.[13]

Contrary to these principles, the Court continues to defer to state sovereignty in this area because states have plenary authority over elections pursuant to the Elections Clause, even though Congress can intervene if it so chooses. Since Congress's "make or alter" authority has been used sparingly, first because of federalism concerns and later because the Fourteenth and Fifteenth Amendments did most of the work of regulating state electoral practices, the Court has ignored that the Clause, by its very terms, deprives states of final policymaking authority over elections. Thus, the Court's decisions that narrow the scope of the VRA on the grounds of "state sovereignty" mischaracterize the historical and textual relationship between the states and the federal government over the matter of elections. As a result of this misunderstanding, the Court has been overly critical of federal legislation that alters or modifies state electoral laws.

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11. The Fourteenth Amendment guarantees each citizen "equal protection of the laws" and the Fifteen Amendment gives Congress the power to enforce, "by appropriate legislation," the right of citizens to vote without regard to race, color, or previous condition of servitude. U.S. CONST. amends. XIV & XV.

12. The theory of interpretation articulated here is loosely based on "intratextualism," a method of constitutional interpretation in which the Constitution is read holistically by comparing and contrasting identical words or phrases in different parts of the document. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999). The Elections Clause and the Fifteenth Amendment both pertain to voting and elections, but my analysis includes the Fourteenth Amendment, which has also been interpreted as a constraint on state authority over elections. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966) (finding that the right to vote is a fundamental interest under the Equal Protection Clause); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87–101 (1980) (rejecting a narrow, clause-bound interpretation of various provisions of the Constitution).

13. *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 226 (2000) (noting that the states' power over elections "has been eradicated by five constitutional amendments (Section 2 of the Fourteenth Amendment, as well as the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments), federal voting rights legislation, and the Supreme Court's Equal Protection cases. It is, in fact, impossible to think of anything a state could do to protect itself with this power today that would not be either unlawful or ineffective.") (internal citations omitted).

The legal scholarship has largely ignored the Court's conflation of sovereignty with autonomy because the theory of dual federalism—the idea that each level of government has a mutually exclusive regulatory sphere[14]—does not require the Court to define what it means for an entity to be sovereign.[15] Rather, the Court has focused on the scope of the entity's policymaking area, which has allowed the Court to define sovereignty by negative implication.[16] As a result, the boundaries of the "residual sovereignty" that the Constitution reserves to the states are unclear,[17] and the Court has been able to bypass these definitional constraints by viewing state sovereignty as concurrent with that of the federal government, even if there is no principled justification for that conclusion.[18]

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14. Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1468 (2001) ("Article VI explicitly recognizes that state judges will engage in some type of judicial review, for they are commanded to set aside state law that comes into conflict with federal law. In the course of this task, state judges first must ask whether a federal statute, with which state law conflicts, itself is consistent with the Constitution. If a state law conflicts with a federal law but the federal law itself is unconstitutional, then the state court may be under no Article VI obligation to invalidate the state law.").

15. *See, e.g.*, Roderick Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 938 (1998) ("The Court has relied either on palpably untrue statements that the federal and state governments operate in separate, independent, and mutually exclusive spheres or on conclusory assertions that commandeering legislation deprives states of sovereignty.").

16. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 200–01 (1824) ("[T]hat a State might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence, from this concession, that a State may regulate commerce with foreign nations and among the States, cannot be admitted."); Katzenbach v. McClung, 379 U.S. 294, 302 (1964) (quoting *Gibbons*, 22 U.S. at 195) ("The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purposes of executing some of the general powers of government.' "); *see also* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 139 ("Since the start, or shortly after the start, the scope of Congress's commerce power has been defined by negative implication from what Chief Justice Marshall said it was not.") (citing *Gibbons*, 22 U.S. at 195).

17. *See, e.g.*, Printz v. United States, 521 U.S. 898, 928 (1997) (holding that Congress cannot commandeer state officials without undermining residual state sovereignty). *Printz*, like the early federalism cases, defines residual sovereignty by negative implication. *Id.* at 918–19 (stating that residual sovereignty is "reflected throughout the Constitution's text" including in the Judicial Power Clause, the Privileges and Immunities Clause, and the Guarantee Clause; it is "also implicit, of course, in the Constitution's conferral of Congress upon not all governmental powers, but only discrete, enumerated ones").

18. *Id.* at 918 ("It is incontestable that the Constitution established a system of 'dual sovereignty.' "); New York v. United States, 505 U.S. 144, 166 (1992) ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); Gregory v. Ashcroft, 501 U.S. 452, 459–60 (1991) ("One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this 'double security' is to be

Regardless of which definition of sovereignty one endorses, however, all theories require that the political entity in question have final policymaking authority in a defined area in order to command the respect of both its citizens and the central authority.[19] For this reason, dual federalism does not tell us much about the Elections Clause because both levels of government are involved in regulating elections. Even cooperative federalism, in which policymaking authority is shared, does not provide an adequate theoretical foundation for the Elections Clause. The text explicitly rejects the notion of shared power by depriving the states of final authority and allowing for the possibility of federal preemption.

In any case, the scholarly and judicial preoccupation with state, as opposed to congressional, sovereignty has had significant implications for the VRA. Because of this presumption that the states are sovereign over elections, the Supreme Court has employed a "federalism norm" that has undermined the effectiveness of the Act, and in particular, section 5.[20] The federalism norm is a nontextual, free-floating conception of the federal/state balance of power that the Court uses to "restore" the original balance of power between the states and the federal government. Besides the fact that the norm is pro state sovereignty and disregards the significant federal authority in this area, the Court ignores that the original balance is an elusive and arbitrary concept. Indeed, it is impossible for the Court to allocate regulatory authority over elections in a way that does not make the Court itself appear political.

By focusing on "sovereignty" as the defining principle of the Elections Clause and using evidence from the constitutional text and

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effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible."); Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.").

19. *See, e.g.*, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 342; *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 198 (1967) (noting that sovereignty is based on the notion that "there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself"); THE FEDERALIST NO. 39, at 245 (1961) (James Madison) (Clinton Rossiter ed. 1961) ("The idea of a national Government involves in it, not only an authority over the individual citizens; but an indefinite supremacy over all persons and things, so far as they are objects of lawful Government."); Frank I. Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1167 (1976).

20. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2006) (requiring certain covered states and political subdivisions to get preclearance from the federal government if they "shall seek to enact or seek to administer any voting qualification or prerequisite to voting" in order to ensure that none "has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color").

history, this Article fills a gap in the literature. While there has been some debate over how federalism affects election law,[21] there has not been a sustained treatment of the implications of the Elections Clause's allocation of power between the states and the federal government for the Court's VRA jurisprudence. This may be because many scholars reject sovereignty as a basis for understanding our system of federalism.[22] But sovereignty, I argue, plays an important role in understanding the scope of congressional power to regulate state electoral mechanisms. Although Congress usually intervenes in state electoral practices pursuant to its enforcement power under the Fourteenth and Fifteenth Amendments, the Elections Clause serves as the baseline for the relationship between Congress and the states with respect to elections. And since the Elections Clause gives Congress final policymaking authority over federal elections and the Fourteenth and Fifteenth Amendments extend this authority to state elections, any judicially enforced federalism norm in favor of state power is illegitimate. These factors require the Court to employ rational basis review of the legislative record of the VRA for any challenges going forward.

Part I.A of this Article reviews the scholarly literature, which is bereft of any discussion of how the Elections Clause, and its allocation of power, should affect judicial interpretations of the VRA. Part I.B focuses on several federalism theories that can explain the allocation of power in the Elections Clause, concluding that all are inadequate because they do not properly consider the role of sovereignty in their analyses. Part II surveys the constitutional history, text, and the Court's case law on the Elections Clause as well as the Fourteenth and Fifteenth Amendments. This Part argues that the states knew that they were surrendering their sovereign authority over elections by ratifying the Constitution. Based on this premise, Part III presents a new theoretical framework for the Elections Clause. Part III.A argues that the Elections Clause gives the states autonomy, or broad authority, over the matter of elections as part of a

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21. *See, e.g.*, Kareem U. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 230–40 (2010) (inventing a new framework for section 5 preclearance that addresses federalism concerns); Luis Fuentes–Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 719 (2009) (discussing judicial interpretation of VRA and the rejection of federalism arguments); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 60 (2010); Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 908–09.

22. *See infra* Part I.B.2. (discussing process theorists who reject an account of federalism that centers around sovereignty); *see also* Gerken, *supra* note 21, at 6 ("Academics argue that sovereignty is in short supply in 'Our Federalism.' They insist that the formal protections sovereignty affords are unnecessary for achieving federalism's ends.").

decentralized organizational structure that requires the Court to defer to Congress when it exercises its authority over elections. Decentralization, not federalism, best describes our electoral system, where states are autonomous rather than sovereign and where they may be immune from certain federal norms but are not exempt from all federal government intervention.[23]

As such, the federalism norm, discussed in Part III.B, is illegitimate because it elevates state over federal authority. The norm is a way to reallocate power between the federal government and the states outside of the legislative process, but it inappropriately prioritizes state sovereignty over Congress's authority to act in this area. This Article, which is both descriptive and normative, aims to fill a gap in the literature by showing how the states' authority under the Elections Clause, although extensive, is not sovereign. As such, abandoning the federalism norm in this context will result in a more faithful interpretation of the VRA and of our system of federalism as a whole. The Court's conflation of "sovereignty" and "autonomy" in its voting-rights jurisprudence and its perception that the Clause is about federalism as opposed to simply decentralization has resulted in an ill-conceived and misplaced deference to state authorities over the matter of elections.

I. DEFINING THE STATES' POWER OVER ELECTIONS: ELECTION LAW MEETS FEDERALISM THEORY

A. The Voting Rights Act as a Justified Intrusion on State Sovereignty: The Scholarly Literature

Congress renewed the VRA in 2006 for another twenty-five years, but the Act continues to generate significant controversy among scholars and the courts. Its two most successful provisions—section 2 and section 5—have received particular attention because these provisions have eradicated much of the racial discrimination in voting, but at a significant cost to the states. Section 2 forbids any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color" and operates nationwide.[24] The Court has interpreted section 2 to reach claims of vote dilution, where a sizable group of minority voters is denied the opportunity to elect the candidate of its choice

23. *See generally* FEELEY & RUBIN, *supra* note 10, at 20–21.

24. 42 U.S.C. § 1973(a) (2011).

because its vote is submerged in a district where residents vote along racial lines.[25]

In contrast, section 5 is a remedial measure that covers only those areas that engaged in the most blatant discrimination in voting at the time of the Act's passage, all of which are in the Deep South. Section 5 suspends all changes in state election procedure until a three-judge federal district court in Washington, D.C., or the U.S. Attorney General approves the changes. The preclearance provision was designed to ensure nonretrogression in minority voter registration or, in other words, to prevent minorities from being worse off under the new voting provision than they were under the previous plan.[26]

For many years, minority groups effectively used section 2 to increase their political representation in local, state, and national bodies. As a result, much of the legal scholarship has focused on the scope of the states' obligations to further increase minority representation, especially in light of past successes.[27] In 1993, the Supreme Court sharply limited the states' obligations under the VRA by holding, in *Shaw v. Reno*, that the Equal Protection Clause is not amenable to race-based redistricting.[28] Given that the very means that states have used to further the Act's mandates have come under assault, it is no surprise that other provisions of the VRA are ripe for constitutional challenge.

In particular, section 5 of the Act, which is the focus of this Article,[29] has borne the brunt of criticism in recent attempts to curb federal power. Many scholars argue that section 5 is still needed in order to combat discrimination in voting, despite the fact that its preclearance provisions allegedly interfere with state autonomy over elections.[30] However, the Court's decision in *City of Boerne v. Flores*,

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25. Thornburg v. Gingles, 478 U.S. 30, 45 (1986).

26. 42 U.S.C. § 1973c (a), (b).

27. *See* sources cited *infra* note 30.

28. 509 U.S. 630, 645 (1993); *see also* Miller v. Johnson, 515 U.S. 900, 913–14 (1995) (applying strict scrutiny to a redistricting plan in which race was a predominant factor in the creation of districts).

29. Going forward, references to "the Voting Rights Act" and "the VRA" refer specifically to section 5 unless otherwise noted.

30. *See, e.g.*, Kristen Clark, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 386 (2008) (arguing that section 5 "helps eliminate barriers to political participation and provides greater levels of access to minority voters"); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 714–15 (2006) (discussing different theories in support of section 5, including the fact that the threat of a lawsuit under the VRA is an important "bargaining chip"); Nathaniel Persily, *The Promises and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 199–202 (2007) (discussing section 5's deterrent effect and violations in covered jurisdictions); Michael J. Pitts, *Section 5 of the Voting*

which required that legislation enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment be a congruent and proportional remedy to the alleged constitutional violation,[31] has raised serious questions about the future of section 5 of the VRA.[32] *Boerne* and other cases that circumscribe Congress's power under the Fourteenth and Fifteenth Amendments, the Commerce Clause, and the constitutional structure have generated a great deal of scholarship that focuses on whether Congress's 2007 renewal of the VRA for another twenty five years is constitutional under *Boerne*'s congruence and proportionality standard.[33]

Rights Act: A Once and Future Remedy?, 81 DENV. U. L. REV. 225, 231 (2003) ("The drastic nature of the Section 5 remedy comes from its abrogation of the autonomy of some state and local governments in all matters related to voting.").

31. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

32. *See, e.g.*, Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1397 (2010) ("However, the Court's decision in *City of Boerne v. Flores* established that Congress's power to enforce the guarantees of the Fourteenth Amendment only extends to laws that were 'congruent and proportional[]' to the constitutional violations that the laws attempt to prevent or remedy. Under this new standard, the question arises whether Congress must justify the coverage formula by distinguishing between covered and noncovered states in their relative rates of violation of minority voting rights."); *see also* United States v. Morrison, 529 U.S. 598, 613 (2000) ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); Alden v. Maine, 527 U.S. 706 (1999) (holding that federalism requires Congress to respect state sovereignty) (internal citations omitted); United States v. Lopez, 514 U.S. 549, 561 (1995) (holding that the Gun-Free School Zones Act "is a criminal statute that had nothing to do with 'commerce' or any sort of economic enterprise" and cannot be sustained under the Commerce Clause"). *Compare* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Amend and Extend the Voting Rights Act*, 44 HOUS. L. REV. 1, 13–14 (2007) (presenting cases in which the Court "upheld congressional abrogation of state's sovereign immunity"), *and* Fuentes–Rohwer, *supra* note 21, at 719 (discussing the Court's and Congress's acknowledgment of the federalism concerns of the Act), *with* Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 177–78 (2005) (discussing cases that "increase the chances that the Court would hold that Congress has the power to reenact Section Five's preclearance provisions").

33. Mark A. Posner, *Time Is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation's History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51, 103–04 (2006) (analyzing the DOJ's approach to section 5 after *Bossier I* and *Bossier II*); *see also* Nw. Austin Mun. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 272–78 (D.D.C. 2008), *rev'd and remanded sub nom*. Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009) (upholding section 5 under the congruence and proportionality standard); Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 47–48 (2006) (discussing the constitutionality of section 2 of the VRA after *City of Boerne*); Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 187–88 (2005) (discussing section 2's constitutionality and conflicts with federalism and the congruent and proportional standard); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691–93 (2006) (analyzing conflicting cases that have addressed section 2 and suggesting a burden-shifting test to govern section 2 vote denial claims). *But see* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV.

In sum, the scholarship is replete with discussion of how the VRA interferes with state sovereignty, and the primary focus has been on whether this intrusion is justified.[34] The Court, at least initially, believed that Congress had the authority to circumscribe the states' authority over elections, but not because Congress is sovereign. In *South Carolina v. Katzenbach*, for example, the Court rejected the argument that the VRA distorted our constitutional structure of government and offended our system of federalism.[35] The *Katzenbach* Court found that although the states "have broad powers to determine the conditions under which the right of suffrage may be exercised," the Fifteenth Amendment supersedes contrary exertions of state power.[36] The idea that Congress can intervene in elections only when states are behaving badly has persisted in the case law. The Court's most recent decision on the constitutionality of section 5, *NAMUDNO v. Holder,* is on point. Although sustaining the constitutionality of the Act, the *NAMUDNO* Court noted that the VRA raises significant federalism concerns because it "authorizes federal intrusion into sensitive areas of state and local policymaking" and, as such, "imposes substantial federalism costs" by making distinctions between similarly situated sovereigns.[37] Thus, because section 5 already has been successful in

1127, 1132 (2001) ("In my view, Section 5 provides Congress with the same capacious discretion to select among various means to achieving legitimate ends as does Article I as construed in *McCulloch v. Maryland*.").

34. *See, e.g.*, Ansolabehere et al., *supra* note 32, at 1388 ("We believe that the VRA, and especially the coverage formula for section 5, needs to be updated or revised specifically to provide greater protection for minority voting rights. However, we also believe the VRA continues to represent a constitutional exercise of congressional power under the Fourteenth and Fifteenth Amendments."); *see also* Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 954–55, 1001 (2011) (debunking the argument that section 5 imposes significant federalism costs because "preclearance has functioned for the most part as a learning/monitoring regime that, in over 99% of all cases, has simply required the production of information. In those rare cases in which an objection has been lodged, the DOJ's concerns usually could be satisfied by limited changes to the jurisdiction's chosen election design.").

35. South Carolina v. Katzenbach, 383 U.S. 301, 313–14 (1966) ("Case-by-case litigation against voting discrimination under the Civil Rights Acts of 1957, 1960, and 1964, has not appreciably increased Negro registration. Voting suits have been onerous to prepare, protracted, and where successful have often been followed by a shift in discriminatory devices, defiance or evasion of court orders."); *see also* City of Rome v. United States, 446 U.S. 156, 176 (1980), *superseded by statute*, *as recognized* in Nw. Austin Mun. Dist. No. One v. Holder (*NAMUDNO v. Holder*), 129 S. Ct. 2504 (2009) ("[L]egislation enacted under authority of § 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with the letter and spirit of the constitution,' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.").

36. *Katzenbach*, 383 U.S. at 324.

37. *NAMUDNO*, 129 S. Ct. at 2511 (quoting Lopez v. Monterey Cnty., 525 U.S. 266, 282 (1999)).

reducing discrimination, thereby making covered states no more culpable for existing discrimination than their northern counterparts, congressional intervention is not justified.[38]

Along these lines, much of the commentary surrounding *NAMUDNO* has debated why the Supreme Court continues to sustain the statute despite doubts about its constitutionality.[39] Recently, Professor Fuentes-Rohwer has referred to the *NAMUDNO* Court's willingness to uphold the statute while employing a narrow and questionable reading of the language as a "paradox."[40] Indeed, the legitimacy of the *NAMUDNO* decision often centers on whether the Court was correct in questioning section 5's constitutionality, particularly since we live in a "post-racial" society.[41] The continued existence of racially polarized voting in both covered and noncovered jurisdictions, however, has convinced some scholars that the Court's concerns about state sovereignty should hold little weight against sustaining the constitutionality of a statute that is clearly still needed.[42]

What the Court and the legal scholarship ignore, however, is that concerns about "sovereignty" and "federalism," at least as they pertain to whether the VRA interferes with the states' authority over elections, are misplaced for reasons other than the continued need for section 5.

The Elections Clause, which gives the states the ability to "choose the time, place, and manner of elections," grants authority

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38. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1712 (2004).

39. Fuentes-Rohwer, *supra* note 21. *Compare City of Rome*, 446 U.S. at 181 (upholding the constitutionality of the VRA), *with* City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, § 3, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. 1973 (2006)) ("[T]he language of § 2 no more than elaborates upon that of the Fifteenth Amendment, 9 and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself."). *City of Rome* and *City of Mobile* were decided the same day.

40. Fuentes-Rohwer, *supra* note 21, at 702.

41. *See, e.g.*, Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL'Y REV. 59, 59 (2009) ("Some have suggested that his victory marks the beginning of a 'post-racial' era in which race bears less significance or consequences."); Abigail Thernstrom & Stephen Thernstrom, Op-Ed, *Racial Gerrymandering is Unnecessary*, WALL ST. J., Nov. 11, 2008, at A15 (observing that "American voters have turned a racial corner"); s*ee also* Ansolabehere et al., *supra* note 32, at 1399 (noting that "a lack of polarized voting does not speak to whether racial minorities face increased obstacles or unconstitutional conditions at the polls").

42. Issacharoff, *supra* note 38, at 1172; Karlan, *supra* note 32, at 31; *see also* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 4 (2008) (arguing that "it is a mistake to judge the efficacy and neutrality of section 5 against an idealized system" given the level of partisanship in the judiciary).

that the states exercise freely, so long as Congress decides not to exercise its power to "alter" state electoral mechanisms. In essence, Congress has a veto power over state practices that govern federal elections, a veto that deprives states of the hallmark of sovereignty: final policymaking authority. As the next Section shows, this absence of sovereignty makes it difficult for many of the different theories of federalism to provide an adequate analytical framework for our electoral system.

B. The Voting Rights Act as an Unjustified Intrusion on State Sovereignty: The Inadequacies of Federalism Theory

As the prior Section shows, the legal scholarship, in arguing for the constitutionality of the VRA, has ignored that the states are not sovereign over elections and has assumed that the Act is a justified intrusion on state sovereignty rather than questioning if it is an intrusion at all. In reality, our system of federalism distinguishes between state autonomy and state sovereignty: whether the states are sovereign is determined by the constitutional text, history, and the specific policy area. With regard to the area of elections, the Elections Clause gives states autonomy over their electoral apparatuses. This authority is plenary if Congress has not acted, but it is not sovereign because Congress retains its authority to modify or alter state practices. Because of this structure, the Elections Clause is not really a federalism provision at all. It does not give the states "exclusive jurisdiction over some set of issues."[43] The Clause is a decentralized organizational structure that gives Congress final policymaking authority over federal elections. And, as Part II.B will show, the Fourteenth and Fifteenth Amendments expand this authority to state elections as well.

This clarification regarding the scope of congressional authority should inform the level of deference that the Court uses to analyze congressional acts that alter or change state electoral practices. If we start from the baseline that the Clause is about congressional sovereignty, then it quickly becomes apparent that the VRA is not an intrusion on state sovereignty at all. The problem is that there has not been a theory of federalism advanced by the Court or the scholarly literature that can explain the Elections Clause, which promotes federalism but is not really "federalist" in nature because there is only one sovereign. Given that most federalism doctrine either has moved away from sovereignty as the core of

43. FEELEY & RUBIN, *supra* note 10, at 16.

federalism theory or embraces a dualism that does not reflect the world we live in, this Article articulates a working theory of sovereignty to help fill this gap with respect to our system of elections. First, it is important to understand why the other theories are lacking.

1. Dual Federalism as a Theoretical Framework for the Elections Clause

Understanding the concept of sovereignty is critical to articulating a meaningful definition of federalism, particularly with respect to elections. Sovereignty and autonomy have been embraced as the focal points of federalism for some scholars, even though the Court has been laissez-faire in its usage of the terms. Professors Feeney and Rubin, for example, define federalism as a polity that grants "partial autonomy" to geographically defined subunits.[44] For these scholars, partial autonomy is the equivalent of sovereign authority; they focus on how geography creates a mutually exclusive zone of policymaking that promotes federalism in a way that a functional grant of powers over a range of governance areas does not.[45] Having an assigned zone does not insulate decisionmaking and power in the same way as defined borders. Moreover, the focus on separate zones of policymaking reflects that dual federalism, or the idea that the state and federal governments each have independent spheres of policymaking authority, remains an organizing principle for many theorists even if it is no longer an accurate description of our system.[46]

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44. *Id.* at 13.

45. *Id.* ("[A]t least one key to our conception of federalism lies in the question of geography itself and the significance of geographical divisions of authority, in contrast to other sorts of divisions."); *see also* Rapaczynski, *supra* note 19, at 349 ("[T]o say that a state is sovereign is an abbreviated way of saying that its sovereignty is limited to some domain. . . . defined geographically by the territory of the country. . . .").

46. *See* Hills, *supra* note 15, at 815 (discussing the argument that dual federalism is dead and has been replaced with theories of cooperative federalism); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005) ("[T]he conceptual framework of dual federalism remains pervasive in theory and doctrine."); *see also* FERC v. Mississippi, 456 U.S. 742, 761 (1982) (rejecting the argument that "the States and the Federal Government in all circumstances must be viewed as co-equal sovereigns" because it is "not representative of the law today"); Fry v. United States, 421 U.S. 542, 546 (1975) (forcing state decisionmakers to comply with the requirements of federal law); FEELEY & RUBIN, *supra* note 10, at 20–25, 29 (criticizing the Court for confusing values of federalism with values that emerge from any decentralized system); Schapiro, *supra*, at 274 ("Dualist theories of federalism identify important values, but they do not address the resolution of the conflicts that commonly arise. The theories focus on the reasons for separating state and federal authority, not on how to reconcile them."). *Compare* John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27–28 (1998) (advocating for dual federalism), *with* Lessig, *supra* note 16, at 214 (discussing the limits of federalism).

Rather, our system is much more fluid because historical, political, and economic realities have made it largely impossible to keep the two spheres—state and federal—separate.

As Lawrence Lessig has persuasively argued, all of the early rules that maintained the line between state and federal power depended on the Court's ability to draw lines: to distinguish direct from indirect regulation of commerce, manufacturing from commerce, and intended from unintended effects.[47] In dormant commerce clause cases, these distinctions, as well as the ability to measure economic effects, determined whether a state statute would stand. Similarly, in the area of federal preemption, the relevant determination turned on whether federal regulation occupied a particular field and left little or no room for state regulation.[48] But the line drawing and formalism that allowed the Court to maintain these distinctions ultimately made the Court appear political—first, by the New Deal,[49] then following the Court's intergovernmental tax immunity decision in *New York v. United States*,[50] and finally by the Court's response to federal regulation of the states in *National League of Cities v. Usury*.[51] Because of the risk that any rule drawing a line between state and federal power may become politicized, Professor Lessig focuses on how prophylactic rules can indirectly advance federalism. His solution to the broader problem of the politicization of federalism rules reflects the hazards of attempting to draw the boundary between state and federal power to the Court's institutional legitimacy.

Despite the problems that arise in trying to keep state and federal power separate, the Court continues to adhere to dual-federalism theories because they represent a schematically easier way of drawing a boundary between state and federal power. Not only is it simpler for the Court to draw categorical lines, but these distinctions

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47. *See* Lessig, *supra* note 16, at 139–40 (describing the fact-specific inquiry that the Court had to use to determine what objects the commerce clause power reached).

48. *Id.* at 166–67.

49. *Id.* at 177 ("Why the old categories were rendered political is . . . because part of what these old limits rested upon had itself been drawn into doubt—had been rendered contestable. Not only the ideas of a passive government in the face of crisis, and the ideas of laissez-faire, but also some of the very premises of federalism itself . . . . To draw these artificial lines to limit governmental power became artificial; the effort, political.").

50. *Id.* at 181–82 (discussing how the rule of *McCulloch v. Maryland* extended to state immunity from federal taxation, but how the doctrine later fell apart because the inability of the Court to discern when immunity was appropriate made it look political when it made such attempts).

51. *Id.* at 184 ("[T]here could be no firm line that would divide proper from improper federal regulation; the line instead was constantly shifting. And if the line was constantly shifting, then the Court couldn't help but appear political in its shifting resolution of these federalism cases.").

also allow the states to retain some meaningful control over certain policy areas.[52] But problems remain. Dual federalism tells us very little about the residual sovereignty that the Court often touts as key to maintaining the values that the framers had hoped federalism would promote, nor does this theory shed much light on the autonomy that the states have in some policymaking areas.[53] Indeed, identifying sovereign authority, rather than relying on rigid boundaries, helps us determine where the locus of power truly lies.

The Court, aware of its spotty history in enforcing federalism, continues to rely on dual federalism in policing Congress's commerce power, albeit in a diluted form. In *United States v. Morrison*, the Court invalidated the civil remedy provision of the Violence Against Women Act on the grounds that Congress was impermissibly regulating noneconomic behavior and therefore exceeded the scope of its commerce authority and its authority to enforce the Fourteenth Amendment.[54] *Morrison,* like *United States v. Lopez,* reflected the Court's belief that it could enforce a rigid separation between state and federal power by focusing on the economic/noneconomic distinction, similar to its early dual-federalism cases.[55] But this proposition quickly fell apart in *Gonzales v. Raich,* where the Court held that Congress may regulate local, noneconomic behavior if such regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[56] The shifting boundaries of federalism made it difficult for the Court to rely on hard lines, despite its dogged insistence that such lines can and should be drawn. Thus, it was inevitable that the states' "residual sovereignty" would be defined by focusing on the outer limits of congressional power.

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52. Schapiro, *supra* note 46, at 271.

53. *See* THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (noting that the union is federal in character because "the jurisdiction [of the proposed Government] extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects" but observing that there will be controversies related to "the boundary between the two jurisdictions").

54. United States v. Morrison 529 U.S. 598, 617–19, 627 (2000).

55. *Id.* at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *see* Lessig, *supra* note 16, at 129 ("*Lopez* is an act of interpretive fidelity. It is an effort to reconstruct something from the framing balance to be preserved in the current interpretive context.").

56. Gonzales v. Raich, 545 U.S. 1, 36 (2005) (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

The Court's ephemeral notion of "residual sovereignty" and persistence in keeping the boundaries separate have led it to ignore the definitional problem that arises whenever it tries to use the term "sovereignty" to describe state action in an area, like elections, where there are not the separate policy spheres typical of dual federalism.[57] States choose the time, place, and manner of both federal and state elections, but, in this context, the term "residual sovereignty" has no special independent significance outside of signifying that the states retain some power to act. "Residual sovereignty" does not, in and of itself, serve as an independent source of authority for state action in the Elections Clause because of the congressional veto.[58]

Consequently, dual sovereignty, which serves as the basis for much of the Court's federalism jurisprudence, does not work as a theoretical framework for the Elections Clause because it does not allocate power in a way that is mutually exclusive.[59] It does not give the states their own independent zone to act, insulated from federal regulation.

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57. *See generally* Lessig, *supra* note 16; *see also* THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (arguing that the union is federal in character because the "jurisdiction [of the proposed Government] extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects").

58. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 804 (1995) ("[T]he [constitutional] provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States."); *see also* Cook v. Gralike, 531 U.S. 510, 520–21 (2001) (rejecting the argument that the states had the right to give instruction to their representatives that the Tenth Amendment reserved, despite historical evidence indicating that this practice was common). Indeed, the *Cook* Court reasoned that the Tenth Amendment could not reserve any state authority to regulate federal elections since the federal offices "arise from the Constitution itself." *Id.* at 522–23 ("Because any state authority to regulate election to [the federal] offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved by, the States.' ") (citation omitted). James Madison had a difficult time discerning the contours of the states' residual sovereignty, but ultimately concluded that because the state governments are "constituent and essential parts of the federal government," federal power will, by definition, be constrained. THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961) ("Thus each of the principal branches owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them."); *see also id.* at 292–93 (noting that the powers reserved to the states are "numerous and indefinite" but "extend to all the objects, which, in the ordinary course of affairs concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State").

59. *See, e.g.*, *Morrison*, 529 U.S. at 648 (explaining that one purpose of the Convention was to secure sovereignty for the states); *Lopez*, 514 U.S. at 576 (describing federalism as the diffusion of sovereign power); Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936) (explaining that while states are only quasi-sovereign, in all power reserved to them they are supreme); Ableman v. Booth, 62 U.S. 506, 516 (1858) ("And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.").

Despite this unique power allocation, the Court still interprets election law regulations from a dualist perspective. The idea that the VRA intrudes on state sovereignty, as several Justices have argued over the years, presupposes that the exercise of congressional authority is so rare as to constitute an exception to the general rule that this is a policy area that belongs to the states.[60] In other words, Congress can intrude on state sovereignty over elections, but only if justified. This proposition is not totally farfetched—the Elections Clause speaks only to governing the "Elections for Senators and Representatives," so state sovereignty could conceivably be at issue since states are required under the Act to preclear *any* change to their election laws.

But this is not completely correct given that the Court does not distinguish between state and federal elections in making arguments about protecting state sovereignty.[61] And, as I argue in Part II.B, the Fourteenth and Fifteenth Amendments limit the amount of residual sovereignty reserved to the states over practices that govern state elections. Interestingly, in criticizing the Act on federalism grounds, the *NAMUDNO* Court focused on how it differentiates between states; the Court also said nothing about whether Congress's authority is broader with respect to regulating federal elections than it is for state elections.[62]

In *NAMUDNO*, the Court relied on "the structure of the Voting Rights Act" and "the underlying constitutional concerns [that] compel a broader reading of the statute" in allowing a small utility district that did not conduct registration for voting to bail out under section

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60. I also use dual federalism as a general label that captures the Court's dormant commerce clause jurisprudence because that doctrine says that the states cannot legislate in Congress's domain, even if Congress has not acted, so the presumption that each level of government has its own exclusive sphere is still in force. *See, e.g.*, Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 426–27 (1921) (invalidating a state licensing requirement that disproportionately burdened cars manufactured outside the state); Walling v. Michigan, 116 U.S. 446, 461 (1886) (holding that state tax on liquor salespeople that discriminated against the introduction of products from another state was unconstitutional); Webber v. Virginia, 103 U.S. 344, 350–51 (1880) (invalidating a state licensing statute for agents of articles manufactured in other states).

61. *See, e.g.*, United States v. Brewer, 139 U.S. 278, 287 (1891) (dismissing indictment of defendants for violating federal law for failing to open ballot boxes since state elections law did not clearly require that ballot boxes be opened at the polling place).

62. Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504, 2512 (2009) ("The Act also differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.' Distinctions can be justified in some cases. 'The doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared.' But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.") (citations omitted).

4(a) of the statute.[63] Typically, only states and their political subdivisions can bail out, or be released from coverage under the Act, if they illustrate that they conduct registration for voting and have not discriminated in the past ten years.[64] The Court expanded the scope of the bailout provisions in order to allow NAMUDNO, which did not conduct voter registration, to bail out so as to avoid ruling on the constitutional questions surrounding the preclearance provisions of section 5. Yet, had the Court acknowledged that Congress has expansive power over elections, it would have recognized that the constitutional problems did not emerge from an application of section 5 to the utility district, but rather from the limited scope of section 4(a) in allowing the district to bail out.[65] Once the question is framed properly, it is clear that the small utility district in *NAMUDNO* should have been able to bail out from section 5 coverage because it had not committed any voting rights violations; the ability to bail out should turn on this factor rather than on whether the jurisdiction conducts registration for voting.[66]

Focusing on the question of whether the section 5 preclearance regime unjustifiably intrudes on the states' zone of authority over elections, as the Court did, ignores that there are very few state electoral procedures that do not have implications for federal elections and federal representation.[67] As such, dualism has no place in the

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63. *Id.* at 2513.

64. *Id.* at 2509 (noting that to bail out, a political subdivision "must show that for the previous 10 years it has not used any forbidden voting test, has not been subject to any valid objection under § 5, and has not been found liable for other voting rights violations"). The Act defines "political subdivision" as "any county or parish . . . [or] any other subdivision of a State which conducts registration for voting." *Id.* at 2514.

65. Abigail Thernstrom, NAMUDNO: *Right Question, Wrong Case*, SCOTUSBLOG (Feb. 8, 2010, 10:53 AM), http://www.scotusblog.com/2010/02/namudno-right-question-wrong-case/.

66. *See NAMUDNO*, 129 S. Ct. at 2514–16 (holding that all political subdivisions, even those that are not counties or parishes and do not conduct voter registration, are eligible to file for a bailout).

67. *Id.* at 2512–13 (implying that section 5 is neither congruent or proportional nor rationally related and therefore exceeds Congress's power under the Fifteenth Amendment, but not definitively resolving this question). *But see* Roe v. Alabama, 68 F.3d 404, 408–09 (11th Cir. 1995) (explaining that directing a federal district court to dismiss state election cases would leave plaintiffs without an adequate forum for vindication of federal constitutional claims); *see also* Riley v. Kennedy, 553 U.S. 406, 425 (2008) (finding that state court orders that changed the method of election for county commissioners did not have to be precleared "because the prerogative of the Alabama Supreme Court to say what Alabama law is merits respect in federal forums, a law challenged at first opportunity and invalidated by Alabama's highest court is properly regarded as null and void *ab initio*, incapable of effecting any change in Alabama law or establishing a voting practice for § 5 purposes"); Foster v. Love, 522 U.S. 67, 71 (1997) ("When the federal statutes speak of 'the election' of a Senator or Representative, they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder."); *Ex Parte* Yarbrough (*The Ku Klux Klan Cases*), 110 U.S. 651, 662 (1884) (arguing that Congress

analysis. Based on the Court's approach and reliance on this theory, however, all it takes is the wrong plaintiff, like an obscure utility district, to show the limitations of a widely successful piece of civil-rights legislation.[68]

As *NAMUDNO* illustrates, starting from the premise that states are "sovereign" over elections can potentially result in the invalidation of legislation that is actually well within congressional authority to implement. The Elections Clause is not about rigid boundaries or multiple sovereigns; it is about the broad authority that the states have to control elections, referenced here as "autonomy," and the sovereignty that ultimately lies with Congress, which allows Congress to intervene through its veto power. It is impossible for dual federalism to capture this dynamic because the Elections Clause leaves little room for the exercise in line drawing that this theory requires.

2. Polyphonic, Cooperative, and Process Federalism as Theoretical Frameworks for the Elections Clause

In order to escape the rigidity of dual federalism, some scholars have sought to develop federalism theories that do not focus on strict boundaries between state and federal authority but still provide a solution to the tension that arises when the two sovereigns try to coexist. These more fluid theories could describe the context of elections, where states still play a significant, sometimes even dominant, role. In particular, Robert Schapiro has argued for what he calls "polyphonic federalism," or a concurrent federalism that does not define the state and federal governments as separate governing enclaves; rather, his theory "asks how the overlapping power of the state and federal governments can best address a particular issue."[69] Under this functionalist approach, there is a background presumption that state and federal power can coexist.[70]

The problem with Schapiro's approach, which he acknowledges, is that encouraging the dialogue that polyphonic federalism envisions between state and federal governments results in an absence of

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can regulate state electoral practices that govern federal elections even if state elections are held on the same day and in the same place, and it is not relevant that "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"); Fuentes-Rohwer, *supra* note 21, at 719.

68. Thernstrom, *supra* note 65; *see also* Ansolabehere et al., *supra* note 32, at 1400 (finding that, if race-based voting patterns were the only factor to decide if a jurisdiction is covered or uncovered, the list of covered states would be different than it currently is).

69. Schapiro, *supra* note 46, at 285.

70. *Id.* at 295.

finality and an increase in forum shopping that could undermine the legitimacy of our electoral system.[71] The need for finality, an important aspect of sovereign authority and a legitimating factor for our system of elections,[72] justifies judicial deference toward congressional action that alters or modifies state electoral provisions. Polyphonic federalism, much like dual federalism, sheds little light on how the judiciary should approach a text that imagines a role for two sovereigns but creates a context in which there can only be one.

While polyphonic federalism does not focus on sovereignty and instead uses shared authority as its underlying theory, many commentators have rejected a sovereignty-based account of federalism in its entirety.[73] This rejection is most prominent in theories of cooperative federalism which, according to one scholar, "invite[] state agencies to implement federal law," primarily through federal regulatory programs.[74] The benefits of such cooperation are that it results in a diversity of regulatory policy within a framework of uniform federal standards. It has the coordination between sovereigns that tends to be absent in dual-federalism regimes.[75] The coordination and freedom that state agencies have to tweak federal programs do

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71. This is already a significant concern. *Id.* at 291; *see also Kennedy*, 553 U.S. at 406–07 (lawsuit filed in state and federal courts); Bush v. Gore, 531 U.S. 98, 103 (2000) (treating application for stay of state Supreme Court's mandate as petition for writ of certiorari and granting it); *Roe*, 68 F.3d at 405–06 (federal lawsuit where question was certified to state court).

72. *See* sources cited *supra* note 21.

73. These commentators observe that concurrent federalism, where the states and the federal government share authority, is more reflective of our system. *See* John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 87 (Daphne A. Kenyon & John Kincaid eds., 1991); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1692 (2001) [hereinafter Weiser, *Federal Common Law*]; Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (arguing that, despite talk about dual federalism, in reality Congress enacts cooperative regulatory programs); Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS 15, 18 (2001) (describing cooperative federalism as the opposite of dual federalism). Others focus on institutional arrangements outside of state and federal regimes that can give minorities power without sovereignty. *See* Gerken, *supra* note 21 (recasting federalism as minority rule without sovereignty, which focuses attention on ignored institutions).

74. Weiser, *Federal Common Law*, *supra* note 73, at 1694.

75. *Id.* at 1697 ("A critical feature of cooperative federalism statutes is the balance they strike between complete federal preemption (a preemptive federalism) and uncoordinated federal and state action in distinct regulatory spheres (a dual federalism). Under preemptive federalism regimes like the Employee Retirement Income Security Act (ERISA), for instance, the federal courts interpret federal enactments or defer to federal agency action as preempting all state action in a field. Dual federalism regimes, by contrast, separate federal and state authority into two uncoordinated domains, giving rise to heated legal battles and considerable confusion for the regulated parties.").

not require sovereignty to be a focal point. While final policymaking authority may lie with Congress under cooperative federalism, this authority is somewhat illusory. States, in implementing federal programs, require flexibility and freedom, tend to be more knowledgeable about the underlying policy, and modify federal rules to comport with local circumstances—a system that strongly implies that neither body is truly sovereign.[76]

There are several persuasive arguments that support cooperative federalism as an underlying theoretical framework for our system of elections. The first is the text—it provides that states will draw the lines in the first instance but gives Congress the ability to change or alter such plans, suggesting a coordination that is akin to many modern federal regulatory programs. The second is our political system. Thanks to the two-party model, state and federal officials coordinate in order to draw district lines and pass electoral rules that give each party the best chance of maximizing its electoral success. The two-party system unites state and federal officials, who coordinate their efforts in order to advance partisan goals.[77]

The problem with cooperative federalism as a framework, however, emerges from the same textual provision that initially led us to believe it might work: the congressional veto. The congressional veto allows Congress to engage in what is effectively a full preemption of state law over federal elections. Cooperative federalism is designed to prevent the full preemption of state law by giving the federal agency and the state the responsibility of implementing federal law.[78] The second problem is that most cooperative federalism programs entail voluntary state involvement. The VRA and other federal legislation that alters or changes state electoral practices are anything but voluntary and tend to trigger substantial outrage on the part of the states.[79] Finally, the allocation of power in our electoral system

76. *Id.* at 1700 ("As a result of this need for cooperation, both the states and the federal government are well aware that they are tied together in their ability to administer cooperative federalism programs. The resulting interdependence gives each important influence over the other."); *see also id.* at n.13 ("Cooperative federalism statutes regularly include 'savings clauses,' which explicitly allow states to impose more stringent requirements than federal law demands.").

77. *See* Kramer, *supra* note 13 at 276 ("[D]ecentralized national political parties . . . linked the fortunes of federal officeholders to state politicians and parties and in this way assured respect for state sovereignty."); Tolson, *supra* note 21, at 862 (arguing that redistricting can protect state authority from expanding federal power).

78. Weiser, *Federal Common Law*, *supra* note 73, at 1697–98.

79. For example, when Congress first passed the VRA, South Carolina immediately challenged its constitutionality. *See* South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (upholding challenged portions of the VRA). States and their political subdivisions have continued to challenge the constitutionality of the Act over the years. *See, e.g.*, Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (2009) (applying constitutional avoidance canon to

cannot be understood without referencing sovereignty, although there can be some disagreement as to where the locus of sovereignty should lie.[80] As a result, trying to apply a cooperative framework, which is not focused on the core of power but its allocation from somewhere other than the core, to the Elections Clause brings us back to our initial questions about which level of government has the authority to do what.

Sovereignty similarly has not been central to advocates of process federalism, who believe that the values of federalism are best served by focusing on procedural constraints on federal power that can be enforced in the courts.[81] With regard to the substance of federalism doctrine, these theorists observe that the state and federal governments will generate policy in order to compete for the political allegiance of citizens.[82] As a result, some (but not all) of these scholars believe that the political process, rather than the courts, is best able to police federalism.[83] Others embrace a limited form of judicial review.[84]

The problem with process theory, and in particular the political safeguards approach, is that, standing alone, it tells us very little about what our federalism should look like.[85] The political safeguards

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refrain from deciding if preclearance requirements are unconstitutional); City of Rome v. United States, 446 U.S. 156, 183 (1980) (upholding *Katzenbach*).

80. *See, e.g.*, Gerken, *supra* note 21, at 8 (proposing to recast federalism as including minority rule through small administrative units lacking sovereignty).

81. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1364 (2001) ("Process federalism's central insight is that the federal/state balance is affected not simply by what federal law is made, but by how that law is made. Most classic separation of powers issues—delegation, for example, or the legitimacy of federal common lawmaking—thus have an important federalism dimension. The converse also seems true: We can go a long way towards assuring state autonomy by policing the federal lawmaking process, even if we are unwilling or unable to enforce substantive limits on federal power.").

82. *See* Gerken, *supra* note 21, at 6 (listing one of the well-known benefits of federalism as competition); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 59–61 (2004) (arguing that states provide political competition for popular loyalty).

83. *See* THE FEDERALIST NOS. 10, 51 (James Madison) (discussing political and institutional checks on national power). *But see* THE FEDERALIST NO. 80 (James Madison) (discussing scope of judicial authority and courts as a way to effectuate constitutional provisions); Young, *supra* note 81, at 1354 (arguing that judicial review in federalism cases should be an important secondary mechanism for maintaining political safeguards).

84. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985) ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a sacred province of state autonomy."); Young, supra note 81, at 1372–73 (arguing that federalism doctrines "should maximize the ability of the system to police itself").

85. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–52, 558–

are less about presenting a theory of federalism and more about choosing a forum to resolve these issues.[86] Whether or not one believes that courts are best suited to address these questions,[87] it is undisputed that the courts are haunted by line drawing and definitional problems that have plagued every theory of federalism that they have formulated up to this point. None of the theories or approaches discussed above definitively resolves how the Court should approach the Elections Clause which, I argue, has a decentralized organizational structure that appears to mimic federalism but in reality concentrates final policymaking authority in only one sovereign—Congress.[88] As the next Part shows, the constitutional history and text, as well as the Supreme Court's jurisprudence, support this view of the Elections Clause.

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59 (1954) (arguing that "the existence of the states as governmental entities and as sources of the standing law is in itself the prime determinant of our working federalism"); *see also* Kramer, *supra* note 13, at 220 (discussing Wechsler's arguments in depth); Young, *supra* note 81, at 1373 (embracing process theory but noting that it deserves "two cheers" instead of three because "even a process oriented Court ought to impose some substantive limits on federal regulatory authority").

86. Schapiro, *supra* note 46, at 279–80 ("[T]he most significant problem with the political safeguards approach is that it is fundamentally a theory of judicial review, not a theory of federalism. The political safeguards argument explains why courts should not draw lines between the state and federal government . . . . However, the theory does not tell Congress how it should make the allocational decisions."); *cf.* Prakash & Yoo, *supra* note 14, at 1461–62 (laying out criticisms of political safeguards theory); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1318–21 (1997) (discussing scope and criticisms of political safeguards theory). *See generally* United States v. Lopez, 514 U.S. 549, 577 (1995) ("To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process.") (citing THE FEDERALIST NO. 46, at 295 (James Madison) (Clinton Rossiter ed., 1961)).

87. *Compare* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1500 (1994) ("[H]ere we come, finally, to the crux of the argument against judicially–enforced federalism—that courts are poorly situated to make (or second guess) the difficult judgments about where power should be settled or when it can be shifted advantageously. Judges lack the resources and institutional capacity to gather and evaluate the data needed for such decisions. They also lack the democratic pedigree to legitimize what they do if it turns out to be controversial. But most of all, courts lack the flexibility to change or modify their course easily, an essential quality in today's rapidly evolving world. Stare decisis is still a major force guiding judicial decision making—a quality we should be loath to surrender, but one that most definitely impedes the ability of courts to abandon previous holdings."), *with* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1748–49 (2005) ("The open-textured nature of the Constitution's structural commitments calls for judicial implementation through doctrine: There is simply no way to administer our federal system without developing rules to flesh out the allocation and balance of authority.").

88. FEELEY AND RUBIN, *supra* note 10, at ch. 1 (distinguishing federalism from decentralization).

II. UNDERSTANDING THE ELECTIONS CLAUSE: THE HISTORY, TEXT, AND CASE LAW

The framers chose a federalist system to protect the people from tyranny by allocating power between the states and the federal government[89] to counteract ambition with ambition, so to speak.[90] But very little of the Court's recent federalism jurisprudence concerns the people as sovereigns;[91] rather, much of its focus has been on how to protect the sovereignty of the states as states from federal overreaching.[92] Protecting the people as sovereigns and protecting the states as states are values of federalism that have converged, with federal overreaching seen as antithetical to the interests of the state and, by implication, the interests of the people.[93] This makes defining sovereignty and developing a normative theory of federalism very difficult when the interests of the people and the state diverge or when the interests of the people are more aligned with federal interests. Federalism is destined to be instrumental and incremental without a basic framework that outlines the attributes of sovereignty.

The Elections Clause, with its initial allocation of power to the states, and its subsequent delegation to Congress of the power to alter state electoral arrangements, escapes the textual and historical

89. *See* BAILYN, *supra* note 19, at 201 (noting that the theory of parliamentary sovereignty triumphed in England at the end of the Glorious Revolution because it is justified by a theory of the ultimate supremacy of the people, a supremacy that is "normally dormant and exercised only at moments of rebellion against tyrannical government," a theory "that was carried on into the eighteenth century and into the debates that preceded the American Revolution").

90. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("Ambition must be made to counteract ambition.").

91. For a recent exception, see Bond v. United States, 131 S. Ct. 2355, 2364, 2367 (2011) (finding that individuals can bring Tenth Amendment claims and that federalism provides liberties to citizens through the diffusion of sovereign power). Yet, even the *Bond* Court viewed this individual cause of action as a part of protecting the sovereignty of the states. *See id.* at 2364 ("[T]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right.").

92. *See, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding that "Congress cannot conscript the *State's* officers directly" (emphasis added)); New York v. United States, 505 U.S. 144, 188 (1992) (holding that "[t]he Federal Government may not compel the *States* to enact or administer a federal regulatory program" (emphasis added)); Gregory v. Ashcroft, 501 U.S. 452, 473 (1991) (holding that the "people of Missouri" have the "prerogative as citizens of a *sovereign State*" to "establish[] a qualification for those who would be their judges" and "[n]either the ADEA nor the Equal Protection Clause prohibits the choice they have made" (emphasis added)).

93. *Gregory*, 501 U.S. at 458 (discussing federalism values from the vantage point of the state being able to ensure that its citizens have certain things).

constraints that plague judicial attempts to find substantive restrictions on congressional authority. There is an organizing principle for the Elections Clause just by virtue of the way it allocates power between "sovereigns"—here, the federal government and the states—which highlights why the distinction between "sovereignty" and "autonomy" is important. Yet the Court's difficulty separating sovereignty from autonomy in its federalism jurisprudence raises interesting questions about a provision of the Constitution that specifically denies that states are sovereign.

As Part II.A shows, the founding generation, and in particular the Anti-Federalists, recognized that the Elections Clause deprived the states of their sovereign authority over elections. This history explains why the Clause generated so much opposition during the debates over the ratification of the Constitution. Part II.B illustrates that the Court has recognized the absence of state sovereignty in its interpretation of the Elections Clause, although it has not extended this understanding of limited state power to the context of voting rights. Part II.C argues that Congress's power to enforce the Fourteenth and Fifteenth Amendments, when combined with its power under the Elections Clause, illustrates that our electoral system is about congressional, not state, sovereignty.

A. The Elections Clause as a Source of State Autonomy and Congressional Sovereignty

1. The Elections Clause as a Constraint on State Authority: The Historical Record

The states' lack of sovereignty over elections is consistent with our system of federalism and our constitutional history. The constitutional framework embraced multiple layers of authority to prevent both levels of government from being sovereign in the same regulatory sphere at the same time. This system of divided governance was inherited from Great Britain and was common in the colonies until the 1760s.[94] The pre-Revolutionary period was first defined by divided sovereignty between the Crown and Parliament, and then the theory of parliamentary sovereignty became dominant, defined as

94. *See* ALLISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 5 (2010) (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)) ("The Framers split the atom of sovereignty . . . . [T]heir idea that our citizens would have two political capacities, one state and one federal, each protected by incursion from the other . . . .").

unlimited and undivided sovereignty within a single polity.[95] Throughout this period, the colonies continued to exercise autonomy over areas of local jurisdiction.[96] The notion of parliamentary sovereignty and the corresponding lack of divided authority served as the basis for many of the disputes between Great Britain and the colonists.[97]

The post-Revolutionary period reflected these concerns about having one supreme authority, which is why the federal government was extremely weak under the Articles of Confederation. The delegates to the Constitutional Convention recognized that more power had to be ceded to the federal government without completely eliminating the sovereign nature of the states. The founders designed the Constitution so that the states would retain control over local matters and, to avoid the despotism of parliamentary sovereignty, the federal government would exercise power only over limited areas that tended to exceed or fall outside of the scope of local competencies.[98] Sovereignty, at least from the 1760s on, was not "final, unqualified, and indivisible" in only one body; instead, the power was divided between two sovereigns, each responsible for specific policy areas, with ultimate sovereignty lying with the people.[99]

The struggle over the delegation of sovereign authority continued well after the new government was established. In particular, the debate during the Constitutional Convention about the proposed congressional veto over all state laws illustrates how the congressional veto in the Elections Clause was intended to be a delegation of sovereignty from the states to the federal government. The Articles of Confederation were ineffective, in part, because of

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95. *Id.* at 13–15 (noting that throughout the seventeenth and eighteenth centuries, "[t]he idea that separate and equal authorities could exist within the same juridical boundaries offended contemporary understandings of the very nature of government power" and noting that some commentators stated that Parliament "hath sovereign and uncontrollable authority . . .").

96. *See* BAILYN, *supra* note 19, at 200, 202–03 (noting that except for certain powers England exercised over "only the outer fringes of colonial life" that "[a]ll other powers were enjoyed . . . by local, colonial organs of government"). In the seventeenth century, there was a dispute over where the locus of sovereignty lay—with the Crown or Parliament. By the Glorious Revolution, the theory of parliamentary sovereignty, justified by the notion that the people are supreme, was the dominant theory in England until the eve of the American Revolution. *Id.* at 200–01.

97. LACROIX, *supra* note 94, at 17 (noting that the nature of sovereignty was contested and that there were "two versions of the British Constitution"—the one "in which Parliament was omnipotent" and "the colonial interpretation, premised on the belief that there were limits to Parliament's authority to legislate for the colonies") (internal citations omitted).

98. *Id.* at 35, 132–33.

99. *See* BAILYN, supra note 189, at 200–28 (discussing the progression from the idea of an absolute, unified sovereignty to the Revolutionary idea of sovereignty in the people).

Congress's inability to control the content or direction of state laws that conflicted with its own dictates. To address this problem, Charles Pinckney proposed during the Constitutional Convention "that the National Legislature should have authority to negative all laws which they should judge to be improper."[100] Both Pinckney and James Madison believed that the provision was necessary because "the States must be kept in due subordination to the nation,"[101] and each understood that a powerful central government was key for the nation to succeed. Along these lines, one delegate, in rejecting the idea that the congressional negative should be limited, observed the following:

> Federal liberty is to States, what civil liberty, is to private individuals. And States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, [than] the savage is to purchase civil liberty by the surrender of his personal sovereignty, which he enjoys in a State of nature. A definition of the cases in which the Negative should be exercised, is impracticable. A discretion must be left on one side or the other? [W]ill it not be most safely lodged on the side of the National government?[102]

The national government, therefore, should have this power because we are "one nation of brethren" and "must bury all local interests and distinctions."[103] Thus, the congressional negative represented a passing of sovereignty from the states to the national government because the states would have no longer had any assurances of finality in the passing of their own laws.

James Madison had proposed the congressional negative to Thomas Jefferson, Edmund Randolph, and George Washington in the months prior to the Convention, arguing that the "federal negative" would establish the supremacy of the national government.[104] Madison envisioned it as a tool to keep the states from defeating acts of Congress, violating national treaties, and being aggressive toward each other. The proposal was ultimately defeated, however, because of fear that the negative gave Congress unchecked authority,

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100. James Madison, *Debate on the Veto of State Laws*, *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 58 (Ralph Ketcham ed., 2003) (June 8, 1787).

101. *Id.* at 58–59. This provision was a part of Article VI of the Virginia Plan, which gave the national legislature the ability "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of the Union." James Madison, *The Virginia Plan*, *in* 10 THE PAPERS OF JAMES MADISON 16 (Robert A. Rutland et al. eds., 1977) (May 29, 1787) (noting that James Madison supported "Charles Pinckney's motion for an unlimited veto over state laws").

102. Madison, *supra* note 100, at 60.

103. *Id.*

104. LACROIX, *supra* note 94, at 138–39.

particularly over the internal workings of the states.[105] Nevertheless, the debate over the congressional negative speaks to the larger debate concerning the locus of authority and power contained in the Elections Clause.

Madison believed that the congressional negative would show that power emanated from the center; he was willing, in fact, to model the negative after the one used by the very empire from which colonists had sought freedom: Great Britain. The federal negative mirrored "the same type of ex ante review of state legislative acts that the British Crown, through the mechanism of the Privy Council, had formerly wielded over the acts of the colonial assemblies."[106] According to Allison LaCroix, "Madison envisioned the federal negative functioning in the same manner as the Privy Council's practice of reviewing statutes ex ante, in a general posture, *before they could be applied in individual cases or challenged by specific parties*."[107]

Thus, Madison's view of the scope and nature of the congressional negative was that it would have sharply limited state sovereignty and state autonomy by giving Congress the ability to invalidate state laws before they went into effect.[108] The proposal of a congressional negative was ultimately defeated, however, because, for many delegates, it resembled too closely the practices of Great Britain during the pre-Revolutionary period.[109] Other delegates expressed fears that a congressional negative over state laws placed too much power in Congress, but they expressed a willingness to support a negative in a more narrow form. Thus, the congressional veto in the Elections Clause represents a compromise of sorts: it gives Congress the ability to veto state laws in limited, but important, circumstances—representation and voting. The importance of elections was a recurrent theme during the Convention, so Congress's ability to veto state electoral regulations was widely seen as necessary to prevent the states from destroying the national government without

105. Madison, *supra* note 100, at 58–60 (stating that Mr. Williamson was concerned that a congressional negative would undermine states ability to control internal police and that Mr. Sherman believed the nature of the congressional veto should be defined).

106. LACROIX, *supra* note 94, at 139; *id.* at 141 ("By positing that lands beyond the realm were held by the monarch alone by virtue of conquest, the doctrine of the king's dominions vested the king's council with authority to oversee colonial legislation and to review the decisions of colonial courts.").

107. *Id.* at 145 (emphasis added).

108. *Id.* at 146 (noting that the negative gave "the general government the power to police both a state's relationship with its inhabitants and its relationship with its fellow states").

109. *See id.* at 147–54 (stating that some thought the negative looked "like little more than a rehash of imperial procedure").

intruding on state sovereignty in the same way that a general negative over state laws would have.

Even the limited veto over elections, however, was problematic for some in the founding generation. The Elections Clause furthered fears that the Constitution created an all-powerful national government that would introduce tyranny, despotism, and a governing aristocracy. To address these concerns, Federalists often drew parallels between the rights that free men surrendered to their governments to protect liberty and the power that states relinquished to the central authority, also viewed as necessary to protect freedom.[110] In other words, just as individuals had to give up some of their individual liberty to state governments in order to secure peaceful enjoyment of those liberties, so too did states have to surrender some of their power to the federal government for the same purpose—to protect the people. The congressional veto in the Elections Clause, from this perspective, was simply another layer of protection for the people in return for the states surrendering their final policymaking authority over elections to the federal government.[111]

Even though the Convention ultimately rejected a general congressional negative over state laws and despite the delegates' assurances about the limited nature of the congressional veto in the Elections Clause, the states recognized the danger that the congressional veto over elections presented. The loss of sovereignty, even in this limited context, led Massachusetts and New Hampshire, for example, to propose an amendment to the Elections Clause that

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110. THE FEDERALIST NO. 51 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself."); *see also* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 11 (1981) ("[J]ust as individuals have to give up some of their natural rights to civil government to secure peaceful enjoyment of civil rights, so states must give up some of theirs to federal government in order to secure peaceful enjoyment of federal liberties." (citing multiple sources)). The analogy between individual liberty/states and state liberty/federal government was a common one. *See, e.g.*, Madison, *supra* note 100, at 60 (comments of James Wilson) ("Federal liberty is to States, what civil liberty, is to private individuals. And States are not more unwilling to purchase it, by the necessary concession of their political sovereignty, than the savage is to purchase civil liberty by the surrender of his personal sovereignty . . . .").

111. *See generally* Foster v. Love, 522 U.S. 67, 73 (1997) (noting that one of the reasons that Congress, pursuant to its power under the Elections Clause, passed a statute fixing the election of congressional members to the same day is to remedy "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 with the burden on citizens forced to turn out on two different election days to make final selections of federal officers in Presidential election years . . . .") (citing CONG. GLOBE, 42d CONG., 2d SESS. 141 (1871) (remarks of Rep. Butler)).

would allow Congress to exercise its veto power only if states failed to call for congressional elections or passed electoral laws that otherwise subverted rights protected by the Constitution.[112] James Winthrop, writing in the *Massachusetts Gazette*, proposed fourteen conditions for accepting the new Constitution, including, "Congress shall have no power to alter the time, place or manner of elections, nor any authority over elections, otherwise than by fining such state as shall neglect to send its representatives or senators, a sum not exceeding the expense of supporting its representatives or senators one year."[113] Other individuals writing at the time also expressed alarm at the veto, with one questioning "how can [C]ongress guarantee to each state a republican form of Government" when the "time place & Manner of chusing the Members of the Lower house is intirely [at their mercy]."[114]

The notion that the veto would be used rarely and only for practical reasons[115] did little to comfort opponents who feared that the Elections Clause undermined the proposed constitution's creation of a federation and evinced an intent by the national government to absorb the states. As one commentator opined:

> By sect. 4th of the 1st article, "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*

112. *See generally* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787–1788, at 448 (2010) ("All of the states that recommended amendments asked for a modification of that provision so Congress could regulate congressional elections only when states themselves did not or could not call elections. Massachusetts and New Hampshire also proposed to add a statement that would allow Congress to use its power over elections against state electoral rules that were 'subversive of the rights of the People to a free & equal representation in Congress agreeably to the Constitution.' ").

113. *See* James Winthrop, "*Agrippa" XVIII*, MASS. GAZETTE (Bos.), Feb. 5, 1788, *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALISTS AND ANTIFEDERALISTS SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO 155, 158 (1993) [hereinafter THE DEBATE ON THE CONSTITUTION, PART TWO].

114. Letter from Joseph Spencer to James Madison, Enclosing John Leland's Objections (Feb. 28, 1788), *in* THE DEBATE ON THE CONSTITUTION, PART TWO, *supra* note 113, at 267, 268 (noting the objections of John Leland, a leading Virginia Baptist).

115. *See* Letter from Samuel Holdon Parsons to William Cushing, Our Security Must Rest in Our Frequently Recurring Back to the People (Jan. 11, 1788), *in* THE DEBATE ON THE CONSTITUTION: FEDERALISTS AND ANTIFEDERALISTS SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART ONE 748, 751 (1993) [hereinafter THE DEBATE ON THE CONSTITUTION, PART ONE] ("[I]t appears to me proper that Congress should determine the *Time*, our Different Legislatures have on this Subject gone into different Practices, it is necessary all Elections should be in Season to attend the federal Legislature and expedient, at least, they should be in One Day throughout the Union this can only be done by the national Authority—it may be so that the present Places of holding Elections will be impossible for the Electors to be convened at . . . it may happen that some one of the States in the Union may neglect or refuse to make any Law by which the Electors may be conven'd.").

> *place of chusing senators*?" The plain construction of which is, that when the state legislatures drop out of sight, from the necessary operation of this government, then Congress are to provide for the election and appointment of representatives and senators.[116]

Thus, even those who would not go as far as accusing Congress of attempting to abolish the states expressed discomfort with the congressional veto because it still represented an opportunity for Congress to assert undue influence over elections. This prospect, when taken to its most extreme conclusion, gave Congress the means to destroy the states' ability to be independent, autonomous units. One individual writing during the ratification debates argued that "Congress [is] to have the power of fixing the *time, place,* and *manner* of holding elections, so as to keep [the states] forever subjected to [its] influence."[117] The common response by Federalists was that Congress would prevent the undue influence of partisan zeal that came from unchecked state control of elections.[118] The congressional veto in the Elections Clause was linked to the then-prevailing notion that the national government would be insulated from the passions of the people in a way that the states were not and probably should not be.[119] The absence of sovereignty in the Clause, therefore, was viewed by the founding generation as a structural safeguard against partisan zeal and tyranny. The veto also reflected the delegates' fear that the states, had they been in complete control of elections, could have used this power to the detriment of their citizens, who would have little recourse.[120]

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116. Samuel Bryan, *Centinel* I, INDEP. GAZETTEER (Phila.), Oct. 5, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 52, 58–59.

117. William Findley?, *Reply to Wilson's Speech: "An Officer of the Late Continental Army,"* INDEP. GAZETTEER (Phila.), Nov. 6, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 100.

118. Rebuttal to "*An Officer of the Late Continental Army*": "*Plain Truth*", INDEP. GAZETTEER (Phila.), Nov. 10, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 111 ("Congress indeed are to have control to prevent undue influence in elections, which we all know but too often happens through party zeal.").

119. *See, e.g.*, Oliver Ellsworth, *Reply to Elbridge Gerry: "A Landholder" IV*, CONN. COURANT (Hartford), Nov. 26, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 234, 236 ("[P]erhaps it may be said, Congress have a power to control this formality as to the time and places of electing, and we allow they have: But this objection which at first looks frightful was designed as a guard to the privileges of the electors. Even state assemblies may have their fits of madness and passion, this tho' not probable is still possible.").

120. *See, e.g.*, JAMES MADISON, *Thursday Aug. 9 in Convention*, *in* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 414, 425 (Ohio Univ. Press 1984) (comments of Madison) (noting that the Elections Clause "was meant to give the National Legislature a power not only to alter the provisions of the States, but to make regulations in case the States should fail or refuse altogether").

Many of the delegates also believed that the Clause was necessary because of basic differences of opinion between the state governments and the delegates over what form national elections should take. For example, members of the House of Representatives are elected to two-year terms and senators are elected to six-year terms with no term limits for either, a structure that was different from many of the state systems at the time.[121] While these differences and others were points of concern during the state ratification debates, the disagreements over the Elections Clause occurred in a framework where most of the delegates, despite advocating for the congressional veto power, believed that states should still have broad authority over elections.[122] Yet these delegates could not deny their concern that states were more susceptible to abusing their authority than Congress would be in using its veto power. Giving states autonomy but not sovereignty addressed this concern.

Notions of dual and concurrent sovereignty do little to capture the historical and theoretical underpinnings of the veto—that there cannot be two sovereigns that make final decisions with regard to elections. And, more importantly, there cannot be two sovereigns without ignoring the concerns that the framers had about the potential for abuse if states had sole authority over their electoral apparatuses. Indeed, the debates during the Constitutional Convention recognized the loss of state sovereignty inherent in giving Congress the ability to negate state laws in their entirety. Thus, the actual structure of the Clause, much like the rejected congressional negative, creates a decentralized structure over elections where state authority is broad but Congress has a veto that, even if used sparingly, still reflects a one-sovereign regime rather than a dualist or concurrent one.

Ironically, the Elections Clause has not been a useful repository of congressional authority because of many of the same federalism concerns that led to the demise of the proposed

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121. MAIER, *supra* note 112, at 31 ("The Constitution put no limit on the number of terms representatives and senators could serve, unlike both the Articles of Confederation and many state constitutions, which imposed terms limits to avoid . . . an 'inconvenient aristocracy' of entrenched officials with no immediate knowledge of the people's needs and feelings.").

122. *Id.* at 452 (noting that Aedanus Burke proposed to limit Congress's authority over elections to " 'only when any state shall refuse or neglect, or be unable, by invasion or rebellion' to make such regulation itself" as a part of the Bill of Rights); *id.* at 151 (discussing objections by individual towns in Massachusetts and Connecticut to Congress's power to overrule the states over the matter of elections); *id.* at 339 (discussing similar objections in the New York ratification debates); *see also* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 597 (Max Farrand ed., 1911) (giving states the ability to "prescribe the time & manner of holding elections" under the Pinckney's Plan submitted to John Quincy Adams).

congressional negative over all state laws.[123] Congress's sparing use of its veto power over the years has allowed the states' authority under the Elections Clause to become dominant and have more influence in our system of federalism.[124] Nevertheless, the existence of a congressional veto gives Congress substantial leeway when in fact it does opt to regulate state electoral authority, through either the Clause or other related constitutional provisions. And, as history reminds us, the veto represents a delegation of sovereignty on the part of the states, a fact that should play a large role in how the Supreme Court interprets congressional action going forward.

2. The Elections Clause as a Repository of Congressional Power: The Case Law

Unlike most federalism issues, there is constitutional text that explicitly deprives the states of complete sovereignty over the matter of elections; the Elections Clause gives states autonomy—or a right to make policy and exercise regulatory authority for the benefit of its citizens absent congressional intervention.[125] The Court has not

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123. As one writer noted:

> A general uniformity of acting in confederations (whenever it can be done with convenience) must tend to federalize (allow me the word) the sentiments of the people. The time, then, might as well have been fixed in the Constitution—not subject to alteration afterwards. Because a day may be chosen by Congress which the Constitution or laws of a State may have appropriated to local purposes, not to be subverted or suspended. Leaving the places subject to the alteration of Congress, may also lead to improper consequences, and (*humanum est errare*) tempt to sinister views.

Strictures on the Proposed Constitution, FREEMAN'S J., Sept. 26, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION, PART ONE, *supra* note 115, at 18, 19. This history is discussed at length in Tolson, *supra* note 21, at 877–88.

124. Tolson, *supra* note 21, at 884–87 (discussing Congress's use of its authority under the Elections Clause, which is controversial because of federalism concerns). Since 1842, Congress has used its authority under the Elections Clause to require states to create single member districts that are compact and contiguous. However, the Fourteenth and Fifteenth Amendments, although more narrow in some respects because of cases interpreting the Amendments to require proof of discriminatory intent, *see, e.g.*, Washington v. Davis, 426 U.S. 229 (1976), have done much of the work that the Clause would have otherwise accomplished. *Id.*; *see also infra* Part II.B. The problem is that premising congressional action solely on the Fourteenth and Fifteenth Amendments, instead of in conjunction with the Elections Clause, calls into question the constitutionality of federal legislation like the VRA, the scope of which extends beyond federal elections and encompasses state practices as well.

125. Young, *supra* note 82, at 14 (" 'Autonomy,' on the other hand, emphasizes the positive use of governmental authority, rather than the unaccountability of the government itself. The OED defines 'autonomy' as '[t]he right of self-government, of making [a state's] own laws and administering its own affairs.' ") (alteration in original); *see* FEELEY & RUBIN, *supra* note 10, at 29 ("In a decentralized regime, the central authority can always override the decisions of the subdivisions if they fail to achieve the purpose that the centralized authority intended when it authorized the subdivisions to decide.").

explicitly adopted this position, but its case law recognizes that the states delegated a portion of their sovereignty over elections to the federal government with the ratification of the Constitution.

In *Foster v. Love*, the Supreme Court invalidated a Louisiana open-primary statutory scheme that violated the Elections Clause by changing the day on which candidates for federal office were elected. The Supreme Court described the Elections Clause as "a default provision; it invests the States with responsibility for the mechanics of congressional elections, . . . but only so far as Congress declines to pre-empt state legislative choices . . . ."[126] The Court interpreted the Clause as giving Congress " 'comprehensive' authority to regulate the details of elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.' "[127]

Similarly, in *U.S. Term Limits, Inc. v. Thornton*, the Supreme Court held that Arkansas, even though it had reserve power over the selection of its congressional representatives, violated the Qualifications Clause when it prevented otherwise eligible individuals who had been elected three or more times to the House or two or more times to the Senate from appearing on the ballot.[128] The Qualifications Clause does not impose term limits on congressional representatives.[129] The Court found that the state's attempt to impose term limits as an added requirement to the Qualifications Clause was contrary to the constitutional text, structure, and history.[130]

The Court reasoned that, since Congress has no authority to change the qualifications of its members,[131] states are similarly limited as the qualifications for members of Congress in the Constitution are "fixed and exclusive."[132] In an earlier case, *Powell v. McCormick*, the Court applied this same reasoning to circumscribe

126. Foster v. Love, 522 U.S. 67, 69 (1997) (internal citations omitted) (citing multiple sources).

127. *Id.* at 71 n.2 (citing Smiley v. Holm, 285 U.S. 355, 366 (1932)).

128. 514 U.S. 779, 800 (1995).

129. *See* U.S. CONST. Art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

130. *Thornton*, 514 U.S. 779, 790 (1995) (discussing "a proposal made by the Committee of Detail that would have given Congress the power to add property qualifications" which was rejected because James Madison argued that "such a power would vest 'an improper & dangerous power in the Legislature,' by which the Legislature 'can by degrees subvert the Constitution.' ") (certain internal quotations marks omitted) (quoting Powell v. McCormack, 395 U.S. 486, 533–34 (1969)).

131. *Id.* at 791–92 (citing *Powell*, 395 U.S. at 539).

132. *Id.* at 790.

Congress's ability to exclude a duly elected individual from being able to take his seat.[133] In contrast, *Thornton* dealt specifically with the issue of whether the state had the ability to change the qualifications of its congressional delegation, even if Congress lacked this ability.[134] The Court answered this question in the negative, reasoning that if states could alter the qualifications of congressional representatives it would violate basic principles of representative government. The Court reached this conclusion in part by observing that "sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government."[135]

Although *Thornton* did not involve the Elections Clause, the Court recognized that the states delegated at least some of their authority over elections to the federal government when they ratified the Constitution. The Court observed that the power to add qualifications was not within the original powers of the states, and, even if it were, this power was stripped from the states with the ratification of the Constitution. As the Court noted, "[T]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[136]

Thus, as *Thornton* recognizes, in order to have sovereignty over the incidents of a federal system, such as altering the qualifications of the congressional delegation, the power must be left to the states by the Constitution.[137] The Elections Clause, even though it gives the states broad power over the time, place, and manner of elections, represents a delegation of power from the states to the federal government because it leaves final authority to Congress. As the *Thornton* Court noted,

> [I]n Art. I, § 4, cl. 1, though giving the States the freedom to regulate the "Times, Places and Manner of holding Elections," the Framers created a safeguard against state abuse by giving Congress the power to "by Law make or alter such Regulations." The Convention debates make clear that the Framers' overriding concern was the potential for States' abuse of the power to set the "Times, Places and Manner" of elections. Madison noted that "it was impossible to foresee all the abuses that might be made of the discretionary power." . . . As Hamilton later noted: "Nothing can be more evident

133. *Id.* at 790–93 (citing *Powell*, 395 U.S. at 539).

134. *Id.* at 800.

135. *Cf. id.* at 794 (discussing its holding in *Powell* with regards to representative government).

136. *Id.* at 801 (emphasis in original omitted) (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985)).

137. *Id.* at 805.

> than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy."[138]

This notion that the Constitution deprived states of their sovereign authority over elections is consistent with the constitutional history and text, and the Court's precedent.[139] To find otherwise would give the states the ability to subvert Congress's veto power in the Elections Clause. As the *Thornton* Court observed with regard to the states' ability to alter the qualifications of their congressional delegation, "[I]t is inconceivable that the Framers would provide a specific constitutional provision to ensure that federal elections would be held while at the same time allowing States to render those elections meaningless by simply ensuring that no candidate could be qualified for office."[140]

Indeed, what is notable about *Thornton* is that the Court views Article I, Section 5 as being an *exclusive* grant of power to the House to determine the qualifications of its membership.[141] Similarly, Article I, Section 3 was viewed as an *exclusive* and express delegation to the states to elect Senators until the adoption of the Seventeenth Amendment.[142] The fact that the states could not add to the qualifications of their representatives in the House delegations because of the exclusivity of this provision and the fact that Congress could not add to the qualifications of duly appointed senators because states had the power to select them demonstrate how each polity has the final policymaking authority in its respective area. The Elections Clause, on the other hand, gives the final policymaking authority over congressional elections to Congress with no provision that a similar power be given to the states.

Along these lines, the Court has interpreted the states' Elections Clause power as being limited to procedural regulations but has not articulated similar limitations on Congress's veto power. In *Cook v. Gralike,* the Court invalidated a Missouri constitutional provision, Amendment 8, that instructed each member of Missouri's congressional delegation to work to pass a term-limits amendment

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138. *Id.* at 808–09.

139. *Id.* at 805 ("[I]n certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution. Thus, we have noted that 'while, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I.' ") (citing United States v. Classic, 313 U.S. 299 (1941)).

140. *Id.* at 811.

141. *Id.* at 804.

142. *Id.* at 804 n.16.

once elected or have the statement "Disregarded Voters' Instruction on Term Limits" printed next to his or her name on the primary and general election ballot.[143] The Court rejected Amendment 8 on the grounds that it was an attempt to dictate a specific substantive outcome—a constitutional amendment for term limits—rather than a procedural regulation that fell properly within the scope of the states' Elections Clause authority.[144] The Court's view that the states' Elections Clause authority is confined to procedural regulations illustrates the limited nature of state power and undermines any notion that it conveys "sovereignty" upon the states over the matter of elections.[145]

Moreover, sovereignty is not required in order for the states to exercise significant and effective power over elections, particularly where Congress has not acted. In an earlier piece, I suggested that Congress's failure to exercise its veto power over partisan gerrymandering allowed the states to use their redistricting authority in a profederalism manner.[146] Thus, state autonomy can thrive and, indeed, mimic sovereignty where Congress has not acted, but otherwise the states are limited in their ability to regulate their electoral mechanisms by Congress's express veto.

Because the Elections Clause is not a federalism provision, and instead concerns decentralization and autonomy, the Court is obligated to defer to Congress where it has exercised its "veto power" over the states. Such deference is also warranted where Congress has acted pursuant to other provisions, such as the Fourteenth or Fifteenth Amendments, in light of the fact that these provisions redefined the relationship between the state and federal governments to give the latter more authority with respect to regulating the franchise.[147] Thus, the fact that the Elections Clause does not give Congress a veto over pure state election practices does not preclude

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143. Cook v. Gralike, 531 U.S. 510, 514 (2001).

144. *Id.* at 523 (" '[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.' ") (citing *Thornton*, 514 U.S. at 833–34).

145. *See id.* at 527 (Kennedy, J., concurring) ("The Elections Clause thus delegates but limited power over federal elections to the States.").

146. *See generally* Tolson, *supra* note 21.

147. *See* Katzenbach v. Morgan, 384 U.S. 641, 647 (1966) ("[O]f course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution."). *See generally Ex Parte* Virginia, 100 U.S. 339, 344–46 (1880) (explaining that the Thirteenth and Fourteenth Amendments were intended to be "limitations of the power of the States and enlargements of the power of Congrese [sic]").

congressional authority to intervene. The Court has also recognized the Fourteenth and Fifteenth Amendments as express limitations on the states' authority over elections;[148] thus, congressional actions pursuant to these provisions also represent a type of "veto power" over state electoral authority.

B. Cementing Congressional Sovereignty: The Civil War Amendments

As the preceding sections show, the lack of state sovereignty over elections is consistent with both the constitutional text and history, but this delegation of state sovereignty to the federal government extends beyond the provisions of the Elections Clause. The Civil War amendments also represent the specific intention of the framers of those amendments to expand federal power at the expense of state sovereignty.[149] Although the Elections Clause speaks only to the election of "Senators and Representatives," the Civil War amendments extend Congress's authority to regulate state electoral practices that implicate the constitutional right to vote as protected by the Fourteenth and Fifteenth Amendments.[150] In *Harper v. Virginia State Board of Elections*,[151] the Court invalidated a state poll tax under the Equal Protection Clause, holding that the right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed."[152] Because Congress has the ability to enforce the mandates of the Fourteenth and Fifteenth Amendments, *Harper* illustrates that this power extends to preventing states from engaging in electoral practices that discriminate against voters on the basis of race, even if the practices used pertain only to state elections.[153] Thus, in *South*

148. *See infra* Part II.B.

149. City of Rome v. United States, 446 U.S. 156, 179 (1980) (noting that the Civil War amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty").

150. The Necessary and Proper Clause, as well as the Nineteenth and Twenty-Sixth Amendments, are also arguably a source of congressional authority, but are beyond the scope of this Article. *See* U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. amend. XIX; U.S. CONST. amend. XXVI.

151. 383 U.S. 663 (1966).

152. *Id.* at 665.

153. *Compare Harper*, 383 U.S. 663, *with* Oregon v. Mitchell, 400 U.S. 112 (1970), *superseded in part by constitutional amendment*, U.S. CONST. amend. XXVI, § 1 (finding that Congress cannot set the voting age in state and local elections). *Oregon v. Mitchell* is not inapposite here, given that Congress made no findings that the twenty-one-year-old voting age requirement was used by states to disenfranchise voters on the basis of race. As the Court noted, the enforcement powers were intended to help fulfill the framers' goal of "ending racial

Carolina v. Katzenbach, the Court upheld provisions of the VRA that prohibited the use of literacy tests in *all* elections, noting that these tests had been commonly used to contravene the requirements of the Fifteenth Amendment and therefore could be banned.[154] As the Court later recognized, "[T]he original design of the Founding Fathers was altered by the Civil War Amendments and various other amendments to the Constitution," and these changes were "intended to deny to the States the power to discriminate against persons on account of their race."[155]

Until recently, the Court had taken a broad view of Congress's enforcement power pursuant to these amendments.[156] The Court recognized that these provisions gave Congress power that had once been reserved to the states—a delegation, in effect, of some of the states' residual sovereignty. As such, Congress was entitled to deference and significant leeway when it acted pursuant to these amendments. But the Court's recent interpretation of congressional power in cases like *City of Boerne v. Flores*[157] and *Seminole Tribe v. Florida*[158] finds that congressional authority must yield to concerns of state sovereignty, which misallocates power between the states and the federal government.

Initially, the Court took a broad view of Congress's power to enforce the Fourteenth and Fifteenth Amendments. In *City of Rome v. United States*, for example, the Court rejected the argument that Congress's enforcement power under the Fifteenth Amendment was limited to remedying only purposeful discrimination, noting that "even if [Section] 2 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to [Section] 2, outlaw voting practices that are discriminatory in effect."[159] The Court further observed that Congress may pass legislation under Section 2 of the Fifteenth Amendment in order to prohibit acts that do not violate

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discrimination and [preventing] direct or indirect state legislative encroachment on the rights guaranteed by the amendments," 400 U.S. at 127, and Congress failed to link the regulation to discrimination based on race.

154. 383 U.S. 301, 333–34 (1966); *see also* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding provision of the VRA that outlawed an English literacy requirement as a condition for voting, even though the law conflicted with regulations for state and local elections in noncovered states).

155. *Mitchell*, 400 U.S. at 126.

156. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). *But see* The Civil Rights Cases, 109 U.S. 3 (1883); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

157. 521 U.S. 507 (1997).

158. 517 U.S. 44 (1996).

159. 446 U.S. 156, 173 (1980).

section 1 of the Act, "so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch v. Maryland*."[160]

The Court has described Congress's power to enforce the Fourteenth Amendment as broader than the judicial power to define the substantive reach of its provisions.[161] In *Katzenbach v. Morgan*, the Court held that legislation enacted pursuant to Section 5 of the Amendment would be upheld

> so long as the Court could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with 'the letter and spirit of the constitution' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.[162]

In effect, the Court has interpreted Congress's enforcement powers as "no less broad than its authority under the Necessary and Proper Clause," capable of addressing state action that has a discriminatory purpose, that has a discriminatory effect, and that may not even violate the substantive provisions of the Amendments.[163] And given the reach of the Necessary and Proper Clause,[164] Congress's power to renew the VRA should be beyond question.

Moreover, state sovereign immunity is not a limit on the reach of this authority. In *Fitzpatrick v. Bitzer*, for example, the Court explicitly held that Congress can use its Fourteenth Amendment power to abrogate state sovereign immunity. *Fitzpatrick,* like *City of Rome* and *Katzenbach*, recognized that the Civil War amendments altered the preexisting power constructs. As the Court observed, *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation."[165]

The *Fitzpatrick* plaintiffs argued that provisions of Connecticut's retirement plan violated Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment.[166] At issue was whether Congress could award backpay as a remedy under Title

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160. 17 U.S. (4 Wheat.) 316 (1819).

161. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (recognizing Congress's power under the Fifteenth Amendment to pass the VRA but seeing no need to overrule its own contrary precedents).

162. *City of Rome*, 446 U.S. at 176 (citing Katzenbach v. Morgan, 384 U.S. at 641 (1996)).

163. *Id.* at 175.

164. *See generally* United States v. Comstock, 130 S. Ct. 1949 (2010) (discussing the breadth of the Necessary and Proper Clause).

165. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

166. *Id.* at 448.

VII for state employees pursuant to its enforcement power under the Fourteenth Amendment.[167]

In finding that Congress can authorize private suits against the states, the Court noted that the Civil War amendments represented a "carving out" of state sovereignty—that these amendments are an "expansion of Congress'[s] powers with [a] corresponding diminution of state sovereignty," a reduction in power that extends to the principle of state sovereignty embodied by the Eleventh Amendment.[168] Thus, there is nothing wrong with Congress's decision to use its power to enforce the Fourteenth Amendment to provide a remedy for private individuals against state action, even if such a remedy interferes with state sovereignty.[169]

The Court's recent attempts to require an expansive evidentiary record in support of the VRA are contrary to this broad view of Congress's enforcement powers under the Fourteenth and Fifteenth Amendments embraced shortly after the Act was adopted. Recent case law represents an inexplicable departure from this earlier precedent.

In *City of Boerne v. Flores*, the Court substantially narrowed Congress's enforcement power under the Fourteenth Amendment. At issue was the refusal of city authorities to grant a building permit to the regional Catholic archbishop to enlarge a church building that had been designated a historic landmark.[170] The archbishop claimed that this refusal violated the Religious Freedom Restoration Act of 1993 ("RFRA"), which prohibited government from " 'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability" and subjected such laws to strict scrutiny.[171] In passing RFRA, Congress relied on its enforcement power under the Fourteenth Amendment based on the rationale that

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167. *Id.* at 452.

168. *Id.* at 455 ("Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.").

169. *Id.* at 454–55 ("[I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. . . . Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted."). *But see* Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that Congress could not lower the minimum age of voters from twenty-one to eighteen in state and local elections because the Constitution explicitly delegated this function to the states).

170. City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (evaluating a city ordinance that required preapproval for all construction affecting historic landmarks and buildings).

171. *Id.* at 515–16.

it was protecting one of the liberties guaranteed by the Fourteenth Amendment.[172]

Congress passed RFRA in order to overturn a Supreme Court decision, *Employment Division v. Smith*, which held that rational basis review applied to laws of general applicability that infringe on a person's exercise of religion.[173] The fact that RFRA increased the level of scrutiny for laws of general applicability beyond that required by *Smith* led the Court to conclude that RFRA was not a proper exercise of Congress's enforcement powers because it did not deter or remedy a constitutional violation.[174] Instead, Congress was trying to make it more difficult for states to defend laws that would be constitutional under the Court's jurisprudence.

According to the Court, Congress could not use its section 5 power to "decree the substance of the Fourteenth Amendment's restrictions on the states" because "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[175] In other words, Congress's enforcement powers are limited to remedial fixes and do not include the ability to make substantive changes to the scope of the Fourteenth Amendment.[176] In order to distinguish Congress's remedial power from acts that make a substantive change in the governing law, *Boerne* established that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[177]

RFRA could be perceived as an attempt by Congress to redefine an aspect of the state's relationship with its citizens. From this perspective, this case looks strikingly like the Civil Rights Cases, where the Court invalidated provisions of the Civil Rights Act of 1875 on the grounds that the states are the primary protectors of civil

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172. *Id.* at 519–20.

173. *Id.* at 512–16.

174. *Id.* at 519.

175. *Id.* (arguing that Congress "does not enforce a constitutional right by changing what the right is").

176. *Id.* at 520.

177. *Id.* at 519–20. The Court later expounded on the congruence and proportionality test. *See* Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (Congress could not subject states to suits under Title I of the American with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Congress could not subject states to suits under the Age Discrimination in Employment Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (Congress could not subject states to suits for patent infringement). *But see* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Pitts, *supra* note 30, at 247 (arguing that "the most important contribution *Hibbs* made to the congruence and proportionality body of jurisprudence is that the [Supreme] Court somewhat lessened Congress's burden to prove a widespread pattern of recent constitutional violations to justify a prophylactic remedy").

rights.[178] In the interest of preserving state sovereignty, Congress can intervene only if the states default on their obligation. A second—and equally plausible—interpretation is that RFRA was an attempt by a democratically elected body to play a role in defining the scope of constitutional rights, consistent with its duty to enforce the Fourteenth Amendment. But the Court believed that Congress, since it is democratically elected, should play a much more limited role in constitutional interpretation.[179]

Regardless of which view of RFRA one endorses, however, the holding of *Boerne* is in obvious tension with the Court's earlier interpretation of Congress's power under the Fourteenth Amendment as being broad enough to enforce remedies that arguably interfere with state sovereignty[180] and to prohibit acts that do not necessarily violate Section 1 of the Fourteenth Amendment.[181] More pointedly, if Congress can enforce a remedy against an act that does not violate Section 1 of the Fourteenth Amendment, it is a bit of a stretch to say that Congress is not allowed to make substantive changes as well.[182] Congress makes substantive changes whenever it prevents states from engaging in acts that are otherwise constitutional under the Fourteenth Amendment.[183]

By comparison, the VRA, by requiring that all state laws (even those that are not discriminatory or have not historically been used to perpetuate discrimination) be precleared in order to go into effect, is a clear example of Congress prohibiting acts that are otherwise constitutional. A general rule of preclearance, however, arguably furthers the mandates of the substantive provisions of the Fifteenth Amendment.[184]

Notably, the *Boerne* Court concluded that Congress's power to enforce equality in voting pursuant to the VRA of 1965 was appropriate because of the history of voting discrimination in this

178. 109 U.S. 3 (1883).

179. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 865 (1999).

180. Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976).

181. City of Rome v. United States, 446 U.S. 156, 175 (1980).

182. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 171 (1997).

183. *See* City of Boerne v. Flores, 521 U.S. 507, 508 (1997) ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.").

184. South Carolina v. Katzenbach, 383 U.S. 301, 334–35 (1966) (rejecting the argument that section 5 of the VRA is too broad on the grounds that experience has taught Congress that a more narrow rule would not work).

country and the fact that the Act's most stringent provisions were limited to the most flagrant offenders.[185] This interpretation of the Act, based on geography and history, is particularly problematic,[186] but it stems from an artificial and judicially created limitation on Congress's ability to enforce equality in elections that originated in *Katzenbach*. The early VRA cases are unusual in that they recognized that Congress had extensive authority over elections and deferred to Congress's determinations about what measures were needed to combat discrimination in voting. But then the Court simultaneously limited this power by suggesting that a strong legislative record is needed in order to justify this "extraordinary legislation otherwise unfamiliar to our federal system."[187]

In *Katzenbach*, the Court dealt specifically with the argument that the VRA exceeded the powers of Congress to enforce the Fifteenth Amendment and encroached on an area reserved to the states by the Constitution.[188] The Court noted the extensive and pervasive history of voting discrimination in this country, the fact that Congress had tried to fix the problem on a case-by-case basis, and the persistence of voting discrimination in this country despite these efforts.[189] These factual findings allowed it to conclude that the VRA was an appropriate use of Congress's enforcement authority under the Fifteenth Amendment.[190] The Court found that "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[191] Thus, the Court did not dispute that the ability to regulate

185. *City of Boerne*, 521 U.S. at 525.

186. *See* J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 743–44 (2008) ("Although Justice Kennedy referred favorably to the Voting Rights Act seven times in his [*Boerne*] opinion, contrasting the record of widespread and persisting racial discrimination that supported the passage of the VRA with the lack of 'examples of modern instances of generally applicable laws passed because of religious bigotry' in the past forty years to buttress the RFRA, voting rights supporters worried, and opponents hoped, that the Court would demand an overwhelming record of widespread, quite-recent racial discrimination in voting to justify a 2007 renewal.") (internal citations omitted).

187. *Katzenbach*, 383 U.S. at 323.

188. *Id.*

189. *Id.* at 308–14 ("Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964.").

190. *See id.* at 326 (noting that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting").

191. *Id.* at 324.

their electoral machinery is part of the reserved power of the states; rather, Congress's power trumps when state power is exercised in a manner contrary to the Constitution.[192]

The problem is that the Court's narrow view of congressional power as being limited to instances when a state explicitly attempts to circumvent the Constitution ignores that Congress, through its veto power under the Elections Clause, is not so limited. Recall that during the ratification debates, the framers rejected limiting constructions of the congressional veto under the Elections Clause. Besides the examples noted in Part II, other examples abound. Virginia, for example, proposed the following:

> Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same.[193]

Yet this proposed modification and others were rejected. The framers anticipated that Congress's authority over elections would be kept in check through normal politics.[194] Thus, the Court's view in *Katzenbach* that Congress may act with regard to elections only if the states circumscribe the dictates of the Fifteenth Amendment is not only misguided and erroneous, but it is also inconsistent with the constitutional text and history.

Katzenbach is also an example in which the Court conflates state autonomy with state sovereignty. It is true that the states have broad power to regulate suffrage[195] and that Congress has broad authority to intervene in state electoral processes to enforce the dictates of the Fifteenth Amendment, as the Court assumes.[196] But because of the Elections Clause, congressional authority is not limited to the dictates of the Fifteenth Amendment, where the Court has restricted Congress's enforcement authority to enacting remedial

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192. *Id.* at 325 ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.") (quoting Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960)).

193. *Amendments to the Constitution*, *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 100, at 224 (June 27, 1788); *see also The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 100, at 244–45 (Dec. 18, 1787) (expressing concern that Congress's ability to alter the time, place, and manner of elections will lead to "life-estates in government").

194. Tolson, *supra* note 21, at 864–65 (discussing controversy over congressional reapportionment acts).

195. *Katzenbach*, 383 U.S. at 325.

196. *Id.* at 325–26.

legislation.[197] The veto power gives Congress broad authority to regulate state electoral mechanisms beyond the Fifteenth Amendment's dictates.

The *Katzenbach* Court, although ostensibly upholding the VRA, created a dangerous precedent. Indeed, the Court could not foresee that the legitimacy of the VRA would be called into question if Congress did not make factual findings similar to those that originally sustained the Act.[198]

Initially, the Justices were willing to endorse a broad reading of the Act. In *Allen v. State Board of Elections*, for example, the Court found that the VRA required that every change to a state's election laws had to be submitted for preclearance because even minor changes could be used to deny citizens the right to vote.[199] But this very broad reading, with the clear implication that the Act would extend to situations heretofore unimagined, has not had the precedential force that it could have had because of the initial limitations laid out by the *Katzenbach* Court. The Court's decision to confine the discussion of the Act's constitutionality to the Fifteenth Amendment; its finding that congressional authority over elections is limited to the Fifteenth Amendment; its determination that this authority is exceptional and uncommon; and, finally, its conclusion that the use of this power can only be justified by an extensive factual record have played a far more prominent role in the Court's recent interpretation of the Act.

Despite *Allen*'s broad reading of the VRA, what carried the day was the *Katzenbach* Court's failure to recognize that Congress's ability to intervene in state electoral processes is a part of its sovereign authority in this area. Continuing to ignore that the states delegated their final policymaking authority over elections with the adoption of the Constitution and their subsequent ratification of the Civil War amendments, the Roberts Court has deferred to state sovereignty in ways that are clearly inconsistent with both the constitutional text and history, as well as with the Court's own precedent.

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197. *See id.*

198. *Compare* Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504, 2511–12 (2009) (questioning continued constitutionality of some sections of the VRA), *with* United States v. Lopez, 514 U.S. 549, 616–17 (1995) (Breyer, J., dissenting) (criticizing the majority for not giving Congress "a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce" and asserting that the standard to be applied is akin to rational basis review), *and* FERC v. Mississippi, 456 U.S. 742, 755–56 (1982) (applying rational basis review to congressional findings).

199. 393 U.S. 544, 565–67 (1969).

III. DISTINGUISHING SOVEREIGNTY FROM AUTONOMY IN FEDERALISM THEORY: A THEORY OF THE ELECTIONS CLAUSE

Figuring out the meaning of the Elections Clause requires us to determine where the Clause—and, by implication, the VRA—fits in our larger system of federalism. Part III.A begins by defining sovereignty, which is at the core of this Article's theory of the Elections Clause. Part III.B shows how the Court's focus on state sovereignty has obscured the fact that the Clause is about decentralization, not about federalism. Finally, this Article concludes that this misunderstanding about the nature of state sovereignty has led the Court to employ a general federalism norm that has inappropriately and illegitimately rendered section 5 of the Act constitutionally suspect.

A. Defining Sovereignty: Using Final Policymaking Authority as a Baseline

Generally speaking, the tension between finding substantive limitations on congressional authority and developing doctrine that follows from the constitutional text and history has led to many fits and starts in the Supreme Court's federalism jurisprudence.[200] In reality, the Court has a definitional problem that makes policing federalism difficult and bleeds over into its analysis of the Elections Clause. Namely, what is sovereignty? Or more specifically, what does sovereignty mean in the context of the Elections Clause?

While sovereignty is certainly not an undisputed concept in law, history, political science, political theory, or any other discipline,[201] it does have some baseline features that the Court can

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200. *See* Rapaczynski, *supra* note 19, at 342 (observing that "the Court's attempts to impose federalism-related limitations on the national government have been, throughout history, frustrated by the political process, resulting three times in constitutional amendments").

201. *See, e.g.*, THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL 84 (2d ed. Ballyntyne Press 1886) (1660) (arguing that in exchange for internal order and protection from outside threats, man is obligated to obey the sovereign unconditionally); JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 149 (Peter Laslett ed., Cambridge University Press 1988) (1690) (maintaining that government's sovereign authority is limited by the rights of its subjects with recourse for rights violations being available in the form of rebellion or judicial action). Even though Locke believed that the people could rise up against a sovereign who abuses his authority, Locke recognized that the properly exercised power of the sovereign is supreme, or final:

> Though in a constituted commonwealth, standing upon its own basis, and acting according to its own nature, that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate; yet the legislative being only a fiduciary power to act for certain

draw on in articulating federalism doctrine—notably, the finality or supremacy of sovereign authority.[202]

The Merriam-Webster Dictionary defines sovereignty as "supreme power, especially over a body politic."[203] Similarly, Andrzej Rapaczynski has described sovereignty as both a descriptive theory that "in every actual political society there exists de facto an ultimate source of authority, legal or political," and a normative theory that "there ought to be such an authority."[204] In his view, "sovereignty" requires, at a minimum level, three things:

> (1) A sovereign must be sovereign (have authority) over someone and something (that is, there must be subjects and a domain over which the sovereign rules); (2) the authority of a sovereign over the subjects within the sovereign's domain must be of a political nature (that is, at a minimum, the types of commands issued by the sovereign must be capable of acquiring a legal status and be backed by an appropriate enforcement mechanism); and (3) the authority of a sovereign must be final (that is, the sovereign cannot in turn be dependent on another person or institution, and there is no further recourse for subjects who are not prepared to obey the sovereign's commands).[205]

Thus, the supremacy of the higher authority, and the finality accorded to its dictates, are the hallmarks of "sovereignty," even if there may be some disagreement as to what rights individuals and subunits have against this center. Contrary to these definitions, the Justices often divide over how much deference to show federal law that affects the ability of states to set their own regulatory policy, even if the states' sovereign authority is not directly implicated.[206] The

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> ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.

Id.

202. Robert Lansing, *A Definition of Sovereignty*, 10 PROC. AM. POL. SCI. ASS'N 61, 64 (1913) ("We think of sovereignty—and I mean by 'we' mankind in general—as the supreme and vital element in a political state, without which it cannot exist in an organized form or possess those other attributes, which enter into the concept of a state."); Hans J. Morgenthau, *The Problem of Sovereignty Reconsidered*, 48 COLUM. L. REV. 341, 341 (1948) ("When the conception of sovereignty was first developed in the latter part of the sixteenth century with reference to the new phenomenon of the territorial state, it referred in legal terms to the elemental political fact of that age, namely, the appearance of a centralized power which exercised its law making and law enforcing authority within a certain territory. This power, vested at that time primarily, but not necessarily, in an absolute monarch, was superior to the other forces which made themselves felt within that territory, and after a century was unchallengeable either from within or from without. In other words, it was supreme."). *But see* David G. Ritchie, *On the Conception of Sovereignty*, 1 ANNALS AM. ACAD. POL. & SOC. SCI. 385, 397 (1891) (discussing the argument that Congress and the states are "non-sovereign" because the Constitution can be amended).

203. *Sovereignty*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/sovereignty?show=0&t=1307124357 (last visited Mar. 1, 2012).

204. Rapaczynski, *supra* note 19, at 347.

205. *Id.* at 347–48 (footnote omitted).

206. *See, e.g.*, Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 887 (2000) (Stevens, J., dissenting); AT&T Corp. v. Iowa Utils. Bd., 525 U.S 366, 420 (1999) (Breyer, J., concurring in

Court often confuses the states' sovereign authority with their autonomous power to operate in a specific regulatory area.[207]

The Merriam-Webster Dictionary defines "autonomy" as "the quality or state of being self-governing."[208] With autonomy, there is significant authority to act—hence the focus on self-government—but that authority is not generally viewed as final.[209] Autonomy embraces the idea that there are some regulatory areas in which the states are immune from federal norms.[210] Since sovereignty can also embrace this principle of immunity,[211] there is considerable overlap between the two terms in federalism theory.[212]

Sovereignty and autonomy also are frequently conflated because not only do the two terms overlap, but sovereignty is a somewhat vacuous term, and its meaning is often driven by context.[213] In the case law, the meaning of "sovereignty" is either implied or inferred from the constitutional structure and text, or it is defined by negative implication from the powers granted to the states or the federal government.[214]

The defining characteristic of sovereignty, and what distinguishes it from autonomy, is finality in decisionmaking by the supreme authority. This basic distinction between sovereignty and autonomy helps us to determine how the state and federal governments stand in relation to each other over the matter of

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part and dissenting in part) ("[W]e are to interpret statutes . . . based on the assumption that Congress intended to preserve local authority."); Nat'l League of Cities v. Usery, 426 U.S. 833, 844–45 (1976).

207. Young, *supra* note 82, at 13.

208. *Autonomy*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/autonomy?show=0&t=1307125878 (last visited Mar. 2, 2012).

209. Young, *supra* note 82, at 14–15 (describing autonomy as "emphasiz[ing] the positive use of governmental authority, rather than the unaccountability of the government itself" although noting that autonomy is sometimes used to refer to the quality of being governed by one's own laws and no other higher authority).

210. *Compare id.* at 3–4 (defining sovereignty as "the notion that state governments should be unaccountable for violations of federal norms" and autonomy as "the ability of states to govern"), *with* Hills, *supra* note 15, at 816 (defining autonomy as immunity from federal norms).

211. *See* Alden v. Maine, 527 U.S. 706, 713 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634 (1999).

212. Young, *supra* note 82, at 14–15 (noting that sovereignty and autonomy both suggest "the ability to do things with power" and also that "[m]any actions that affect state sovereignty will impinge on state autonomy").

213. Rapaczynski, *supra* note 19, at 351 ("[S]o long as some domain of state power can be meaningfully identified, even if a state is not itself free to change it, the idea of state sovereignty does not lose all of its utility. The real problem is that even a moderately searching scrutiny of the powers of the federal government shows that the alleged existence of a residual category of exclusive state powers over any private, nongovernmental activity is in fact illusory.").

214. *See supra* note 16.

elections. In particular, if we focus on finality and treat this as the core of authority for the Elections Clause, it becomes easier to see how sovereignty is a factor that must be considered in allocating authority over elections.[215]

Defining sovereignty is an attempt, even by those who reject sovereignty as the core of federalism, to understand what "power" states and their citizens retain postratification.[216] The Elections Clause is most easily understood as juxtaposition between sovereignty and autonomy. Sovereignty requires a level of decisionmaking that is insulated from disruption. The Clause, therefore, cannot be understood without referencing this absence of sovereignty or the lack of final policymaking authority on the part of the states.[217] States have significant authority over elections that, over time, has grown into a strong autonomy that the Court has come to equate with sovereignty. Yet Congress's ability to modify, alter, or change state law prevents even the strongest account of autonomy from being equal to sovereign authority.[218] Congress's ability to change state law is the power to press uniformity with respect to a particular electoral rule.[219] This is contrary to the following values of federalism often touted by proponents of state sovereignty: citizen participation, regulatory diversity, and experimentation.[220]

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215. *See* Michelman, *supra* note 19, at 1167 ("[G]overnments are distinguished by their acknowledged, lawful authority—not dependent on property ownership—to coerce a territorially defined and imperfectly voluntary membership by acts of regulation, taxation, and condemnation, the exercise of which authority is determined by majoritarian and representative procedures.").

216. *See* Gerken, *supra* note 21, at 15 ("Process federalists emphatically resist the separate spheres approach that is so often paired with sovereignty. They rightly point out that it is exceedingly difficult to draw the line between state and federal functions. Yet floating in the background of their work is a similar conception of state power—the sense that states should have de facto autonomy over 'their' policies."); Young, *supra* note 82, at 52 (noting that "autonomy, not sovereignty" better promotes the values of federalism because "[j]ust having state governments is not enough; those governments need to have meaningful things to do. Federalism cannot provide regulatory diversity unless states have autonomy to set divergent policies; state governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora.").

217. Ernest Young, for example, has argued that sovereignty has to do with political accountability, a factor which by definition requires final policymaking authority in order for voters to know who to blame for perceived or actual governmental shortcomings. Young, *supra* note 82, at 59; *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (arguing that political accountability is a value of federalism).

218. Young, *supra* note 82, at 30–31.

219. Congress has used its power to regulate elections and reduce gerrymandering by passing the Apportionment Acts of 1842, 1862, and 1901, which initially instituted requirements of contiguity, compactness, and population equality. Vieth v. Jubelirer, 541 U.S. 267, 276 (2004).

220. *Gregory*, 501 U.S. at 458; Young, *supra* note 82, at 163.

The Court perceives the states' power under the Elections Clause as the creation of a powerful interest or right in the states against the federal government. It does so in the name of promoting the "values" of federalism and characterizes this power as a part of state sovereignty, ignoring that Congress still has substantial authority to intervene through the Clause (its veto power) and other provisions (the Fourteenth and Fifteenth Amendments). Equating sovereignty with autonomy, a mistake that the Court has made in other areas of its jurisprudence, perpetuates the confusion.

In *Printz v. United States*, for example, the Court found that Congress could not direct state law-enforcement officers to participate in a federally enacted regulatory scheme on the grounds that "laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution."[221] *Printz*, however, had more to do with political considerations rather than any concerns about state sovereignty.[222] Justice Scalia, writing for the majority, observed the following:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.[223]

This concern about political accountability—and Congress's ability to force the states to internalize the political and economic costs of administering federal programs—reflects "a distortion in the ordinary political process that we generally count on to protect state autonomy."[224] Thus, *Printz* articulates an anti-commandeering rule that, according to Professor Young, seeks to correct this distortion.[225] Couching the issue in terms of dual sovereignty rather than in terms of process correction, however, obscures the fact that the *Printz* decision actually does nothing to prevent Congress from preempting state and local laws thereby achieving the same result condemned in the decision.[226]

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221. Printz v. United States, 521 U.S. 898, 924–25 (1997).

222. Hills, *supra* note 15, at 820.

223. *Printz*, 521 U.S. at 930.

224. Young, *supra* note 82, at 128.

225. *Id.*

226. *Printz*, 521 U.S. at 932 ("But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."); *see also* Hills, *supra* note 15, at 822 ("Seen against a

In reality, *Printz*'s anti-commandeering rule—which suggests immunity from federal norms in the interest of preserving political accountability—and Congress's final policymaking authority over a particular policy area are not the same thing.[227] Congress can still act to preempt, modify, or alter state power in other ways and, as a result, state decisionmaking lacks the finality that defines true sovereignty.

Neither notions of political accountability nor determinations of the rights of subunits against the center are integral or unique to any notion of sovereignty and can just as easily be at issue if the state has autonomy in a particular policy sphere.[228] Thus, the lesson of *Printz*, particularly for the Court's interpretation of the VRA, is that even if the Court conceives of state sovereignty as a proxy for political accountability, as it does in *Printz,* this value is adequately protected by the fact that states draw the lines for congressional representatives in the first instance.[229] This power is sufficient to protect the autonomy interest that states have over elections even if it would be insufficient had state sovereignty really been at issue. *Printz* is a clear example of the Court conflating sovereignty with autonomy, a mistake that has bled over into its voting rights jurisprudence.

B. Understanding Sovereignty: Federalism, Decentralization, and the Illegitimacy of the Federalism Norm

As the prior sections show, the Court ignores that the Elections Clause gives the states strong autonomy power over elections and leaves sovereignty with Congress. The organizational structure of the Clause itself is not really federalist, but reflects a decentralized organizational structure that is often confused with federalism.

As Professors Feeley and Rubin have argued, "federalism grants subunits of government a final say in certain areas of

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background of almost unlimited national powers to regulate private persons directly, *New York* and *Printz* present something of a paradox: Why give state governments the right to withhold their regulatory processes while simultaneously giving the state governments nothing to regulate with those processes?").

227. *See, e.g.*, Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 4 (noting that "recognition of [state] immunity from private suit may encourage Congress to subject the states to other, more intrusive means of ensuring compliance with federal law").

228. New York v. United States, 505 U.S. 144, 169 (1992); Young, *supra* note 82, at 127.

229. Tolson, *supra* note 21, at 860 (arguing that the states' redistricting authority under the Elections Clause is a way for the states to wield influence with their congressional delegation and therefore protect their regulatory authority).

governance,"[230] whereas in a decentralized regime "the central government decides how decisionmaking authority will be divided between itself and the geographical subunits."[231] Decentralization is the best way of describing a policy area in which states are autonomous rather than sovereign—where they may be immune from certain norms but are not exempt from all intervention from the federal government. As such, the ability of Congress to preempt state regulatory regimes reflects that the founders were not overly concerned with protecting state sovereignty in this respect because, if this had been a concern, state authority would be final.

The distinction between autonomy and sovereignty is an important one because, as *Printz* shows, the creation of a powerful interest in the state, such as the ability to create the time, place, and manner of elections, means little if the final authority to preempt the entire field ultimately lies with Congress. The anti-commandeering rule is based on the notion that Congress should carry out federal responsibilities itself because state officials cannot be trusted, a view that has its antecedents in the previously discussed theories of dual sovereignty.[232] But because Congress can preempt the field entirely, there is very little about the anti-commandeering rule that is reflective of federalism.[233] For these same reasons, the time, place, and manner provision, also subject to the whims of Congress, is not really federalist either.

The Court's clear statement rule is another instance where the Court's characterization does not accurately capture the nature of our system. In *Gregory v. Ashcroft,* the Court held that Missouri's mandatory retirement age for state judges did not violate the Age Discrimination in Employment Act ("ADEA") because Congress did not clearly express its intention to apply the ADEA to state court judges.[234] The Court focused on the need for a clear statement from Congress because "congressional interference with the Missouri people's decision to establish a qualification for their judges would

230. FEELEY & RUBIN, *supra* note 100, at 20; *see also id.* at 16 ("[T]he subunits must exercise exclusive jurisdiction over some set of issues; that is, there must be some types of decisions that are reserved to the subsidiary governmental units and that the central government may not displace or countermand.").

231. *Id.* at 21.

232. Hills, *supra* note 15, at 842 (arguing that "[t]he legacy of dual federalism that Justice Scalia invokes [in *Printz*] is, indeed, a nationalistic legacy, forged by the Marshall Court and carried forward by Justice Story out of distrust for state institutions rather than love of state autonomy").

233. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1673 (2006).

234. 501 U.S. 452 (1991).

upset the usual constitutional balance of federal and state powers."[235] The presumption is that the ability to determine the qualifications of their government officials is integral to states' "sovereignty." However, by allowing for the possibility that Congress can abrogate state sovereign immunity with a clear statement of its intention to do so, the Court implicitly held that the state is not truly sovereign in this sphere because its decisions are not final.[236]

The *Gregory* Court's a priori references to "sovereignty" were further confused by the Court's discussion of the merits of federalism as a justification for its clear statement rule. Justice O'Connor argued that the clear statement rule furthers the principal benefits of a federalist system, which include checking abuses of government power; ensuring a "decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; increase[ing] the opportunity for citizen involvement in democratic processes; allow[ing] for more innovation and experimentation in government; and mak[ing] government more responsive by putting the States in competition for a more mobile citizenry."[237]

The states do not necessarily have to be "sovereign," however, in order to promote these values. As Professors Feeney and Rubin point out, the distinction between federalism and decentralization is particularly salient whenever the Court attempts to justify federalism as an ideal governing structure based on values that are not unique to federal systems.[238] Thus, *Gregory* and its discussion of the merits of federalism are misleading in part because the state is not truly sovereign with respect to determining the qualifications of its government officials, and the exhaustive list of federalism's values does little to change this fact. Instead, the states are autonomous with respect to the qualifications of their state officials so long as Congress does not issue a clear statement that it is abrogating state sovereign

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235. *Id.* at 463 (arguing that states have the authority to "determine the qualifications of their most important government officials" and it is "an authority that lies at the 'heart of representative government' ").

236. *Id.* at 463–64, 468 (noting that the "authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit" and pointing to the Fourteenth Amendment and the Commerce Clause as potential limitations).

237. *Id.* at 458.

238. FEELEY & RUBIN, *supra* note 10, at 22–24; *see also id.* at 18 ("Different modes of governance should be described by different terms, and arguments in favor of each one should be based on its own distinctive features, not merged with other arguments through verbal obfuscation.").

immunity.[239] The states' power in *Gregory* is best explained by decentralization, which means that state law governs unless Congress indicates its intention to displace it.

1. Federalism vs. Decentralization: Defining the Federalism Norm

This distinction between federalism and decentralization has significant implications for the VRA, where the Court has characterized state sovereignty as encompassing a broad authority for states to regulate their electoral machinery.[240] In pursuing this end, the Court, as with *Gregory*'s clear statement rule and *Printz*'s anti-commandeering rule, has employed a general federalism norm to an area that is governed by a provision—the Elections Clause—that is not distinctly federalist.

The federalism norm, according to John Manning, refers to a nontextual, free-floating conception of the state/federal balance of power that the Court uses to police the boundaries of federalism.[241] This norm emerged during the "federalism revolution" of the

239. *See* Edward L. Rubin & Malcom M. Feeley, *Federalism and Interpretation*, PUBLIUS, Spring 2008, at 175 ("Autonomy necessarily implies multiple decision makers and permits each decision maker to set its own goals in the areas where such autonomy prevails.").

240. *See* Roudebush v. Hartke, 405 U.S. 15, 24 (1972) ("Unless Congress acts, Art. I, § 4 empowers the States to regulate the conduct of senatorial elections."); Oregon v. Mitchell, 400 U.S. 112, 123 (1970) ("In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them. A newly created national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws."); Smiley v. Holm, 285 U.S. 355, 366 (1932) ("It cannot be doubted that [the] comprehensive words [of the Elections Clause] 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.").

241. *See* John Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2008 (2009) (criticizing the federalism norm); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999) (attempting to find a textual basis for state immunities from federal law due to the Court's inability to derive these immunities from the text). Others have looked to political theory and pragmatic concerns to justify an expansive federalism doctrine. *See, e.g.*, Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1604 (2000) ("By linking the Framers' original understandings of the Constitution's structure to broader aspects of political theory, the 'big ideas' approach [to federalism] offers recourse to sources that may offer determinate answers when more familiar sources, such as text and specific history, run out."); *id.* at 1637 (discussing Justice Black's and Justice O'Connor's pragmatic approaches to federalism); *see also* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 8–22 (1969) (discussing the extratextual basis for federalism).

Rehnquist era, a series of cases in which the Court held that there are constitutional limitations to the exercise of federal authority over the states.[242] *United States. v. Lopez*, for example, was the first time in decades that the Court invalidated a federal statute as exceeding the scope of Congress's powers under the Commerce Clause.[243]

Recent cases have extended the limitations on congressional power beyond the text to both structural and historical arguments about the boundaries of federal authority.[244] Notably, in *Alden v. Maine,* the majority focused on this idea of a "free-floating" federalism, which is a concept of state sovereignty that extends beyond the boundaries of the Tenth Amendment.[245] As a result, Congress cannot subject nonconsenting states to private suit and, in effect, abrogate state sovereign immunity.[246] The Court found that this sovereignty

242. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (Congress exceeded scope of its powers under Section 5 of the Fourteenth Amendment in abrogating state sovereign immunity under the Americans with Disabilities Act); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act as exceeding Congress's commerce powers); City of Boerne v. Flores, 521 U.S. 507 (1997) (Religious Freedom Restoration Act was not a congruent and proportional remedy under Fourteenth Amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (Congress's Commerce Clause authority does not extend to abrogating state sovereign immunity in court); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not commandeer the legislative processes of the states by compelling them to enact and enforce a federal regulatory program); Gregory v. Ashcroft, 501 U.S. 452 (1991) (holding that the ADEA did not prohibit a state from instituting a mandatory retirement age for its state court judges). *But see* Matthew Adler, *State Sovereign Immunity and the Anti–Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 158, 163 (noting that the Constitution has very few state sovereignty constraints, and as a result, "Congress is constitutionally permitted to exercise its commerce clause powers in a way that changes the structure of state government, sets the qualifications for state officers, and so forth; the states are not shielded from these outcomes by constitutional guarantees, but rather by the structure of the national political process, which makes such outcomes unlikely").

243. 514 U.S. 549 (1995) (invalidating a federal gun control statute as beyond Congress's authority under the Commerce Clause); *see also* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the National Industrial Recovery Act on commerce clause grounds); Hammer v. Dagenhart, 247 U.S. 251 (1918) (Congress exceeded its commerce clause power by enacting legislation excluding the products of child labor from interstate commerce). During this time, the Court routinely struck down progressive legislation on a number of grounds. *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (striking down a state minimum wage law on freedom of contract grounds); Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923) (same for federal minimum wage law).

244. *See* Young, *supra* note 877, at 1736 ("Much of the Federalism debate has centered on textual and historical sources. But it seems fair to say that although those sources of law have been highly relevant to the Court's enterprise, neither text nor history has dictated many of the resulting doctrines.").

245. The Tenth Amendment provides: "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." U.S. CONST. art. X.

246. Alden v. Maine, 527 U.S. 706 (1999).

derives from "the Constitution's structure, and its history, and the authoritative interpretations by this Court," which "reserve[] [to the states] a substantial portion of the Nation's primary sovereignty."[247] It is this residual state sovereignty, a concept that is not derived solely from the text, that the Court has relied upon to find that the powers delegated to Congress under Article I do not include the power to either subject nonconsenting states to suit in state or federal courts or commandeer state officials to enforce federal law.[248]

As John Manning has observed, this tendency to engage in "structural inference" has created a category of unenumerated states' rights that is significantly broader and more potent than Congress's Article I powers and extends beyond the Tenth and Eleventh Amendments. These unenumerated states' rights are usually tied to some federalism value, such as protecting state sovereignty, that the Court deems important enough to warrant looking beyond the text and tapping into a residual sovereignty left to the states.[249] The Court's recent federalism decisions look past the contested statutes' semantic meanings and rely on multiple constitutional provisions in order to reinstate the federalism balance that, in the Court's view, the framers intended.[250] The failure to point to a textual source for its conclusions, according to Manning, makes the Court's new purposivism in its federalism cases illegitimate.[251] Indeed, the fact

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247. *Id.* at 713–14.

248. *See* cases cited *supra* notes 177 and 225. Some commentators thought that the Supreme Court curtailed judicially enforced federalism with its decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), holding that Congress did not exceed its powers under the Commerce Clause in passing the Controlled Substances Act, which forbid the use of homegrown marijuana even if such use was allowed by state law. *See e.g.*, Ilya Somin, Gonzales v. Raich: *Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 508 (2006) (arguing that the decision is wrong on textual and structural grounds). However, decisions following *Raich* illustrate that the Court is still very much willing to enforce these limits, especially in the context of the VRA.

249. *See* Manning, *supra* note 240, at 2036 (noting that the *Alden* Court, in finding states immune from suit, "invoked the overall tenor of the many constitutional clauses that presume the 'continued existence' and 'vital role' of the states").

250. *See id.* at 2006 ("This technique, a form of structural inference, identifies numerous discrete provisions that, in particular ways, divide sovereign power between state and federal governments and, in so doing, preserve a measure of state autonomy. Taking all of those provisions together, the Court ascribes to the document as a whole a general purpose to preserve a significant element of state sovereignty."); *see also* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (espousing the general rule that "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law") (internal citation omitted).

251. *See* Manning, *supra* note 240, at 2049; *id.* at 2051 ("Whatever indeterminacy marks provisions such as the General Welfare Clause, the Commerce Clause, or the Necessary and Proper Clause, the balance of Section 8 leaves little doubt that the drafters and adopters of Article I established a system of enumerated powers and made rather specific judgments about what constituted appropriate matters of federal concern.") (internal citation omitted). *But see*

that federalism is a political construct with unclear lines makes the notion of a free-floating, judicially enforced federalism norm dangerous for the area of voting rights.[252] The Court, for example, can easily rely on the changed racial environment as evidence that the statute's current implementation is no longer consistent with its original purpose and therefore unjustifiably undermines the original state/federal balance of the Constitution, even if this balance is nonexistent.[253]

A decentralization analysis, however, would defer to Congress's determination of both the scope of the VRA and the proposed remedy.[254] The denial of sovereignty to the states justifies deference toward legislative judgments in the form of rational basis review.[255] Instead, the Court has gone in the opposite direction, employing a type

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Gillian Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 101 (2009), *available at* http://www.harvardlawreview.org/media/pdf/Forum_Vol_122_metzger.pdf (arguing that because the Constitution has broad and ambiguous language, the founders likely intended that there be a general federalism norm).

252. *Cf.* EDWARD A. PURCELL JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE 34 (2007) (position of some founders before ratification with regards to whether the Constitution supported a strong central government changed post-ratification); Charlton C. Copeland, *Ex Parte* Young: *Sovereignty, Immunity, and the Constitutional Structure of American Federalism*, 40 U. TOL. L. REV. 843, 872 (2009) (rejecting the notion that allocating regulatory authority between the state and the federal government is the sole way of ensuring fidelity to our federal structure in part because of the impossibility of determining the right balance that accurately reflects the duality of American federalism).

253. *Cf.* Manning, *supra* note 240, at 2024–25 ("[T]he Court has evidently concluded that, if modern Commerce Clause doctrine threatens its minimum conception of state sovereignty, it will handle the problem by recognizing implied limitations in federal power that are traceable to some form of historically reconstructed original understanding of the appropriate federal-state balance."). *But see id.* at 2046 (noting that the Court's actions are problematic because the Constitution operates at different levels of generality and "[e]nforcing the spirit rather than the letter of a document devalues the fundamental decision to design the bargaining process a particular way. . . . [T]he stakeholding states (through their delegates) exercised their allocated voting power to adopt a document that, in many respects, divided power between the state and federal sovereigns rather precisely.").

254. *See* FEELEY & RUBIN, supra note 10, at 80–81 ("[D]ecentralization, a centrally established strategy that favors transfers of authority from centralized to subsidiary units for specific purposes, fits perfectly with fiscal federalism's goal of allocating authority among levels of government in the most efficient manner.").

255. William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 107 (2001) (noting that in the time prior to *Boerne*, "[t]he rationality standard [] provided the framework for reviewing the basis of congressional action"); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1755 (2002) (arguing that the Court's requirement of due legislative deliberation is untenable); *see also* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 144 (2001); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 796 (1996) (arguing that areas of exclusive state power are a necessary condition of a system of constitutional federalism and attempting to identify those).

of freestanding federalism that protects state sovereignty to a greater degree than previously.

2. The Federalism Norm and Section 5 of the Voting Rights Act

The free-floating federalism norm poses the most problems for section 5 of the VRA, which requires states to preclear any change to their election laws before the change can go into effect. Critics of section 5 initially relied on a somewhat boundless notion of federalism in challenging the provision. In *South Carolina v. Katzenbach*, which upheld the constitutionality of section 5,[256] Justice Black argued in dissent that

> by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so [section 5] distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.[257]

Justice Black viewed the provision as not only violating the constitutional structure, but also as inconsistent with the original meaning of the Constitution.[258]

Similarly, Justice Powell, in *City of Rome*, argued in dissent that section 5's "encroachment [on state sovereignty] is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity," and "it strips locally elected officials of their autonomy to chart policy."[259] Thus, the

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256. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."); *id.* at 313–15 (observing that case-by-case litigation against voting discrimination under the Civil Rights Acts of 1957, 1960, and 1964, has not appreciably increased Negro registration and that voting suits have been onerous to prepare, protracted, and where successful have often been followed by a shift in discriminatory devices, defiance or evasion of court orders"); *see also* City of Rome v. United States, 446 U.S. 156, 176 (1980) ("[L]egislation enacted under authority of § 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with the letter and spirit of the [C]onstitution,' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.") (internal citations omitted).

257. *Katzenbach*, 383 U.S. at 358 (Black, J., concurring and dissenting).

258. *Id.* at 360–361; *see also* Georgia v. United States, 411 U.S. 526, 545 (1973) (Powell, J., dissenting) (forcing a state to submit its legislation for advanced review is incompatible with our constitutional structure, a state of affairs made worse because it applies to only a few states).

259. *City of Rome*, 446 U.S. at 201–02 (Powell, J., dissenting); *see also Georgia*, 411 U.S. at 543 (White, J., dissenting) ("Although the constitutionality of § 5 has long since been upheld, it remains a serious matter that a sovereign State must submit its legislation to federal authorities before it may take effect. It is even more serious to insist that it initiate litigation and carry the burden of proof as to constitutionality simply because the State has employed a particular test or

focus on values without any tie to the text, as in *Gregory*,[260] also purports to act as some constraint on congressional power in this context.[261] More recently, Justice Thomas criticized section 5 on federalism grounds, noting that "the section's interference with state sovereignty is quite drastic—covered States and political subdivisions may not give effect to their policy choices affecting voting without first obtaining the Federal Government's approval."[262]

The *NAMUDNO* Court has taken up the mantle, relying on structure and history in protecting state sovereignty from the broad provisions of section 5. *NAMUDNO*, although ostensibly upholding section 5 through questionable statutory interpretation, contains strong language that warns Congress about the costs that the provision imposes on the states, suggesting that the Court might later invalidate it.[263] However, the Court's analysis is flawed for several reasons. First, the structure of section 5 and its allocation of power between the states and the federal government reflect the decentralized nature of our system of elections. Section 5, according to the Court, "goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C."[264] As Professors Feeney and Rubin have noted, however, "in decentralization, in contrast to federalism, the central government identifies the [most efficient] result and thus defines the criteria for success or failure."[265] The Court has upheld the constitutionality of section 5 in the past for the reason articulated by these scholars: that it was the most efficient and effective way for Congress to address a

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device and a sufficiently low percentage of its citizens have voted in its elections.") (internal citation omitted).

260. 501 U.S. 452, 458–61 (1991) (discussing the numerous benefits of a federalist system and concluding that "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute" (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989))).

261. *See* PURCELL, *supra* note 251, at 23–24 (describing that judges and commentators often invoked "the so-called values of federalism . . . to limit national power"); *see also* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1543–45 (1998) (arguing that the Court uses clear statement rules in order to enforce values such as state autonomy at the expense of individual rights).

262. Lopez v. Monterey Cnty., 525 U.S. 266, 294 (1999) (Thomas, J., dissenting).

263. *See* Nw. Austin Mun. Dist. No. One v. Holder, 129 S. Ct. 2504, 2512 (2009) (noting that the coverage formula is based on evidence that is over thirty-five years old and does not address the reality that "the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide").

264. *Id.* at 2511–12 (noting that "preclearance requirements in one State would be unconstitutional in another").

265. FEELEY & RUBIN, *supra* note 10, at 21.

problem that had defied resolution in the past through piecemeal legislation.[266]

Second, although the states are similarly situated sovereigns, as the *NAMUDNO* Court argues, they are not sovereign over Congress with respect to elections. And with decentralized regimes, "the central government decides how decisionmaking authority will be divided between itself and the geographical subunits."[267] The Court's decisions have, at times, reflected that the states are less powerful than Congress in this area. Recall that in *U.S. Term Limits, Inc. v. Thornton*,[268] the Court found the states' power to choose the time, place, and manner of elections is not broader than Congress's power to make or alter such provisions.[269] In fact, the *Thornton* Court limited the states' electoral authority to regulate procedure, a determination that stands in opposition to the Roberts Court's arguments that federal intervention into state electoral schemes undermines substantive policy preferences.[270]

The Roberts Court makes an error by viewing Congress's power to pass section 5 as limited to Congress's remedial authority under the Fifteenth Amendment and ignoring that the Elections Clause gives Congress broad authority over state electoral schemes more generally. As the sovereign authority, Congress has significant room to craft a regulatory regime that achieves the goals and values that are the aims of the policy. But the Court has erroneously focused on the ways in which section 5 prevents states from maintaining their local preferences, which is ironic given that the Court's case law has made it exceedingly unlikely that section 5 will prevent a jurisdiction's voting laws from going into effect.[271]

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266. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966) ("The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name. . . . Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future. In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary.").

267. FEELEY & RUBIN, *supra* note 10, at 21.

268. *See* discussion *supra* Part II.A.2.

269. 514 U.S. 779, 832 (1995) (arguing that if Congress cannot add qualifications to its members, then states also cannot under the guise of exercising their power to regulate the time, place, and manner of elections).

270. *Id.* at 834–35 ("Our cases interpreting state power under the Elections Clause reflect the same understanding. The Elections Clause gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.' " (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932))).

271. As Nathaniel Persily and Jennifer Rosenberg recently pointed out, "[c]overage, by itself, which is the source of the complaint in *NAMUDNO*, only raises federalism concerns if

In *Reno v. Bossier Parish School Board*, for example, the Court held that the Attorney General could not deny preclearance under section 5 for a plan that was nonretrogressive, even if the proposed changes were discriminatory and violated section 2 of the Act.[272] Moreover, the Court limited the section 5 inquiry to the search for retrogressive, as opposed to discriminatory, intent.[273] As Michael Pitts has argued, the *Bossier Parish* cases represent the Court's attempt to limit the substantive reach of section 5 by curbing the federal government's ability to deny preclearance to state voting practices.[274] The *Bossier Parish* cases reflect the Court's misunderstanding about the scope and nature of congressional authority to effectuate the goals of the VRA.

Thus, the Court's unfavorable treatment of section 5 of the VRA is unsurprising given this emerging view in its jurisprudence of state sovereignty as lying not only within the contours of the text but also in the Constitution's structure and history.[275] Given the explicit

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jurisdictions have a legitimate fear that their voting laws will not be allowed to go into effect." Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1678 (2009).

272. Reno v. Bossier Parish Sch. Bd. (*Bossier Parish I*), 520 U.S. 471, 486–87 (1997).

273. Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320, 335–36 (2000) (reinstating the rule that the presence of any discriminatory purpose is grounds for denying preclearance).

274. Michael J. Pitts, *What Will the Life* of Riley v. Kennedy *Mean for Section 5 of the Voting Rights Act?*, 68 MD. L. REV. 481, 520–21 (2009) ("In the 1990s, the Attorney General had prevented the implementation of many voting changes solely because the changes had been adopted with a discriminatory purpose; in the early 2000s [after *Bossier Parish I & II*], the Attorney General prevented the implementation of only a few changes solely because the changes were adopted with a discriminatory purpose.") (internal citation omitted); *see also* Abrams v. Johnson, 521 U.S. 74, 96 (1997) (holding that the benchmark for comparing whether a new plan is retrogressive is the previous plan that had been in effect, a holding that resulted in older plans with less minority representation serving as the benchmark for retrogression); Halberstam, *supra* note 34, at 954–55 ("Section 5 does not go beyond what is substantively already required of states and localities. To the contrary, in making preclearance decisions, the DOJ was forced to tolerate unconstitutional and, under *Bossier Parish II*, even intentional discrimination, so long as it did not make minorities worse off. Section 5, as the Supreme Court has stated on several occasions, is therefore less burdensome than the Constitution itself.") (internal citations omitted).

275. *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (developing a clear statement rule requiring Congress to announce its intent to preempt state law without relying on a specific textual provision in the Constitution); *see also* Manning, *supra* note 240, at 2031 ("[T]he Court abstracted from the specific enumeration of powers in Article I a general purpose of 'federalism' that is both broader and more potent than the enumeration from which it is derived. However sensible *Gregory*'s particular limitation on federal interference with state judicial tenure may seem when imagining the contours of a dual sovereignty, the fact remains that the Court rested its authority on the abstraction of a freestanding federalism found nowhere in the text.") (internal citations omitted).

textual commitment that states determine the time, place, and manner of elections, at least in the first instance, the concerns of Justices Powell and Black, although they did not carry the day forty years ago, have manifested themselves in recent years as the federalism concerns allegedly raised by the Act have become more salient.[276]

CONCLUSION

The Supreme Court conflates state autonomy with state sovereignty in the context of the VRA, in effect promoting the dualist undertones that characterize much of its federalism case law and giving the states significantly more power over elections than they otherwise would have. Its voting rights jurisprudence presupposes that the states still retain a large amount of "sovereignty" over elections, leaving room for the Court to characterize the federal/state relationship over elections as one of shared power instead of viewing the state as subordinate to federal authority. The view of electoral authority as "shared" has led the Court to defer more to the states over the matter of elections.[277] This deference is due in part to the misconception that placing meaningful limits on congressional authority extends to all federalism issues, including those issues such as elections, which are not truly "federalist" in nature but instead reflect a decentralized system of authority.

This focus on sovereignty—with special emphasis on the state side of the equation—has raised concerns that judges have become ill-suited to implement far-reaching civil rights legislation, mostly

276. For further discussion, see Persily, *supra* note 30, at 117 ("That measure [Section 5] stands alone in American history in its alteration of authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws. No other statute applies only to a subset of the country and requires covered states and localities to get permission from the federal government before implementing a certain type of law.") and Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of A Conservative Court*, 5 DUKE J. CONST. LAW & PUB. POL'Y 125, 134 (2010) ("In asking select states and local jurisdictions to preclear any and all changes to their voting laws, section 5 essentially places these jurisdictions in a status akin to a receivership. To critics, this bears an unmistakable resemblance to Reconstruction."); *see also* City of Rome v. United States, 446 U.S. 156, 210–11 (1980) (Rehnquist, J., dissenting) (arguing that "Rome [by maintaining an at-large election system] has not engaged in *constitutionally* prohibited conduct" and "prohibition of these changes can[not] genuinely be characterized as a remedial exercise of congressional enforcement powers" and effectively gives Congress "the power to determine for itself that this conduct violates the Constitution").

277. For a recent example, see Perry v. Perez, 132 S. Ct. 934 (2012) (per curiam) (finding that a district court, in drawing interim redistricting plans, should defer to the State's recently enacted plans even if those plans have not been precleared as required under section 5 of the VRA and are being challenged under section 2 of the provision).

because their concerns about reigning in federal authority and ceding power to the states have trumped issues of individual rights. Indeed, the presence of a free-floating federalism norm can raise the evidentiary threshold so high that Congress could never amass enough evidence of voting discrimination to justify the renewal of section 5 or develop a coverage formula that would allay the federalism concerns raised by the *NAMUDNO* Court.

In reality, Congress's power under the Elections Clause and its power to enforce the dictates of the Fourteenth and Fifteenth Amendments ensure the constitutionality of the VRA. Consequently, the Court should employ rational basis review of the legislative record of the VRA for any new constitutional challenges going forward.