MEMORANDUM

TO: Paul Jacob and Ron Alban
Americans for Citizen Voting
FROM: Graves Garrett Greim
RE: U.S. Citizen Voting Amendment
DATE: April 15, 2026

INTRODUCTION

In current debates over voter registration, it is commonly assumed that individuals who are not citizens of the United States cannot legally vote in federal elections. But in fact, there is nothing in the U.S. Constitution that compels this conclusion. To the extent U.S. citizenship has become a federal voting requirement, it is fortuitous, due only to the policy judgments of individual states. It is not due to any valid exercise of authority by the United States Congress. That conclusion may surprise many. But if one supports the bedrock principle that it is essential to ensure that only U.S. citizens vote in federal elections, the only certain protection is a federal constitutional amendment. Otherwise, individual states will be free under our current constitutional system to allow aliens to vote in federal elections. The legal basis for this conclusion is set forth in Section I, below.

Given the need for a constitutional amendment, questions immediately arise regarding the text of the proposed citizenship requirement and the means for enforcing its provisions. Those considerations are explored in Section II. We reach one main conclusion: that it is prudent to track the existing Elections Clause by conferring power to the state legislatures to enforce the citizenship requirement, while allowing an override by the U.S. Congress. Congress is also granted express authority to enforce the provisions in the District of Columbia.

Finally, Section III explores some details regarding the joint resolution necessary to propose the amendment, and the ratification process for the states.

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PROPOSED TEXT OF THE RESOLUTION

The proposed language is as follows:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three fourths of the several States:
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> Article _____
>
> Section 1. Only citizens of the United States may qualify to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress.
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> Section 2. Appropriate legislation to enforce this article shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. Congress shall have power to enforce this article by appropriate legislation for the district constituting the seat of government of the United States.

ANALYSIS

I. A Constitutional Amendment Is Necessary to Guarantee Citizen-Only Voting in Federal Elections

The Constitution does not establish independent qualifications for voting in federal elections. The Founders committed this judgment to the states, subject to important restrictions outlined below. Many states have exercised this power to bar non-citizens from voting in federal elections. Yet they have not universally done so, and at times in American history many states have allowed non-citizens to vote in federal elections. At the federal level, Congress has enacted one statute that purports to ban non-citizen voting in federal elections, and another that punishes false statements of citizenship on voter registration forms. But no court has ever

considered whether the first statute (enacted only in 1996) is a valid exercise of congressional power. Indeed, a review of the constitutional text and related case law shows that the Constitution simply did not confer upon Congress the power to enact this first provision—either as a direct grant of power or under its purely remedial (and therefore more limited) authority under free-standing provisions like the Reconstruction Amendments. Accordingly, as shown below, a constitutional amendment is the only certain way to ensure that non-citizens do not vote in federal elections.

A. Express Constitutional Authority and Limits Regarding Voter Qualifications

1. Article I and the Seventeenth Amendment

The Constitution provides no one a "right to vote." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973) ("[T]he right to vote, *per se*, is not a constitutionally protected right.") Further, it imposes no specific qualifications for voting in federal elections, which stands in sharp contrast to its provision of qualifications for elected federal offices. *See, e.g.*, U.S. Const., art. I, section 2, clause 2 (qualifications for U.S. Representatives); art. I, section 3, clause 3 (Senate); art. II, section 1, clause 5 (President).

Still, the Constitution does provide a clear *means for determining* qualifications in congressional elections. For the U.S. House of Representatives, "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, section 2. The same rule now applies to the U.S. Senate: "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." U.S. Const. amend. XVII. Together, these are the "Qualifications Clauses." Thus, for congressional elections, states determine the qualifications of voters by determining the qualifications of voters for the largest house of their own legislatures. Their decisions regarding the qualification of citizenship (if any) for those legislative houses therefore also control the citizenship qualification for their voters for the U.S. House and Senate.[1] In contrast, there is no such provision for presidential elections.

[1] Actually, congressional and state qualifications need not exactly match. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 225–27 (1986) (holding that the Qualifications Clauses are satisfied so long as no one who could vote in the relevant state election is denied the same right in the covered federal elections). This holding implies that state qualifications could be tighter than their federal counterparts, but federal qualifications could not be tighter than their state counterparts.

Against that background, do other parts of the Constitution expressly limit state discretion in setting the "citizenship" qualification, or otherwise fill gaps, such as the Constitution's silence on presidential elections?

The answer is no. The most likely sources of such guidance would be the Elections and Electors Clauses, which apportion state and federal authority for congressional and presidential elections, respectively. Starting with the Elections Clause, which applies only to Congress, "[t]he 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." U.S. Const., article I, section 2, clause 4. Next, under the Electors Clause, which applies to elections for presidential and vice-presidential electors, "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const., art. II, section 1, clause 2. For these elections, congressional authority is more limited than for congressional elections: "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." *Id.* at art. II, section 2, clause 4.

Does the Elections Clause—which covers "time, place, and manner" regulations— encompass the question of *qualification*, or *who* is qualified to vote? The weight of authority over the past several decades leans heavily against this proposition, even though no case has directly held that qualifications are outside the scope of time, place, and manner regulations. *See Inter-tribal Council of Arizona v. Arizona,* 570 U.S. 1, 16 (2013); *Oregon v. Mitchell*, 400 U.S. 112 (1970). *See also U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (in arguably analogous situation, holding that qualification of *candidates* is substantive and therefore not a "time, place, and manner" power initially reachable by the states under the Elections Clause).

Inter-tribal shows unanimity on this point across nine justices who adhered to a range of jurisprudential approaches, even though the Court's treatment of the qualifications issue was technically dictum. The Court had decided to intervene in a long-running dispute between Arizona and various voter groups over Arizona's efforts to ensure that only citizens vote in state and federal elections. To help enforce its citizenship requirement, Arizona had required applicants for voter registration to provide documentary proof of U.S. citizenship. *Inter-tribal*, 570 U.S. at 9. But there was a problem: Arizona's proof requirement arguably conflicted with the National Voter Registration Act ("NVRA"); the NVRA required states to "accept and use" a

federally-prescribed form for registrations, and that form did not require such proof of citizenship. *Id.* at 9-13.

Arizona argued, however, that the NVRA should be given a limited reading because states have the right to set the qualifications of voters under the Qualifications Clauses; forcing them to use the federally prescribed form as a matter of preemption under the NVRA and Elections Clause would violate states' own independent constitutional right to set qualifications. *Id.* at 15-16. The Court disagreed. But it narrowly missed deciding the issue that matters for purpose of this memorandum, instead rejecting Arizona's argument on narrow grounds. To wit, the Court decided that on the record before it, the NVRA's required use of the federal form (and the requirement that Arizona could therefore not require proof of citizenship to be submitted along with the federal form) did not interfere with Arizona's right to set qualifications of voters for federal elections. *Id.* at 19-20.

The Court's decision to resolve the case in this manner arguably makes the rest of its reasoning dicta, but importantly for purposes of this memo, the majority opinion expressly agreed that Arizona's right to set federal voter qualifications arises from the Qualifications Clauses, not from the Elections Clause, and is therefore not subject to federal preemption under the Elections Clause. Justice Scalia's majority opinion was explicit:

> One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly. "It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *Oregon v. Mitchell,* 400 U.S. 112, 210, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (Harlan, J., concurring in part and dissenting in part)…

Id. at 16. The Court went on to explain the reason the Founders chose to commit voter qualifications solely to the states, and not to the Congress:

> Prescribing voting qualifications, therefore, "forms no part of the power to be conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times,* the *places,* and the *manner* of elections." The Federalist No. 60, at 371 (A. Hamilton); see also *id.,* No. 52, at 326 (J. Madison). This allocation of authority sprang from the Framers' aversion to concentrated power. A Congress empowered to regulate the qualifications of its own electorate, Madison warned, could "by degrees subvert the Constitution." 2 Records of the Federal Convention of 1787, p. 250 (M. Farrand rev. 1966). At the

> same time, by tying the federal franchise to the state franchise instead of simply placing it within the unfettered discretion of state legislatures, the Framers avoided "render[ing] too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone." The Federalist No. 52, at 326 (J. Madison).

Id. at 17. Succinctly, "…the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Id.* at 16.

Importantly, Justice Scalia wrote for the seven-justice majority, and both dissents (Thomas and Alito) expressly agreed that Congress had no power to set voter qualifications for federal elections. As of 2013, there appeared to be no votes on the Court for the proposition that states set voter qualifications under the Elections Clause and that those qualifications are therefore subject to congressional override.

The one earlier decision which could have resolved this issue was *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which the Court took up challenges to several 1970 amendments to the Voting Rights Act of 1965. These included a permanent ban on literacy tests, a mandate that state and federal elections allow 18-year-olds to vote, and the abolition of certain durational residency requirements for voting in presidential elections. *Id.* at 117. The Court had already held that Congressional power under the Voting Rights Act was remedial only, as part of its powers to enforce the Fifteenth Amendment's ban on discrimination in voting on account of race. *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 325-327 (1966). But *Mitchell* presented a new, age-based qualification that did not obviously fit with the purposes of the Voting Rights Act to remedy racial discrimination. The question fractured the Court.

Although the Court did uphold the 18-year-old voting provision in federal (but not state) elections, no majority could agree on a basis for that decision, and only Justice Black believed that an age qualification was a "time, place, and manner" restriction for which Congress could override state rules under the Elections Clause. *Mitchell*, 400 U.S. at 123-124 (opinion of Black, J.). Justice Black's basis for extending this Elections Clause authority to the Electors Clause was murkier, but ultimately was based on the Necessary and Proper Clause. *Id.*, n. 7.

Two partial concurrences/dissents joined in total by four other justices, Douglas, Brennan, White, and Marshall, maintained that the 18-year-old voting qualification was valid remedial authority under the Reconstruction Amendments. *Id.* And importantly, four other justices believed the 18-year-old qualification was invalid under the Reconstruction Amendments *and invalid under the Elections or Electors Clauses*. Justice Harlan persuasively argued that the plain text of the Elections and Electors clauses, as well as other evidence of the founders' intent,

showed that qualifications of voters were left fully to the states. *Id.* at 209-212 (opinion of Harlan, J., dissenting in part) (also opining that the Fifteenth Amendment provided no basis for congressional authority regarding age qualifications). And Justice Stewart, writing for Chief Justice Burger and Justice Blackmun, explained that "[t]he Constitution withholds from Congress any general authority to change by legislation the qualifications for voters in federal elections. The meaning of the applicable constitutional provisions is perfectly plain." *Id.* at 287 (opinion of Stewart, J., dissenting in part). Justice Stewart engaged in both textual analysis and a review of the constitutional debates regarding the Elections Clause, arguing as follows:

> The 'manner' of holding elections can hardly be read to mean the qualifications for voters, when it is remembered that s 2 of the same Art. I explicitly speaks of the 'qualifications' for voters in elections to choose Representatives. It is plain, in short, that when the Framers meant qualifications they said 'qualifications.' That word does not appear in Art. I, s 4. Moreover, s 4 does not give Congress the power to do anything that a State might not have done, and, as pointed out above, no State may establish distinct qualifications for congressional elections.

Id. at 288.

Considering that Justice Douglas also took this position, *id.* at 143, a total of *five justices* agreed even as early as *Mitchell* that the Elections Clause does not apply to allow congressional legislation fixing voter qualifications. *Oregon v. Mitchell* is a highly fractured decision, but Justice Black's thinly reasoned opinion stood alone in arguing that the Elections and Electors Clauses gave Congress power to set qualifications for federal elections. And fast-forwarding back to *Inter-tribal Council*, the majority and one dissent cited the *Oregon v. Mitchell* dissenters (Justice Harlan or Justice Stewart) for the proposition that Congress cannot set federal voter qualifications. *Id.*, 500 U.S. at 16 (in footnote 8, stating that the Harlan-Stewart analysis "underlies our analysis here"); *id.* at 42 (Thomas, J., dissenting). Again, although all of this is technically dictum, it is impossible to conceive of any decision from today's Court taking a contrary position.

As with the Elections Clause, there is no case law controlling the analysis regarding the Electors Clause. But with respect to electors, the plain text seems even clearer than the Elections Clause, since Congress does not even have power to fix the "Manner" of choosing electors; it is limited to the "Time" of their choosing and the "Day" on which they vote. U.S. Const., art. II, section 2, clause 4.

The conclusion that Congress lacks power to dictate voter qualifications for federal elections is important. Tellingly, as discussed below, Congress's attempt to enact just such a statute was not even based on the Elections Clause. And the Electors

Clause, unlike the Elections Clause, does not provide for a congressional override with respect to "Manner". These elections-related provisions in the Constitution simply do not give Congress the power to prohibit non-citizen voting in federal elections.

In summary, our Constitution leaves to states the power to define the qualifications of their own voters for their own legislature (at least with respect to U.S. citizenship status), and therefore to determine the qualifications of voters in congressional elections. The power to determine who can vote for electors in a presidential election is likely also reserved to the states. At the very least, there is no constitutional provision providing that the federal government will control voter qualifications for all federal elections.

2. Historical Practice

Although a textual analysis (as recently articulated by a Supreme Court that was unanimous on this point) leans strongly against any finding of a reserved federal power to require citizen-only voting in federal elections, it is possible that history and tradition—that is, the practices that began with those who understood the original public meaning of the Constitution and had to begin to implement it—counsel otherwise. But they don't.

One study found that "as many as forty states and federal territories at one point or another allowed noncitizens to vote…" RONALD HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING IN THE UNITED STATES 16 (2006). Maryland, for example, allowed non-citizens to vote in local, state and federal elections from 1776 to 1851. *Id.* at 19. Restrictions on alien voting followed historical events impacting concerns regarding immigrants, such as relations with France and the War of 1812. *Id.* at 18. Indeed, "[f]rom the late 1770s until the 1820s, voting requirements were not tied to citizenship." *Id.* at 17. State allowance of alien voting apparently traces back to the early colonial era and continued through the founding era and early republic. *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical Constitutional and Theoretical Meanings of Alien Suffrage*, 141 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1391, 1399-1406 (1993). For example, the Ohio Constitution enfranchised for all elections "all white male inhabitants" who were 21, who met certain other requirements, and who had lived there for one year. *Id.* at 1403.

The manner in which states historically justified and approached non-citizen voting is also instructive. In particular, the historical experience with Wisconsin, starting in 1848 and continuing for sixty years until 1908, shows how some states today could begin to justify non-citizen voting and win over skeptics. In its constitutional debates concurrent with its 1848 statehood, Wisconsin factions argued

about whether to allow alien suffrage in order to attract immigrants. HAYDUK, *supra* p.7 at 31. The pro-alien side prevailed, but limited suffrage to so-called alien declarants. These were aliens who, at the first step of naturalization, declared their intention to eventually become citizens. Raskin, *supra* p.7 at 1406. The pro-suffrage argument was that this would attract much-needed immigrants, and that participating in the political community was part of the pathway to full citizenship. *Id.* at 1407. *See also* HAYDUK, *supra* p.7 at 31. Starting in 1848, then, the Wisconsin Constitution extended the vote to males over 21 who were "White persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization …" *See* Wis. Const., art. III, section 1 (1848), State Democracy Research Initiative, University of Wisconsin Law School, at https://50constitutions.org/wi/constitution/section-amendment-id-48427 (compiled from original document, last visited December 5, 2025).

Importantly, under federal law in 1848, the group defined by this Wisconsin provision, declarant aliens: remained citizens of their home country; would not become naturalized citizens for several years; need never actually become U.S. citizens; and did not even need to take an oath of loyalty to the United States. Raskin, *supra* p.7 at 1406.

Despite potential criticisms, Wisconsin's "declarant alien" provision "proved popular" among states wanting to attract immigrants. Oregon adopted the same framework just three months later, followed by several other states. *Id.* at 1407. Although Wisconsin ended "declarant alien" suffrage in 1908, it did so based not on its supposed lack of constitutional power to have allowed alien suffrage, but because a new wave of immigration caused the underlying politics to change. *Id.* at 1415-1416.

The lesson from Wisconsin is that states can devise special variants of alien suffrage that could entice fence-sitters, making alien suffrage more popular than one might suppose. States today might well return to some version of the Wisconsin model in order to answer objections. States could reinstate a "declarant" model. Or perhaps they would pair this model with a residency requirement. Any number of innovations are possible for a state determined to allow aliens to vote in federal elections.

In conclusion, the historical record not only supports a plain-text reading of the Constitution, it provides troubling antecedent for hybrid versions of alien suffrage that could prove popular in some states.

B. The Existing Federal Statute and Possible Constitutional Bases for Congressional Authority to Enact It.

Notwithstanding the established authority surveyed in subsection I.A, in 1996, Congress enacted a statute that purports to ban non-citizen voting. See 18 U.S.C. § 611. This section considers whether that statute is authorized under a power granted to Congress by the Constitution, or whether it is a permissible remedial (enforcement) measure under the Reconstruction Amendments or some other later constitutional amendment. It appears the answer is no.

1. The Relevant Statute

Congress has enacted a ban on alien voting as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IRRIRA"). The portion of IRRIRA that contains the ban is codified at 18 U.S.C. § 611. It provides:

> It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, unless--
>
> (1) the election is held partly for some other purpose;
>
> (2) aliens are authorized to vote for such other purpose under a State constitution or statute or a local ordinance; and
>
> (3) voting for such other purpose is conducted independently of voting for a candidate for such Federal offices, in such a manner that an alien has the opportunity to vote for such other purpose, but not an opportunity to vote for a candidate for any one or more of such Federal offices.

18 U.S.C. § 611. This is a criminal provision that in most cases, would punish alien voting in federal elections but not in state elections where such voting is allowed by state law and is "conducted independently" of federal voting. *Id.*

At the time of passage, the legislative record suggested that Congress may have viewed itself as exercising its immigration and naturalization powers, rather than Elections Clause powers or remedial powers under various suffrage-related amendments. The "immigration" rationale is therefore addressed immediately below.

2. Express Grants of Power Relating to Immigration and Naturalization

Congressional power to control immigration arises from a combination of its powers to "establish an uniform Rule of Naturalization," U.S. Const. art. I, section 8, cl. 4, its power to control foreign commerce, and its power to control foreign affairs. *Arizona v. United States*, 567 U.S. 387, 394–95 (2012). "The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Id.* at 395. "As this Court has said, it is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions." *Id.*, 567 U.S. at 422 (Scalia, J. concurring in part and dissenting in part).

When 18 U.S.C. § 611 was being debated, at least some discussion suggested that Congress believed it was acting under this core immigration power. 142 Cong. Rec. 8664–65 (1996) (statement of Sen. Simpson). Is this sufficient to grant Congress the power to fix a particular type of voter qualification—citizenship status—that it would otherwise not have? The answer is likely no.

The Supreme Court has developed a taxonomy for categorizing conflicts between state powers and the federal immigration power. Structural immigration powers, such as the power to control entry and deportation of aliens, reside exclusively with the federal government. With respect to regulation of aliens within our borders, regular preemption principles apply. For example, "the Federal Government has occupied the field of alien registration," so that even state registration requirements that are merely complementary to the federal registration system are preempted. *Arizona*, 567 U.S. at 401 (considering Arizona registration requirement that essentially tracked the federal system, and noting the efficacy of having one uniform nationwide system for registering aliens). On the other hand, state provisions imposing penalties on aliens who unlawfully seek work was preempted only on the basis of obstacle preemption—that it stood as an obstacle to a particular federal statute. *Id.* at 405-407.

It is likely that the federal government's delegated immigration power can reach far enough to embrace a wide range of alien activities within the country. For example, the government can control registration of aliens, work and employment of aliens, and law enforcement involving aliens. *Arizona*, 567 U.S. at 400-413 (surveying federal laws that largely preempted Arizona statute). All of these provisions have something to do with controlling who enters and is excluded from the country; who can become a citizen of the country; and interstate commerce or our economic relations with those aliens' home countries.

To take a further step, 18 U.S.C. § 1015 makes it illegal to "... make any false statement or claim that he is a citizen of the United States in order to register to vote or to vote in any Federal, State, or local election…" While this is adjacent to the actual power to vote, and therefore adjacent to a qualification to vote such as 18 U.S.C. § 611, the provisions in § 1015 are not the same thing as a qualification. Instead, they pertain to inherently illegal conduct by aliens while in the United States—conduct that would be relevant in deciding whether to incarcerate or deport them.

This provision, § 1015, sits just within the immigration power, and just outside the power of states over the qualifications of voters. The line between the two powers is bright enough. There is no obvious connection between voter qualification and the kinds of concerns that surround immigration and naturalization. There is no obvious way in which alien voting would impede Congress' undoubted power to control entry and deportation of aliens, their economic activities in this country, and our means of monitoring them while they are here. Voting happens independently of the federal government's ability to enforce the laws against—and if necessary, remove—aliens.

On the other hand, voluminous evidence (which is only generally summarized in Section I.A) shows that before and after the founding, and before and after the Reconstruction Amendments, which related in part to suffrage, the states had the power of deciding qualifications of voters. That is not surprising, because the Constitution expressly delegated this task to the states. In the face of that clear delegation, courts would have to strain mightily to determine that the immigration power justified congressional imposition of voting qualifications.

There is no judicial decision on point, and 18 U.S.C. § 611, a relatively recent statute in our long history of immigration enforcement, has never been attacked on the grounds that Congress lacked power to enact it. But the above-referenced considerations seem compelling against the contrary view, that the penumbra of the delegated immigration power is a silent exception to the Constitution's express delegation of voter qualifications to the states. For all of these reasons, § 611 would be vulnerable to constitutional attack in the proper case, and is not a reliable basis for supposing that states could not extend voting in federal elections to aliens. And of course, § 611 could simply be repealed by a future Congress.

3. Congressional Remedial Powers

The preceding section analyzed powers delegated to Congress, where congressional authority is at its apex. But Congress also exercises another kind of power: remedial power to enforce substantive protections in the Constitution. This section explores whether those powers could support a federal ban on non-citizen voting.

Graves Garrett Greim

Beginning with the Civil War, the Constitution has eliminated states' ability to discriminate on various grounds in qualifying voters, which has had the effect of expanding the franchise. This includes the Fourteenth Amendment (generally requiring that states extend the equal protection of the laws, a prohibition which prohibits invidious discrimination in voter qualifications). *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966). More directly, it also includes the Fifteenth Amendment (prohibiting laws that "deny or abridge" the right to vote "on account of race, color, or previous condition of servitude."); Nineteenth Amendment (discrimination based on sex); Twenty-Fourth Amendment (discrimination based on failing to pay poll or other taxes in federal elections); and Twenty-Sixth Amendment (discrimination based on age for anyone over eighteen).

Each of these prohibitions bar discrimination on particular grounds against "citizens" who vote, but again, they do not expressly convey a right to vote to "citizens" or provide that *only* "citizens" can vote. Indeed, none of these provisions actually confer a right *to* vote; they are instead carefully crafted to provide that the right to vote shall not be subject to discrimination based on race, sex, and other criteria.

It is true that Congress can and does pass "appropriate" remedial statutes enforcing these constitutional provisions. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 308, 333-34 (1966) (upholding federal law prohibiting literacy tests as a valid exercise of congressional authority to enforce the Fifteenth Amendment) *and Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (upholding federal law prohibiting literacy tests as a valid exercise of congressional authority to enforce the Fourteenth or Fifteenth Amendment). Indeed, in each of these cases (and others from the early Civil Rights Era), the Supreme Court upheld congressional legislation that eliminated particular state-imposed qualifications on voting. But importantly, to repeat the conclusions of Section I.A of this memo, in no case was there a controlling opinion deeming Congressional power to have arisen from the Elections or Electors Clauses. Nor does any case suggest that Congress could ban some groups from voting in order to enhance the voting power of other groups; such severe measures would likely be deemed substantive (requiring an independent constitutional delegation of power) rather than merely remedial (arising from the power to enforce a pre-defined right).

Finally, it is important that for decades after the Civil War and the Reconstruction Amendments that followed, Wisconsin and many other states that had followed its lead allowed non-citizens to vote in federal elections. *See* Raskin, *supra* at p.7, at 1414-1417 (noting that Arkansas in 1926 ended alien suffrage, so that the election of 1928 may have been the first election in 100 years in which no alien cast a vote in any election for any office, "national, state, or local."). The rise and fall

of alien suffrage in federal elections traces to political developments within the states, rather than to acts of Congress or any federal constitutional amendment.

In sum, nothing in the Reconstruction Amendments or other suffrage-related amendments confers a power upon Congress to ban non-citizen voting in federal elections.

4. Existing Constitutional Provisions Create a Greater Probability of Non-Citizen Voting than May Be Commonly Appreciated

An objection could be raised that the above-referenced possibility of non-citizen voting is merely a theoretical concern, and not a likely eventuality. Political predictions regarding which states could eventually flex their power to allow non-citizen voting is beyond the scope of this memorandum, but one point is worth considering. Specifically, the Constitution already *requires* that non-citizens be allowed to vote in elections for the U.S. House and Senate (see Art. I, Section 2, and the Seventeenth Amendment, respectively) if a state decides to open the largest house of its *state legislature* to non-citizen voting. Put another way, states are powerless to extend voting to non-citizens *only* for their state legislatures.

And because that requirement is constitutional, not even a federal statute (such as 18 U.S.C. § 611) could allow states to experiment with a compromise position, whereby non-citizens could vote in state legislative elections but not in federal elections. Any voter who is granted the state legislative franchise, but denied the federal franchise, could likely mount a facial challenge to any state or federal statute that interfered with the constitutional mandates of Article I or the Seventeenth Amendment.

In this way, what appear to be purely local, state-level concerns regarding voting for the state legislature could ultimately determine the franchise for that state's representatives in Congress and for presidential electors. Proponents of such an effort could perhaps disclaim any effort to enfranchise aliens for congressional elections, arguing that this is merely a temporary and unintended outcome of their local reforms. They would argue that the onus should be on the nation at large to eliminate non-citizen voting in federal elections. And as noted in Section I.A.2, they could devise hybrid non-citizen voting schemes that have surface appeal, such as by extending suffrage to non-citizens who "declare" an intent to become citizens.

In sum, states need not "sell" themselves on non-citizen voting in federal elections for this result to emerge from local political changes. Implementing a constitutional citizenship requirement for federal elections, and starting the process soon, would preempt any such efforts.

D. The Proposed Language for Section 1

The proposed language for Section 1, keeping with the Constitution, does not confer an individual right to vote to anyone. Nor does it confer any individual rights, in contrast to the Reconstruction Amendments and other amendments relating to suffrage. It is more akin to the Qualifications Clauses, in that it substantively impacts who is qualified. Unlike those Clauses, which simply require congressional voter qualifications to match those of the various states, this imposes a substantive restriction. It therefore impliedly amends those Clauses to a limited extent. Those Clauses will remain in effect, except that state enactments at the state level cannot change the citizenship requirement for federal elections.

Additionally, the language for Section 1 almost exactly copies the 24th Amendment (which banned discrimination in applying poll taxes in congressional and presidential elections). This amendment uses the 24th Amendment as a model because it is recent and it also deals with a qualification for voting. Additionally, the 24th Amendment was drafted to leave states free to fix qualifications for voting in state and local elections, which is also the intent of this proposed amendment (subject to the exception, as noted in the immediately prior paragraph, that state legislative voting qualifications can no longer apply to congressional voting qualifications if they would allow non-citizens to vote in federal elections).

Finally, Section 2 is modeled after the enforcement provisions of most recent suffrage-related amendments, and in apportioning responsibility between the states and Congress to enforce its provisions, precisely tracks the Elections Clause. Enforcement is addressed more fully in Section II, below.

II. The States and Congress Should Be Responsible for Any Appropriate Legislation to Enforce under Section 2

A. General enforcement.

Arguably, Section 1 is self-enforcing. It is not a generalized individual right that might require federal civil rights laws (like the Voting Rights Act) to give it full effect. It should simply be the case that, via the Supremacy Clause, states won't allow non-citizens to vote when they hold federal elections.

But there is a complex web of federal-state interplay on many other election administration issues that are at the very least adjacent to the issue of non-citizen voting. *See, e.g., Inter-tribal Council*, covering voter registration requirements and states' ability to require documentary proof of citizenship when doing so might conflict with the National Voter Registration Act.

It seems inevitable that state-federal tugs of war over time, place, and manner restrictions will carry over into non-citizen voting, even though as noted above non-citizen voting relates to qualifications and is therefore not a time, place, and manner restriction subject to the Elections Clause. Still, as a precaution, the amendment follows the order of operations in the Elections Clause by first empowering states to enforce the restriction, and then allowing Congress to override the restriction as necessary.

The same body of law that is already applied under the Elections Clause could therefore adjudicate any conflicts between state and federal law with respect to non-citizen voting enforcement. That would aid predictability of outcomes, and would likely strongly favor preemption. The reference to "appropriate legislation" would also allow application of the body of law that applies congruence-and-proportionality review to determine the appropriateness of remedial statutes under the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Those precedents could be applied to limit state or federal enforcement laws that sweep far more broadly than necessary to enforce this amendment, although it must be noted that this proposal, unlike the Fourteenth Amendment, does not confer an individual right.

B. Enforcement in the District of Columbia

Solely to avoid doubt, the text of the proposed measure gives Congress the power to enforce the requirement of U.S. citizenship for voting in federal elections in the District of Columbia. Congress already has "exclusive Legislation in all Cases whatsoever" over the federal district that serves as the seat of government. See U.S. Const., art. I, Section 8, Clause 17. Of course, the District has only non-voting representation in the House of Representatives and, not being a State, is not subject to the provisions in Article I regarding congressional elections. But this grant of authority does matter for presidential elections, since the Twenty-Third Amendment provides as follows:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

U.S. Const. amend. XXIII. This amendment gives Congress the power to "direct" the "manner" of these elections, and in Section 2 gives Congress "power to enforce this article by appropriate means." To ensure that there is no question that these sources of congressional power over the District of Columbia also include the power to enforce the U.S. citizenship voting requirement, the proposed amendment specifically authorizes the Congress to enforce citizen-only voting in the District.

III. Ratification

A. Article V of the Constitution

Article V lays out the two steps necessary for adoption of a constitutional amendment: proposal and ratification.

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall **propose** Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when **ratified** by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. Const. art. V (emphasis added).

Congress may **propose**, upon a two-thirds vote of both houses, an amendment to the Constitution. (Congress must also call a convention for proposing an amendment upon application from two-thirds of state legislatures, but this power from the states has never been successfully invoked.) A proposal for a new amendment includes: (1) a proposed amendment text; and (2) a proposing clause that specifies, *inter alia*, the mode of ratification and, generally, any time limit on ratification.

The proposed amendment must then be **ratified** by three-fourths of the States by whichever mode Congress identifies in its joint resolution, and within any designated window of time. The two modes of ratification open to Congress are state legislative action or state convention.

B. Proposal

Although Article V provides two modes of proposing constitutional amendments, the states have never successfully exercised their power to call an Article V Convention. To date, all 33 constitutional amendments that have been

proposed to the states for ratification have been proposed by joint resolution of Congress.

A joint resolution proposing a constitutional amendment must pass both houses of Congress by a two-thirds vote. "The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent." *State of Rhode Island v. Palmer*, 253 U.S. 350, 386 (1920).

There is no requirement under Article V that the President approve a joint resolution proposing a constitutional amendment. The president's exclusion from the process was confirmed by the Supreme Court in *Hollingsworth v. Virginia*, 3 U.S. 378 n.2 (1798).

C. Mode of ratification

Article V makes explicit that Congress has the duty to prescribe one of two modes of ratification in its proposal of any amendment. Congress may call for ratification "by Legislatures of three fourths of the several States," or "by Conventions in three fourths thereof." U.S. Const. art. V.

In all but one case, Congress has required ratification by state legislatures. Only when proposing the 21st amendment, which repealed the 18th Amendment (Prohibition), has Congress called for ratification by convention. The common explanation for this decision was that Congress judged that the temperance lobby retained too strong an influence in legislatures to allow legislative action on Prohibition that reflected the will of the people. This explanation is consistent with the common understanding of why the convention method of ratification was included in the Constitution: to allow for votes determining the will of the people that bypass their elected representatives.

D. Time limits for ratification

Since 1917's proposal for what became the 18th Amendment (Prohibition), Congress has included time limits, generally 7 years, for ratification in the joint resolution proposing nearly every proposed constitutional amendment.[2] Congress's

[2] In some joint resolutions, a time limit for ratification has been included in the proposed amendment text and is therefore now incorporated into the Constitution. For the 23rd through 26th Amendments, as well as the failed Equal Rights Amendment, Congress included a time limit within the proposing clause of the joint resolution proposing the amendment, to avoid extraneous constitutional text. The location of the time limitation does not seem to affect its validity. *See, e.g.*, *Coleman*, 307 U.S. at 452 (noting the absence of a time limitation in either the text or the resolution).

power to prescribe a definite period for ratification was confirmed in *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921), as an "incident of [Congress's] power to designate the mode of ratification." *Id.*

The 1921 Supreme Court in *Dillon* further listed reasons for implying a reasonable time limitation for ratification, based on the states manifesting a roughly contemporaneous sentiment that is proximate in time to the necessity that inspired the proposed amendment. *Id.* at 374-75. Then, in 1939, the Supreme Court in *Coleman v. Miller*, 307 U.S. 433, 452 (1939), refused to fill in an implied "reasonable time" limitation for ratification where one had not been specified, suggesting that Congress should determine whether a ratification period was reasonable by an act of "promulgating" (or not) a proposed Amendment after the requisite number of state ratifications. *Id.* at 454. However, this reference to "promulgation" was based on a single historical anomaly, and the text of Article V provides no support for the involvement of Congress in adoption of an amendment after its initial proposal. *Dillon* itself specifies that an amendment is "consummated" on the day of the final state ratification. 256 U.S. at 376. So, *Coleman*'s reference to congressional review of whether an amendment that lacks a specific time limit has been ratified within a "reasonable time" is not likely to be applied today.

Moreover, fifty years after *Coleman*, a movement to ratify one of the original 12 proposed amendments to the Constitution resulted in ratification of the 27th Amendment in 1992, more than 202 years after it was initially proposed. Congress did pass a concurrent resolution validating the adoption of the 27th Amendment, but the legal necessity or significance of that act is dubious for the same reasons that *Coleman* is considered unreliable. Article V itself, *supra*, provides for no involvement of Congress in ratification of amendments following its proposal of an amendment to the states.

In short, there are dicta in *Dillon* and *Coleman* suggesting that there is an implied and unpredictable "reasonable time" limitation on the ratification of any constitutional amendment, but neither constitutional text nor history nor legal precedent supports Congress's power to exercise any limitation on a ratification window other than its power, confirmed in *Dillon*, to specify a time limitation ahead of time. Further, the most recent historical precedent suggests that a proposed

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Time limits for ratification have been tied to an amendment's "submission by Congress," so they begin to run on the day final action on the joint resolution is taken in Congress, before formal processes for notification of the States have begun. The Archivist of the United States formally notifies the Governor of each state of the proposed amendment, and Governors are charged with either submitting the amendment to the state legislature or calling a state convention, as specified in Congress's resolution. States have acted on proposed amendments prior to receiving official notice.

amendment that is not subject to an explicit time limitation in its text or resolution remains open to ratification indefinitely.

So, for a proponent of an amendment, there seems to be little upside to including a time limit on ratification.

E. Choice of legislative or convention-based ratification

The joint resolution proposing an amendment must specify whether ratification must take place by state legislative action or by state convention. State conventions are thought to elicit a more direct expression of the people's will, and perhaps for that reason were invoked in 1933, when the passage of the 21st Amendment (repealing 18th Amendment Prohibition) seemed likely to be compromised by the continuing influence of the temperance lobby in state legislatures.

State legislative action is a traditional and familiar process, involving introduction and passage of a bill through all houses of the state legislature. Some states provide special levels of approval for ratification of an amendment, such as a constitutional majority or a supermajority. Such provisions might be subject to constitutional challenge, and whether such requirements can constitutionally bind the legislature is beyond the scope of this memorandum.

F. Ratification by convention

The proposed U.S. Citizen Voting Amendment requires ratification by convention, so important features of the country's previous exercise of that mode must be noted.

First, each state has substantial freedom. It is free to design its own convention, from election and number of delegates to timing, location, and other details. Some states have code provisions that provide abiding rules for any ratifying conventions. States, of course, are also free to not act at all, whether by legislative action or convention, but it seems possible that states would be less likely to ignore a call for ratification by convention.

Although delegated to each state's discretion, all the state conventions leading up to the 21st Amendment were organized in a manner that resulted in them being ministerial, rather than deliberative. This was accomplished by having voters elect delegates that were either pledged for or against ratification. Many states used an at-large slate-of-delegates approach, analogous to the method used by most states for Electoral College delegates. This structure made the convention mimic as closely as possible a direct vote of the people, fulfilling Congress's purpose in selecting the convention mode of ratification.

State conventions to ratify the 21st Amendment were organized and executed efficiently. Congress passed the joint resolution for the 21st Amendment on February 20, 1933. A sufficient number of state conventions were held such that the Amendment was ratified on December 5, 1933.

G. Validity

The Archivist of the United States declares a constitutional amendment "valid, to all intents and purposes, as a part of the Constitution of the United States" by publication with his certificate, whenever he receives "official notice" of the requisite number of state ratifications to render the amendment "adopted, according to the provisions of the Constitution." 1 U.S.C. § 106b. Such publication includes a list of the ratifying states. *Id.* The Supreme Court in *Dillon* declared the "consummation" of an amendment to be the date of the last state's ratification, rather than the date of the publication of its validity. 256 U.S. at 376.

CONCLUSION

Because the U.S. Constitution currently allows states to decide who can vote in federal elections—even including non-citizens—a constitutional amendment is necessary to ensure that only U.S. citizens vote for the Congress and for President. Congress can pass a resolution now proposing just such an amendment. The proposal would give primary enforcement power to the states, subject to a congressional override —the same division of power that has governed the states and Congress since 1788 under the Elections Clause in Article I. To assure the will of the American people is fulfilled, the proposal relies upon the "convention" mode of ratification, which, based on the precedent of the 21st Amendment, allows voter participation in the ratification process.

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