THE UNCONSTITUTIONALITY OF THE FEDERAL BAN ON NONCITIZEN VOTING AND CONGRESSIONALLY-IMPOSED VOTER QUALIFICATIONS

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ABSTRACT

Congress strikes at the core of state sovereignty when it disenfranchises voters. Yet demands for national disenfranchisement laws have become pervasive since the 2016 election, and Congress has a ready model: a federal statute prohibiting noncitizens from voting in federal elections. Despite upending centuries of state control over voter qualifications, this statute remains unchallenged in court and unexamined in academia; its constitutionality has been assumed. This Article challenges this assumption, arguing that the federal ban on noncitizen voting—along with every other voter qualification Congress imposes—unconstitutionally infringes state sovereignty.

Most voting rights scholarship focuses on the constitutional amendments that prevent disenfranchisement based on race, sex, wealth, and age. This Article demonstrates how the Constitution limits the federal government even further. By tracing the history of the Elections Clause and analyzing contemporary election law jurisprudence, this Article shows how Congress's traditional sources of authority over federal elections do not empower it to impose substantive qualifications on voters. More fundamentally,

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examination of the text and history of the Voter Qualifications Clauses reveals that states possess an exclusive power to determine who is ineligible to vote. This analysis makes evident that all congressionally-imposed voter qualifications—even those that do not invidiously discriminate—cannot survive the constraints of American federalism.

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I. INTRODUCTION

In the wake of the 2016 election, federal politicians have put states on notice: deprive people of the right to vote, or the federal government will do it for you. President Trump has condemned Virginia for restoring voting rights to people convicted of felonies.[1] He has similarly attacked jurisdictions for allowing noncitizens, and seemingly anyone else that a state might wish to enfranchise, to "just walk in and vote."[2] To the chagrin of state election officials in both major political parties,[3] a federal task

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1. Andrew Cain, *Donald Trump's Five-state Blitz Ends in Leesburg - Three Hours Late*, RICHMOND-TIMES DISPATCH (Nov. 7, 2016), http://www.richmond.com/news/virginia/government-politics/article_8b8386b6-8f7e-5895-806d-11f0ddc6e71a.html ("In his remarks Trump took a potshot at Virginia Gov. Terry McAuliffe . . . 'Your governor has illegally given voting rights to 60,000 felons,' Trump said."). Although the Virginia Supreme Court overturned an early attempt to enfranchise people convicted of felonies en masse, Howell v. McAuliffe, 292 Va. 320, 342–43 (2016) (holding that the Virginia Constitution does not allow the governor to issue blanket clemency orders to groups of people), Virginia Governor Terry McAuliffe subsequently restored the right to vote to thousands of such people individually, VA. OFFICE OF THE GOVERNOR, GOVERNOR MCAULIFFE'S RESTORATION OF RIGHTS POLICY (Aug. 22, 2016), http://commonwealth.virginia.gov/media/6733/restoration-of-rights-policy-memo-82216.pdf. Several months before President Trump's condemnation, the court denied a motion to hold Governor McAuliffe in contempt for issuing individual clemency orders. *See* Denial of Contempt Motion at 1 (No. 160784), https://www.brennancenter.org/sites/default/files/legal-work/HowellvMcAuliffe-Order-9.15.16.pdf.

2. *Transcript of Meet the Press*, NBC NEWS (May 8, 2017), http://www.nbcnews.com/meet-the-press/meet-press-may-8-2016-n570111.

3. The bipartisan National Associations of Secretaries of State has disputed the claims of widespread voter fraud that federal officials are using to justify the need for a federal voter fraud task force to investigate state election practices. *Jan. 24 Statement by NASS*, NAT'L ASS'N SEC'YS STATE (Jan. 24, 2017), http://www.nass.org/

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force is investigating state election practices and may recommend nationwide voting restrictions.[4] Never before has the federal government so brazenly threatened state sovereignty to expand the electorate—not even in the earliest days of our country when far fewer people were eligible to vote.[5]

The growing acceptance of federal voting restrictions is a radical departure from American tradition. To the extent the federal government involved itself in voting rights historically, it was to enfranchise voters, such as people of color, women, and young adults.[6] The power to *dis*enfranchise has traditionally been seen as a power belonging to the states alone. But this era of deference to state authority has ended, and the specter of national disenfranchisement is upon us.

The shift in favor of federal power we see today is rooted in the late 1990s when Congress passed the first-ever federal statute imposing a qualification on voters: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[7] Tucked within this law is a provision, codified at 18 U.S.C. § 611, that makes it a crime for all noncitizens, documented and undocumented alike, to vote in federal elections.[8] This provision is a "voter qualification" law: it prescribes a substantive eligibility requirement (here, citizenship)

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news-releases-and-statements/release-nass-statement-election-integrity-jan17.

4. *Transcript of White House Daily Press Briefing*, CNN (Jan. 25, 2017), http://transcripts.cnn.com/TRANSCRIPTS/1701/25/wolf.01.html (describing remarks by former Press Secretary Sean Spicer indicating the Presidential Election Integrity Commission will investigate "bigger states" and "make some recommendations . . . [a]nd maybe it is voter ID in states"). For a comprehensive critique of voter identification laws, see Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

5. *See* Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 205–06 (2015) (noting that early state constitutions typically extended voting rights only to men "with a sufficient interest in the community," which was often defined by property ownership, age, citizenship, and other factors).

6. *See* U.S. CONST. amends. XV (preventing disenfranchisement based on race), XIX (preventing disenfranchisement based on sex), XXVI (preventing disenfranchisement based on age for people at least eighteen years old); *see also id.* amend. XXIV (abolishing poll taxes in federal elections); Harper v. Virginia, 383 U.S. 663, 670 (1996) (interpreting the Fourteenth Amendment to prohibit wealth-based voter qualifications and poll taxes in state elections); Enforcement Act of 1870, 16 Stat. 140; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C. (Supp. II 2015)).

7. Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C. (2012)).

8. 18 U.S.C. § 611 (2012).

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and disenfranchises anyone who does not satisfy it.[9]

Superficially, Congress's decision may appear noncontroversial—why should noncitizens be allowed to participate in a country's democratic processes? This question deserves exploring and it has generated voluminous scholarship[10] and press coverage.[11] But debating the merits of noncitizen disenfranchisement obscures another question that poses far greater consequences for our republic and yet has received little commentary—can the federal government, which has historically expanded the right to vote, dictate who *cannot* vote?

If the answer is yes, then the Federal Noncitizen Voting Ban

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9. Although voter qualifications are "substantive," voters may also need to satisfy various "procedural" requirements before being allowed to vote. States can use a procedural requirement to enforce a voter qualification—for example, the voter qualification of "citizenship" may be enforced by a procedure requiring voters to swear under oath that they are citizens. *See* Kobach v. U.S. Election Assistance Comm'n, 772 F.3d 1183, 1195–96 (10th Cir. 2014), *cert. denied,* 135 S. Ct. 2891 (2015) (citing Arizona v. Inter Tribal Council of Arizona, Inc., 570 U.S. 1, 133 S. Ct. 2247, 2257–60 (2013)). As discussed in Part V, the Elections Clause gives Congress authority to establish procedural requirements in federal elections but not the authority to impose voter qualifications.

10. *See, e.g.*, Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977) (refuting arguments that noncitizens should be disenfranchised because they are more likely to commit voter fraud, vote as a bloc, lack political knowledge, or be disloyal to the United States); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993) (arguing for noncitizen voting in local elections because noncitizens have the same political and civic interests and responsibilities as their citizen neighbors at the local level); Paul Tiao, Note, *Non-Citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171 (1993) (arguing that noncitizen suffrage is supported by the same democratic ideals that motivated passage of the Voting Rights Act of 1965); Paul David Meyer, Note, *Citizens, Residents, and the Body Politic*, 102 CAL. L. REV. 465 (2014) (arguing that noncitizen disenfranchisement violates the First Amendment).

11. *See, e.g.*, Joshua A. Douglas, *Noncitizens Are Gaining the Right to Vote. Good.*, WASH. POST (Aug. 18, 2017), https://www.washingtonpost.com/opinions/noncitizens-are-gaining-the-right-to-vote-good/2017/08/18/805b86e2-4d3e-11e7-9669-250d0b1583b_story.html?utm_term=.da38a449910b (arguing for localities to extend voting rights to noncitizens); Maggie Astor, *Maryland City May Let Noncitizens Vote, a Proposal With Precedent*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/2017/08/09/us/college-park-immigrant-voting-rights.html (discussing movement to grant noncitizens suffrage in College Park, Maryland); Joe Mathews, *California Should Allow Noncitizens to Vote*, VENTURA COUNTY STAR (Aug. 12, 2017), http://www.vcstar.com/story/opinion/columnists/2017/08/12/california-should-allow-noncitizens-vote/560342001/; Bradley Blakeman, *Respect Citizenship: Don't Let Illegals Vote*, NEWSMAX (Aug. 9, 2017), https://www.newsmax.com/BradleyBlakeman/disenfranchisement-registration/2017/ 08/09/id/806782/.

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is only the beginning. Especially in today's political climate, with federal officials increasingly chastising states for allowing too many people to vote,[12] voter qualification laws may ensnare many people besides noncitizens. Even a single congressionally-imposed voter qualification can disenfranchise large swaths of the country overnight. Worse still, without access to the polls—or even the ability to move elsewhere in the country to gain such access—those affected by such legislation have no political recourse. Our democracy's doors are forever closed to them.

Every state currently imposes its own citizenship qualification on voters,[13] so the consequences of the Federal Noncitizen Voting Ban may not immediately appear so dramatic. But consensus on who should be ineligible to vote is rare. For instance, states vary widely in how they treat the voting rights of people convicted of felonies; some states disenfranchise them permanently (absent a pardon or similar reprieve), while other states even allow them to vote from prison.[14] States also differ on whether people determined to be "mentally incompetent" are allowed to vote.[15]

If Congress possesses the power to impose voter qualifications, then it can easily ignore states' wishes and create

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12. In addition to President Trump's comments and the concerns surrounding the Presidential Election Integrity Commission, the Department of Justice is pressuring states to purge their voter rolls by taking the unusual step of sending letters to forty-four states demanding detailed information about each states' procedures for deleting voter registration records. Such a wide-reaching request indicates that the federal government may be preparing to sue states that do not aggressively purge their voter rolls. Sam Levin, *This DOJ Letter May Be More Alarming Than Trump Commission's Request for Voter Data*, HUFFINGTON POST (July 5, 2017), http://www.huffingtonpost.com/entry/department-of-justice-voter-purge_us_595d22b1e4b0da2c7326c38b; Letter from T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Div., Dep't of Justice, to Kim Westbrook Strach, Exec. Dir., N.C. State Bd. of Elections (June 28, 2017), https://assets.documentcloud.org/documents/3881855/correspondence-DOJ-Letter-06282017.pdf. For a discussion of how aggressive voter purges often lead to the disenfranchisement of scores of eligible voters, see generally Myrna Pérez, *Voter Purges*, BRENNAN CTR. FOR JUSTICE (2008), http://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf.

13. Raskin, *supra* note 10, at 1415–17.

14. For a complete breakdown of how each state treats the voting rights of people with felony convictions, see *Felon Voting Rights*, NAT'L CONF. STATE LEGISLATURES (Sept. 29, 2016), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

15. For an overview of the state-by-state voting rights of people determined to be mentally incompetent, see *State Laws Affecting the Voting Rights of People with Mental Disabilities*, BAZELON CTR. FOR MENTAL HEALTH L., https://www.866ourvote.org/newsroom/publications/body/0049.pdf (last visited Aug. 17, 2017).

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a uniform policy disenfranchising every person in these groups nationally. States, robbed of their historical authority to establish voter qualifications, would be powerless to stop it.

Fortunately, the Framers of the Constitution anticipated the dangers of national disenfranchisement, and they determined that Congress should have no power to impose qualifications on voters. The Constitution is silent as to who may vote in state elections, and by virtue of the Tenth Amendment, the Framers chose to reserve to the states the power to establish voter qualifications for state elections.[16] The Framers also explicitly addressed who may establish voter qualifications for *federal* elections. Article I, Section 2 of the Constitution links voter qualifications in federal elections to voter qualifications in state elections.[17] This rule originally applied only to House of Representatives elections,[18] but Section 1 of the Seventeenth Amendment has since applied the same rule to Senate elections.[19]

Together, these "Voter Qualifications Clauses" and the Tenth Amendment have been historically understood to mean that the states, and the states alone, can impose qualifications on voters—both in federal and state elections.[20] The federal government respected this constitutional arrangement from the birth of our nation until 1996, when Congress abruptly took the issue of noncitizen suffrage away from the states.[21] Surprisingly, this monumental shift of power has evoked virtually no commentary or scholarship.[22]

This Article seeks to fill this void. It contends that the Constitution prevents Congress from imposing voter qualifications, and consequently, the Federal Noncitizen Voting Ban is unconstitutional. Two overarching arguments support this position. First, the Elections Clause, which is Congress's primary source of power over federal elections, enables Congress

16. *See* U.S. CONST. amend. X.

17. U.S. CONST. art. I, § 2, cl. 1.

18. *Id.*

19. U.S. CONST. amend. XVII, § 1.

20. *See, e.g.*, THE FEDERALIST NO. 60, at 394 (Alexander Hamilton) (Modern Library, 1941).

21. 18 U.S.C. § 611 (2012).

22. No scholarly articles have analyzed the constitutionality of 18 U.S.C. § 611 from a states' rights perspective, but this question was briefly sketched on a blog. *See* Derek T. Muller, *Is a Federal Ban on Noncitizen Voting Unconstitutional?*, EXCESS OF DEMOCRACY (June 21, 2013), http://excessofdemocracy.com/blog/2013/6/is-a-federal-ban-on-alien-voting-unconstitutional.

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to adopt only procedural election regulations; the Clause's reach is not broad enough to encompass substantive voter qualifications. Second, even if Congress has other powers—such as its authority to regulate immigration—that allow it to establish voter qualifications without overstepping the Tenth Amendment, the Voter Qualifications Clauses independently prohibit Congress from doing so. These clauses grant to the states the exclusive authority to impose voter qualifications.

The topics of voter qualifications and noncitizen voting intersect with many legal and political issues that fall outside this Article's scope. This Article does not discuss the wisdom of enfranchising or disenfranchising noncitizens, nor does it wade into the political debates over the merits of other voter qualifications. Moreover, it does not discuss the constitutionality of citizenship voter qualifications imposed by the states.[23] Finally, although this Article argues that Congress cannot *create* voter qualifications, it does not argue that Congress cannot *abolish* them; to enforce the guarantees of the Fourteenth Amendment and the Suffrage Amendments, Congress can expand, but not contract, the franchise.[24] This Article focuses solely on the unconstitutionality of congressionally-imposed voter qualifications generally, and the Federal Noncitizen Voting Ban specifically—since the Ban is, at least for now, the only congressionally-imposed voter qualification that exists.

Part II of this Article discusses the problems presented by congressionally-imposed voter qualifications and how they undermine constitutional values of federalism. To illustrate how Congress has historically respected state sovereignty to impose voter qualifications, Part III discusses the history of noncitizen

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23. *See* Meyer, *supra* note 10 (arguing that noncitizen disenfranchisement violates the First and Fourteenth Amendments).

24. *Compare* Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 52–54 (1959) (upholding literacy voter qualification as constitutional) *with* 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). However, as discussed in Part IV(B) of this Article, Congress may expand the franchise only in ways that "congruently and proportionally" prevent or remedy a type of disenfranchisement prohibited by the Constitution. *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997). For an argument that Congress's Fourteenth and Fifteenth Amendment enforcement powers allow it to pass legislation guaranteeing suffrage to people convicted of felonies, see *Legal Analysis of Congress' Constitutional Authority to Restore Voting Rights*, BRENNAN CTR. FOR JUSTICE (Aug. 3, 2009), https://www.brennancenter.org/analysis/legal-analysis-congress' -constitutional-authority-restore-voting-rights.

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voting laws, beginning in colonial times and ending with the enactment of the Federal Noncitizen Voting Ban.

Part IV provides an overview of the traditional sources of Congress's electoral powers. It outlines the Voter Qualifications Clauses, the Fourteenth Amendment, the Suffrage Amendments, and the Elections Clause. Part V analyzes the history, text, and Supreme Court interpretations of the Constitution to show that the Elections Clause, which empowers Congress to regulate the "manner" of federal elections, does not allow it to establish voter qualifications.

Part VI outlines the contours of another constitutional power: Congress's authority to regulate immigration. It is one of Congress's broadest powers, perhaps even *the* broadest, and it has been invoked before as a constitutional justification for the Federal Noncitizen Voting Ban. Part VII demonstrates why the Voter Qualifications Clauses affirmatively prevent Congress from using any of its delegated constitutional powers, even those as broad as its immigration power, to disenfranchise voters.

II. THE FEDERALISM COSTS OF CONGRESSIONALLY-IMPOSED VOTER QUALIFICATIONS

To illustrate the constitutional harms of congressionally-imposed voter qualifications, this Part discusses how such laws undermine the core principles of American federalism. All federal laws impose some burden on the states, but the Constitution minimizes these costs by reserving to the states powers that are too stifling, inefficient, or dangerous to be wielded by the highest level of government. As traditionally expressed, the benefits of federalism include encouraging participatory and responsive governance, enhancing representation of diverse interests, fostering legal innovation and experimentation, and preventing tyranny.[25] This Part shows how congressionally-imposed voter qualifications impermissibly

25. The foundational case articulating these federalism values is *Gregory v. Ashcroft*. 501 U.S. 452, 458 (1991). Scholars sometimes characterize these same values using different terminology than the Court. *See, e.g.*, Robert A. Schapiro, *Toward A Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 266–67 (2005) (categorizing the values under three umbrella terms: economic theory, republican political theory, and liberal political theory); Erwin Chemerinsky, *The Values of Freedom*, 47 FLA. L. REV. 499, 525 (1995) (collapsing the three values of political participation, political responsiveness, and enhanced diversity representation into a single value).

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undermine each of these federalist values.

A. DIMINISHING POLITICAL PARTICIPATION AND REPRESENTATION OF DIVERSE INTERESTS

Congressionally-imposed voter qualifications destroy the ability of people to politically participate, and this in turn hampers governmental capacity to represent the country's diversity of interests. This is caused by two factors: the federal legislative process leading up to the passage of a voter qualification law, and the subsequent disenfranchisement of voters after the law is passed. First, given the scale and remoteness of the federal government, fewer people can participate in the federal legislative process than in a state's legislative process.[26] This is not unique to congressionally-imposed voter qualifications. The second factor, however, makes congressionally-imposed voter qualifications especially burdensome: they continue to limit people's political participation even after they are enacted.

A traditional view is that federalism promotes political participation because states are geographically smaller, which allows more groups to be involved in the lawmaking process.[27] "All other things being equal, it is easier for people to exchange information and ideas, understand more about the issues at stake, and deliberate with each other in smaller units than in larger ones."[28] This reasoning applies to congressionally-imposed voter qualification laws as much as any other federal law. When Congress considers such laws, fewer people have the political resources necessary to participate in the decision-making process, and many diverse interests are left unheard. In contrast, when states are empowered to craft voter qualifications without congressional interference, the constituencies affected by such laws can more easily access policymakers.[29] The resulting

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26. While few disagree with this point, several scholars argue that states are too large to achieve ideal levels of civic engagement and that participatory governance is more likely at the city and county level. *See* Chemerinsky, *supra* note 25, at 528; Schapiro, *supra* note 25, at 271 (2005). For an analysis of the role cities and counties play in regulating voting rights, see Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039 (2017).

27. *See* Schapiro, *supra* note 25, at 270–71; Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1313 (1994)

28. Briffault, *supra* note 27, at 1313

29. *See id.*; Chemerinsky, *supra* note 25, at 527.

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legislation is likely to be considerate of a wider diversity of political interests.

But unlike most other federal laws, the federalism costs of congressionally-imposed voter qualifications are especially severe because they stifle political participation both before and after they are enacted. Voter qualifications disenfranchise one or more segments of the population, restricting their ability to take part in future political decisions. When adopted into federal law, voter qualifications affect those groups across the entire country.

If a goal of federalism is to facilitate political participation, then that goal is better achieved when states impose voter qualifications, not Congress. Although state-imposed voter qualifications also disenfranchise voters, their scope is limited by the state's territorial boundaries. One state's decision to impose a voter qualification does not disenfranchise voters in other states, leaving open many other avenues of participation throughout the country. Those affected by one state-imposed voter qualification might find opportunities to vote in another state.[30]

Moreover, depriving people of the right to vote is not the only way that congressionally-imposed voter qualifications limit political participation after their enactment. Voter qualifications can make political participation itself a crime, the penalties for which may be severe. Unsuspecting voters may suddenly find themselves ripped from their communities and silenced behind prison walls.[31] If those voters happen to be noncitizens, their domestic political agency may be entirely destroyed by federal immigration laws that penalize noncitizen voters with removal from the country altogether.[32]

To illustrate, take the stories of Ellen Valle McDonald and Margarita del Pilar Fitzpatrick, who have nearly identical stories that end in vastly different ways. Both immigrated to the United

30. One of the chief benefits of the federal system is that "[t]o the extent that the relevant differences of opinion concerning an issue are territorially concentrated, state-level decision making can reduce the number of people who are on the losing side of the issue and, thus, hold down the costs to individuals of government decisions that go against them." Briffault, *supra* note 27, at 1314.

31. *See* 18 U.S.C. § 611(b) (2012) (subjecting noncitizens who vote in federal elections to fines and imprisonment).

32. *See* 8 U.S.C. § 1182(a)(10)(D) (2012) (subjecting noncitizens who vote illegally in any election to deportation); *see also* § 1227(a)(6) (2012) (imposing penalty of inadmissibility on noncitizens who votes illegally in any election).

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States, became lawful permanent residents,[33] and applied to become naturalized citizens.[34] They each mistakenly believed that they had the right to vote,[35] when in reality, their home states of Hawaii and Illinois, respectively,[36] allowed only citizens to vote[37] and penalized noncitizens who "knowingly" voted.[38] Based on their misunderstandings, both McDonald and Fitzpatrick voted in at least one election.[39] They later divulged their voting histories to federal agents during their naturalization interviews.[40] This prompted immigration authorities to bring deportation proceedings against them for illegally voting as noncitizens.[41] McDonald defended herself by arguing she did not "knowingly" vote in violation of her state's law.[42] She won her case on appeal, which allowed her to remain in the country and

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33. McDonald v. Gonzales, 400 F.3d 684, 685 (9th Cir. 2005); Matter of Fitzpatrick, 26 I. & N. Dec. 559, 559 (B.I.A. 2015).

34. *McDonald*, 400 F.3d at 686; *Fitzpatrick*, 26 I. & N. Dec. at 559.

35. *See McDonald*, 400 F.3d at 685–86 ("When McDonald next received a Notice of Voter Registration and Address Confirmation in the mail, she believed that the government was allowing her to vote even though it had learned she was not a citizen."); *Fitzpatrick*, 26 I. & N. Dec. at 560 ("[Respondent] contends, however, that the DHS has not shown that she *intended* to vote in violation of 18 U.S.C. § 611.") (emphasis added).

36. *McDonald*, 400 F.3d at 685; *Fitzpatrick*, 26 I. & N. Dec. at 559.

37. HAW. CONST. art. II, § 1; 10 ILL. COMP. STAT. 5/3-1 (Westlaw through Public Acts effective November 22, 2017, through P.A. 100-535).

38. *See* HAW. REV. STAT. § 19-3.5(2) (Westlaw through Act 3 (End) of the 2017 1st Special Session); 10 ILL. COMP. STAT. 5/29-12 (West 2006). Both are general criminal laws that penalize "knowingly" violating other state election laws, including those laws that require a voter be a citizen. In *McDonald*, the court interpreted Hawaii's knowledge requirement to mean that a noncitizen must be aware that voting is prohibited by Hawaii's election code. *McDonald*, 400 F.3d at 689–90. No court has interpreted Illinois's law in the context of noncitizen voting, and a lower state court decision case suggests that "knowingly" in Illinois election law might mean "knowledge of facts," not "knowledge of law." People v. DeStefano, 64 Ill. App. 2d 389, 399 (Ill. App. Ct. 1965) (holding that a person convicted of a crime is conclusively presumed to know the consequences of that conviction, including disenfranchisement); *see also* Bryan v. United States, 524 U.S. 184, 193 (1998) (stating that the *mens rea* "knowingly" requires only "proof of knowledge of the *facts* that constitute the offense" unless the statute indicates otherwise, and the *mens rea* "willfully" requires proof that the defendant "acted with knowledge that his conduct was *unlawful*") (emphasis added). Regardless of the meaning of the current Illinois knowledge requirement, the general intent *mens rea* of 18 U.S.C. § 611 prevents Illinois from even explicitly protecting noncitizens from any punishment if they mistakenly vote.

39. *McDonald*, 400 F.3d at 686; *Fitzpatrick*, 26 I. & N. Dec. at 559.

40. *McDonald*, 400 F.3d at 686; *Fitzpatrick*, 26 I. & N. Dec. at 559.

41. *McDonald*, 400 F.3d at 686; *Fitzpatrick*, 26 I. & N. Dec. at 559.

42. *McDonald*, 400 F.3d at 689.

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continue pursuing citizenship.[43] Fitzpatrick made the same argument,[44] but she lost her case.[45]

The key difference between these remarkably similar cases is a congressionally-imposed voter qualification. McDonald's deportation proceeding was based on her alleged violation of state law,[46] but Fitzpatrick's was based on her alleged violation of the Federal Noncitizen Voting Ban.[47] Unlike Hawaii's "specific intent" law, which applies only to noncitizens who vote while "knowing" they are ineligible,[48] the Federal Noncitizen Voting Ban requires only "general intent." This means noncitizens violate the law when they vote regardless of whether they are unaware of their ineligibility.[49] Because Fitzpatrick, unlike McDonald, was prosecuted under federal law, her good-faith (but mistaken) belief that she was eligible gave her no valid defense[50]—regardless of her state's law.

Fitzpatrick's story is not unique,[51] and it illustrates the immense federalism costs of congressionally-imposed voter qualifications. Not only do these laws override state suffrage protections and expel people from the political community, they can also supersede state penalties and expel people from their physical communities to prison cells—or, for noncitizens, to another country entirely. Compared to other federal laws, this criminalization of political participation itself makes congressionally-imposed voter qualifications uniquely detrimental to federalist values. To say that congressionally-imposed voter qualifications "undermine" political participation would be an understatement; for people affected by such laws, the ability to politically participate is annihilated.

B. STIFLING STATE INNOVATION

Congressionally-imposed voter qualifications also trample

43. McDonald v. Gonzales, 400 F.3d 684, 690 n.11 (9th Cir. 2005).

44. *See* Matter of Fitzpatrick, 26 I. & N. Dec. 559, 560 (B.I.A. 2015).

45. *Id.* at 562.

46. *McDonald*, 400 F.3d at 687.

47. *Fitzpatrick*, 26 I. & N. Dec. at 559–60.

48. *McDonald*, 400 F.3d at 688–90.

49. *Fitzpatrick*, 26 I. & N. Dec. at 560; Kimani v. Holder, 695 F.3d 666, 669 (7th Cir. 2012); United States v. Knight, 490 F.3d 1268, 1270–71 (11th Cir. 2007).

50. *Compare McDonald*, 400 F.3d at 687 *with Fitzpatrick*, 26 I. & N. Dec. at 559–60.

51. *See, e.g.*, *Knight*, 490 F.3d at 1269; *Kimani*, 695 F.3d at 671–72.

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the ability of states to pass innovative election laws and experiment with welcoming new groups of voters into the political community. As eloquently stated by Justice Brandeis, "[O]ne of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[52] To the extent the federal government monopolizes policymaking, competition between and experimentation within states is stifled.[53] Sometimes, the benefits of a national policy outweigh the costs to state innovation, and courts and legislators must weigh these considerations when interpreting or proposing federal legislation.[54]

But the price of congressionally-imposed voter qualifications is egregiously high. Two features in particular demonstrate why allowing states to conduct suffrage-expanding experiments are preferable. First, when states are prevented from enfranchising groups of people in federal elections, those groups are unlikely to ever gain the political capital needed to overturn the federal law that disenfranchises them. In other words, preventing state suffrage innovations will stunt some peoples' political participation, raising similar concerns to those discussed in the previous section. Second, even when congressionally-imposed voter qualifications purport to regulate participation only in federal elections, they have downstream effects that seriously limit how states may innovate with laws that govern their own state elections.

The first feature is borne out by history: congressionally-imposed voter qualifications prevent states from engaging in the types of suffrage-expanding experiments that have historically led to cherished constitutional protections for women and people of color.[55] Congressionally-imposed voter qualifications hamper

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52. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

53. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498 (1987).

54. Given that this cost-benefit analysis is relevant to all pieces of legislation, some scholars dispute whether this federalism value should guide judicial decision making or if the political branches are better suited to make the final call on when state innovation is not preferable. *See, e.g.*, Chemerinsky, *supra* note 25, at 529.

55. *See* Douglas, *supra* note 26 (noting that contemporary suffrage movements for sixteen-year-olds, noncitizens, and non-residents have tracked historical movements by beginning within states at the local level).

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nascent suffrage movements by requiring them, from their inception, to engage in national campaigns to overturn federal laws. This is an exorbitant political cost to bear for people who are already disenfranchised, and it flies in the face of how suffrage movements have historically succeeded in the country—through state innovation.[56]

For instance, women's suffrage became protected nationally by the Nineteenth Amendment only after fifteen state legislatures abolished state-imposed gender voter qualifications.[57] Had Congress intervened early in history by enacting a law that disenfranchised women across the country, suffragists would have had to take their fight to Congress before women could have gained the right to vote in even a single state. Without the benefit of a few states boldly choosing to enfranchise women, the country would not have seen the results of the "experiment" of allowing women to vote. This in turn would have severely diminished the capacity of the women's suffrage movement.

But because states could innovate and were not hamstrung by congressionally-imposed voter qualifications, women began securing the franchise at the state level. This ultimately made securing voting rights nationally an achievable task for a group that would have otherwise been completely excluded from the political community.[58] The same is true of other groups of voters, including people of color, young adults between the ages of eighteen and twenty, and people who could not afford to pay poll taxes—all of these groups received federal voting protections only after a number of innovative states led the way.[59]

The consequences of preventing voting rights experiments are equally severe today. The Federal Noncitizen Voting Ban renders states powerless from even piloting the idea of allowing noncitizens to vote in federal elections, making the prospects of noncitizen suffrage nearly impossible.

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56. *See* Douglas, *supra* note 26.

57. *Map: States Grant Women the Right to Vote*, NAT'L CONST. CTR., http://constitutioncenter.org/timeline/html/cw08_12159.html (last visited Aug. 16, 2017).

58. For a full treatment of the state-by-state approach of the women's suffrage movement, including how one critical vote in the Tennessee state legislature ensured ratification of the Nineteenth Amendment, see generally Justice Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657 (1996).

59. *See* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1282–84 (2012).

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Contrast this with felony disenfranchisement—an area where Congress has not legislated. Proponents of felony disenfranchisement argue that people convicted of felonies cannot be trusted to vote because they are morally incompetent, more inclined to commit election crimes, and more likely to support politicians that would legalize unethical conduct. Opponents argue that these claims do not reflect reality.[60]

Since Congress has not disenfranchised people with felonies, states are freely experimenting with different policies. This allows claims about felony disenfranchisement to be tested before being accepted or rejected. If society should determine that the experiments show people convicted of felonies can be trusted to vote, then felony enfranchisement becomes a viable political option. This is not true for noncitizen suffrage, as the Federal Noncitizen Voting Ban has shut down modern state experiments before they can even begin.[61]

A second consequence of restricting suffrage experiments is downstream limitations on how states can innovate in their own elections. For instance, even when a congressionally-imposed voter qualification restricts voting in only *federal* elections, as the Federal Noncitizen Voting Ban does, it may still severely burden state efforts to expand the franchise in their own *state* elections. If a state wishes to allow noncitizens to vote in state elections, but it holds elections for state and federal offices on the same day (as most states do),[62] the state can maintain that arrangement only by assuming the expense of preparing state-only ballots to give to noncitizens and identifying noncitizens at the polls. Alternatively, a state could completely sever their own elections from federal elections, holding them on separate election days. This, too, would burden the state with considerable expense. It would also likely decrease voter turnout,[63] which might be

60. *See* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1302–03, 1307–08 (1989).

61. As discussed more in Part III of this Article, the last time noncitizens could vote in any state was nearly 100 years ago, making the results of those "experiments" unreliable today. *See* Raskin, *supra* note 10, at 1415–17.

62. *See* Karl Kurtz, *Why Do Four States Have Odd-Year Elections?*, NAT'L CONF. STATE LEGISLATURES (Aug. 15, 2011), http://ncsl.typepad.com/the_thicket/2011/08/08/why-do-four-states-have-odd-odd-year-elections.html (noting that only four states—Louisiana, Mississippi, New Jersey, and Virginia—hold odd-year gubernatorial elections).

63. Research in and across various states shows turnout is highest in presidential elections, declines in even-year "midterm" elections when congressional candidates are on the ballot but presidential candidates are not, and is lowest in odd-year

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anathema to the state's policy goals. The Federal Noncitizen Voting Ban thus makes a state's decision to enfranchise noncitizens in state elections exceedingly impractical. The same difficulties arise for any other congressionally-imposed voter qualification that technically applies only to voters in federal elections.

Congressionally-imposed voter qualification laws can also produce a chilling effect on state electoral legislation. The Federal Noncitizen Voting Ban is already hindering states from adopting "automatic voter registration" systems.[64] Under such a system, a state adds a person to its voter registration list based on information the state already has about that person's eligibility, with little or no action required on the part of the person.[65] The goal of adopting automatic voter registration is to place the burden of voter registration on the state.[66]

But if a state inadvertently registers a noncitizen, and the error misleads a noncitizen into voting in a federal election, that noncitizen will have violated the Federal Noncitizen Voting Ban.[67] States can amend their own citizenship voter qualification

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elections when no federal candidates are on the ballot. *See, e.g.*, JURJEVICH ET AL., *Who Votes for Mayor?*, PSU PILOT RESEARCH REPORT 17 (2015), https://www.pdx.edu/prc/sites/www.pdx.edu.prc/files/Who_Votes_for_Mayor_Sept_2015.pdf (showing correlations between voter turnout rates and the timing of several city elections); Jake Kara, *Voter Participation Drop Sharpest in Odd-year Elections*, TRENDCT (Nov. 5, 2015), http://trendct.org/2015/11/05/voter-participation-drop-sharpest-in-odd-year-elections/ (analyzing voter turnout rates among Connecticut voters in presidential, midterm, and odd-year elections).

64. *See generally Automatic Voter Registration*, BRENNAN CTR. FOR JUSTICE (Feb. 28, 2017), https://www.brennancenter.org/analysis/automatic-voter-registration (discussing mechanics and political history of automatic voter registration). At the time of this writing, some version of automatic voter registration has been adopted in Oregon, California, Vermont, West Virginia, Connecticut, Alaska, Colorado, Rhode Island, and Illinois. *Id.*

65. *See generally id.*

66. *See generally id.*

67. Even without automatic voter registration, instances exist in which a state official misled a noncitizen into believing they were eligible to vote, causing the noncitizen to violate the Federal Noncitizen Voting Ban and suffer through a deportation proceeding. In *Keathley v. Holder*, 696 F.3d 644, 645 (7th Cir. 2012), a noncitizen who allegedly violated the Federal Noncitizen Voting Ban contended that she voted only because an Illinois Department of Motor Vehicles employee, who knew Keathley was a noncitizen, offered her a voter registration form. The court held that if this employee misled Keathley into thinking she was eligible, she could pursue the "official authorization" defense (also called "entrapment by estoppel") to escape liability. While potentially offering some relief to noncitizen voters, this affirmative defense provides less protection than a specific-intent law: it applies only when a

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laws to forgive noncitizens who get ensnared this way, but they cannot absolve noncitizens of liability for violating federal law. The Ban thus discourages state experimentation with novel election laws, lest they risk having their residents sent to federal prison.

Taken together, these features of congressionally-imposed voter qualifications place tremendous limits on state innovation. Not only do they prevent states from conducting the very types of experiments that have led to constitutional protections for women and people of color, they even interfere with states' ability to innovate when regulating its own state elections. This intrusion into state sovereignty is precisely what American federalism is designed to prevent.

C. FOSTERING CONDITIONS RIPE FOR TYRANNY

The greatest threat to federalism presented by congressionally-imposed voter qualifications is the role they play in facilitating national tyranny. The Framers worried that if too many governmental powers were centralized, the government could easily oppress its own populace. They spoke of three ways that this tyranny could manifest: a minority faction could capture the government and subjugate all other interests ("tyranny of the minority"), a majority coalition could capture the government and exploit minority factions ("tyranny of the majority"), or the government could become its own faction and oppress the populace.[68]

To mitigate these risks, the Framers restricted federal authority to certain defined areas. By keeping most lawmaking powers divided among the states, the Constitution minimizes the damage that an abusive federal government can inflict.[69] Moreover, to the extent states determine who may vote in federal elections, they serve as a direct check on federal power by controlling access to the federal ballot box.[70] These factors

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government official who has authority over voter registration gives the noncitizen incorrect information, and it places on the noncitizen the burden of proving this occurred. Moreover, availability of this defense to noncitizen voters outside of the Seventh Circuit is unclear.

68. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 382 (1985).

69. Schapiro, *supra* note 25, at 273–74.

70. This point is elaborated on in Part V of this Article, which discusses how the Framers were gravely concerned that Congress could insulate itself from political accountability if it determined who could not vote in federal elections.

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decrease the likelihood that a faction or coalition of factions could win enough federal elections to take control of the federal government.

But when Congress decides who is ineligible to vote, factions can not only capture the federal government, but entrench themselves within it. Voter qualifications are weapons that federal officeholders can wield to disenfranchise those who oppose their existing regime. Once insulated from democratic accountability, the controlling factions can subjugate the population, or segments of it, without fear of reprisal. The states may resist,[71] but because they are deprived of any say over the composition of the national electorate, they have fewer practical means available to defend themselves or their residents against federal overreach.

In contrast, when the states impose voter qualifications, the risks of national tyranny are dramatically lower. One state's voter qualifications do not affect the rights of voters in other states, which blunts the effectiveness of using voter qualification laws to tyrannize the nation. Instead of capturing one federal government, oppressive factions need to use voter qualification laws to independently take control of fifty state governments—a far more herculean task.[72] Although state officeholders can still abuse state-imposed voter qualification laws for their own political benefit, residents living under the thumb of a single tyrannical state government at least have the potential to move to another state or request assistance from the federal government.

This is not meant to diminish the significance of state-level tyranny for those affected by it. Southern states have a long history of disenfranchising people of color, allowing the white ruling class to oppress people of color in all walks of life. But a political remedy to this tyranny was available, and Congress eventually restored suffrage to people of color in those states by passing the Voting Rights Act of 1965.[73] If, in contrast, the

71. Shapiro, *supra* note 25, at 272 (noting that one of the benefits of federalism is that "states [can] act as loci of resistance to abuses of federal authority").

72. *See* Rapaczynski, *supra* note 68, at 383 ("[P]ublic-goods theory tells us that, all things being equal, small interests are easier to organize than larger ones[.]").

73. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C. (Supp. II 2015)). For an overview of southern oppression of racial minorities and the eventual passage of the Voting Rights Act, see generally GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE

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federal government had been the entity responsible for the tyranny, there would have been no higher level of authority to appeal to for relief.

In short, the power to disenfranchise is an antecedent to the power to tyrannize. It is appropriately delegated to the states, where the risk that such laws can enable national tyranny are low. Every time Congress imposes a voter qualification, the federal government moves closer to becoming the oppressive regime that American federalism was designed to prevent.[74]

III. HISTORY OF NONCITIZEN VOTING LAWS

Traditionally, Congress recognized the federalism concerns of congressionally-imposed voter qualifications and respected states who chose to expand the franchise—including when states enfranchised noncitizens. While allowing noncitizens to vote may seem bizarre today, it was widely accepted throughout the country for hundreds of years. Well before the Declaration of Independence, noncitizens often enjoyed suffrage in the colonies, and many states allowed noncitizens to vote throughout the eighteenth, nineteenth, and early twentieth centuries.[75] Although noncitizen suffrage was never universally accepted, the question of whether to allow or prohibit it was, until 1996, always decided by the states.[76]

This Part traces the history of noncitizen suffrage in the United States and describes how acceptance of the idea has waxed and waned over the centuries. It concludes by discussing the passage of the Federal Noncitizen Voting Ban.

A. THE ERA OF STATE DISCRETION

Coupling suffrage with citizenship was not always viewed as a self-evident requirement of democracy. In early American history, nationalistic attitudes were mitigated by many other beliefs about how to define the political community. The colonies typically chose to tie suffrage to race, gender, religion, residence, and property ownership, and they often welcomed property-

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TRANSFORMATION OF AMERICAN DEMOCRACY (2013).

74. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power.").

75. Raskin, *supra* note 10, at 1397–99.

76. *Id.* at 1399–1417. Before the 1990s, the only instances in which Congress considered the issue of noncitizen suffrage were when it passed legislation regulating the country's federal territories. *See infra* note 84 and accompanying text.

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owning, Christian white males to vote regardless of their citizenship status.[77] In the 1700s, French Huguenots who satisfied these qualifications could vote in the colony of South Carolina, and Germans voted and were elected to office in the colony of Pennsylvania.[78] The prevalence of noncitizen voting in spite of so many other voter qualifications indicates that noncitizens were not historically viewed as a threat to the political order,[79] and in part the phenomenon may be explained by an early belief that all community residents should have a say in how they are governed.[80]

After ratification of the Constitution, many states continued the tradition of noncitizen suffrage.[81] Early state laws typically enfranchised qualified "inhabitants" of a state as opposed to "citizens," and though in some instances these terms may have been interpreted to have the same meaning, noncitizens were typically allowed to vote under such laws.[82] Some states, such as Virginia and Vermont, explicitly allowed noncitizens to vote, and Pennsylvania granted suffrage to noncitizens who lived in the state for at least two years.[83] In each instance, a state's decision to allow noncitizens to vote reflected the state's authority to define its own voter qualifications for state and federal office. Congress made no attempt to divest states of this power.

However, Congress did involve itself in the issue of noncitizen suffrage in those areas where the states had no power whatsoever: federal territories. The first Congress to meet after the ratification of the Constitution readopted the Northwest Ordinance of 1787, which established territorial legislatures in territories northwest of the Ohio River. This law explicitly allowed noncitizens who had lived in one of these territories for at least two years to vote in territorial legislative elections. Congress also enacted legislation allowing noncitizens to vote for representatives in statewide constitutional conventions in these

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77. Raskin, *supra* note 10, at 1399, 1401; Rosberg, *supra* note 10, at 1094.

78. Raskin, *supra* note 10, at 1399; Rosberg, *supra* note 10, at 1096.

79. Raskin, *supra* note 10, at 1401.

80. Spragins v. Houghton, 3 Ill. 377, 408 (1840) (describing Illinois's noncitizen suffrage provision as being based "upon the just principles of reciprocity between the governed and governing, [which entitle inhabitants] to a voice in the choice of the officers of the government, although they may be neither native nor adopted citizens").

81. Raskin, *supra* note 10, at 1400.

82. Rosberg, *supra* note 10, at 1095–97.

83. Raskin, *supra* note 10, at 1400.

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territories. These laws were passed in hopes of encouraging settlement.[84] Nonetheless, after a territory became organized into a state, the state itself then chose whether to allow or prohibit noncitizens to vote. Typically, such states continued to enfranchise noncitizens.[85]

Attitudes toward noncitizen suffrage shifted in response to the War of 1812, which heightened fears about foreign influences over the country. During the following three decades, some states redefined their suffrage laws to apply to only "citizens" instead of "inhabitants." Moreover, except for Illinois, all new states admitted to the Union chose to restrict the franchise to citizens.[86] But even during the height of the anti-immigrant sentiment of this period, Congress did not intervene to make states' decisions for them.

The trend against noncitizen suffrage began to reverse in 1848 with the advent of "declarant suffrage" in Wisconsin.[87] Declarant suffrage laws allowed noncitizens to vote if they declared under oath their intent to become citizens.[88] This reshaped noncitizen suffrage in a way that made it more palatable to those skeptical of foreign influences.[89] By the following year, Congress permitted declarant suffrage in nine western territories.[90] When states emerged from these territories, some decided to maintain the tradition, while others abolished it.[91] But overall, the popularity of declarant suffrage surged after the Civil War, with at least thirteen new states and five former Confederate states choosing to adopt it.[92]

This trend reversal did not survive the turn of the century, when the coming of another war saw the final fall of noncitizen suffrage.[93] Like the War of 1812 before it, World War I and the events preceding it prompted xenophobic nationalism to take hold

84. Raskin, *supra* note 10, at 1402.
85. *Id.* at 1402–03.
86. *Id.* at 1403–04, 1406.
87. *Id.* at 1406.
88. Declarant suffrage laws did not encompass *all* noncitizens who declared their intent to become citizens; generally, they applied only to white noncitizens who held citizenship in another country. *Id.*
89. Raskin, *supra* note 10, at 1407.
90. *Id.* at 1407–08.
91. *Id.*
92. *Id.* at 1414.
93. *Id.* at 1415–17.

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throughout the country.[94] States rapidly disenfranchised noncitizens in the first three decades of the 20th Century, and, Arkansas, the last state that allowed noncitizens to vote, repealed its noncitizen suffrage law in 1926.[95] No state since has extended suffrage to noncitizens.[96] Outside of a handful of localities—mostly located in Maryland—that allow noncitizens to vote in local elections,[97] noncitizen suffrage remains almost unheard of in the United States today.

B. *IIRIRA* AND THE CREATION OF THE FEDERAL NONCITIZEN VOTING BAN

Some contemporary scholars have advocated that states reenfranchise noncitizens,[98] but this Article does not engage in that debate or address the policy merits of noncitizen suffrage itself. Instead, it questions the results of an unexpected twist: Arkansas's prohibition of noncitizen voting in 1926[99] was not the end of the story. Seventy years later, Congress—which previously had legislated on noncitizen suffrage only in the context of federal territories[100]—infringed upon state electoral power in an unprecedented way: it prohibited noncitizens from voting in federal elections.[101]

The Federal Noncitizen Voting Ban was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[102] Intended to deter and punish unauthorized immigration, many of IIRIRA's provisions nonetheless affect documented immigrants. By passing IIRIRA, Congress "strengthened border security, initiated the border fence project,

94. Raskin, *supra* note 10, at 1415–17.

95. *Id.*

96. *Voting by Nonresidents and Noncitizens,* NAT'L CONF. STATE LEGISLATURES (Feb. 27, 2015), http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx.

97. *Id.*

98. *See, e.g.,* Raskin, *supra* note 10, at 1467–68 (arguing for enfranchising noncitizens in local elections); Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 271–73 (2000) (arguing for allowing legal permanent residents to participate in local elections).

99. *See* Raskin, *supra* note 10, at 1415–17.

100. *See id.* at 1402.

101. *See* 18 U.S.C. § 611 (2012).

102. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Division C, 110 Stat. 3009 (1997). IIRIRA comprises Division C of an omnibus bill. *Id.*

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added three and ten-year bars to readmission for immigration violators, tightened eligibility for cancellation of removal, streamlined removal proceedings[,] . . . instituted electronic employment verification pilot programs, and removed public benefits for most undocumented immigrants while tightening eligibility restrictions for lawful immigrants.[103] Congress also added new grounds for excluding and deporting noncitizens, including a ground for voting "in violation of any Federal, State, or local" law.[104] Finally, Congress created new crimes only applicable to noncitizens, two of which directly impact voting rights: first, a provision criminalizing the act of falsely claiming to be a citizen to register to vote or vote,[105] and second, the Federal Noncitizen Voting Ban, which criminalizes the act of voting in any federal election.[106]

The consequences for disobeying the Federal Noncitizen Voting Ban are stiff. The provision itself penalizes violators with a potential fine and imprisonment for up to one year.[107] Because of the separate provisions in IIRIRA that allow the federal government to exclude or deport those noncitizens who vote unlawfully under any federal law,[108] violators of the Ban can also be deported. Moreover, unlike some state prohibitions on noncitizen voting, which are specific intent laws,[109] the Ban is a general intent law. This means that noncitizens who vote in a federal election under the mistaken belief that they are eligible nonetheless violate the law and may be punished.[110]

Despite this provision's novelty, little indication is given as to why Congress included it in IIRIRA. The Ban is not discussed in the committee reports of IIRIRA or its predecessor bills,[111] and

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103. Anne Parsons, *A Fraudulent Sense of Belonging: The Case for Removing the "False Claim to Citizenship"*, 6 MOD. AM. 4, 7 (2010).

104. 8 U.S.C. § 1182(a)(10)(D) (2012) (inadmissibility); § 1227(a)(6) (deportability).

105. 18 U.S.C. § 1015(f) (2012).

106. § 611(a).

107. *Id.*

108. 8 U.S.C. § 1182(a)(10)(D) (2012) (inadmissibility); § 1227(a)(6) (deportability).

109. Parsons, *supra* note 103, at 8.

110. *See id.*

111. The language of the Ban was included in several unpassed bills in the 104th Congress before it was inserted into IIRIRA, all of which either have no associated committee reports or the reports do not include discussion of the Ban. In the Senate, these bills include S. 269, 104th Cong. (1995) and S. 1394, 104th Cong. (1995). Neither has an associated committee report, but letters expressing the Clinton Administration's views on these bills indicate that they once included an even stricter version of the Ban that would have prohibited noncitizens from voting not

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while it was briefly discussed on the Senate floor when it was added to one of IIRIRA's predecessor bills, the speakers did not explain its necessity.[112] Given that every state already prohibited noncitizen voting,[113] this unprecedented federal law was largely superfluous, other than that it imposed a general intent standard that not every state incorporated into their own prohibitions.

IV. WHO DECIDES: CONSTITUTIONAL POWERS OF CONGRESS OVER ELECTIONS

Although he did not explain the need for the Ban, IIRIRA's sponsor—Senator Alan Simpson—did make remarks on the Senate floor trying to justify the Ban's constitutionality. He mostly did so by distinguishing it from an earlier version of the Ban that would have prohibited noncitizens from voting in *any* election—federal, state, or local. By limiting the Ban to only federal elections, Senator Simpson believed it clearly fell within Congress's constitutional authority to enact.[114] This Part provides an overview of the traditional sources of this constitutional authority over elections: the Voter Qualifications Clauses, the Fourteenth Amendment and Suffrage Amendments, and the Elections Clause.

A. VOTER QUALIFICATIONS CLAUSES

Perhaps surprisingly, the Constitution does not grant anyone an affirmative right to vote.[115] The text of the

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only in federal elections, but also in state and local elections. Letter from Acting Assistant Att'y Gen. Kent Markus to Sen. Alan K. Simpson on S. 269 (June 7, 1995), *in* 3 SOC. SEC. ADMIN., OMNIBUS CONSOLIDATED APPROPRIATIONS ACT OF 1997 (INCLUDING IMMIGRATION REFORM) at 231, https://www.ssa.gov/history/pdf/ Downey %20PDFs/Omnibus%20Consolidated%20Appropriations%20Act%20of%201997%20Vo l%203.pdf (last visited Aug. 17, 2017) [hereinafter OMNIBUS CONSOLIDATED] (compiled legislative history); Letter from Deputy Att'y Gen. Jamie S. Gorelick to Sen. Orrin G. Hatch on S. 1394 (Feb. 14, 1996), *in* OMNIBUS CONSOLIDATED*, supra*, 396–98. A federal-elections-only version of the Ban was added into S. 1664, 104th Cong. (1996), on the Senate floor, 142 Cong. Rec. 8664-65 (1996) (statement of Sen. Simpson), but the bill's committee report does not discuss it, *see* S. Rep. No. 104-249 (1996). In the House of Representatives, IIRIRA's predecessor bill H.R. 2202, 104th Cong. § 217(a) (1996), included the version of the Ban that was eventually passed into law, but the bill's committee report does not contain any discussion of it, *see* H.R. Rep. No. 104-469 (1996).

112. 142 Cong. Rec. 8664-65 (1996) (statement of Sen. Simpson).

113. *See* Raskin, *supra* note 10, at 1416.

114. 142 Cong. Rec. 8664-65 (1996) (statement of Sen. Simpson).

115. San Antonio Indep. Sch. Dist. v. Rodgriguez, 411 U.S. 1, 35 n.78 (1973) ("[T]he right to vote, *per se*, is not a constitutionally protected right."); *see also* Harris v. McRae, 448 U.S. 297, 322 n.25 (1980) ("Although the Constitution of the United

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Constitution as ratified in 1787 was practically silent on who could vote, and none of the amendments in the Bill of Rights mentioned suffrage. In the early days of our country, states exercised nearly unfettered power to decide who may vote in state and local elections.[116] Many states initially extended suffrage only to white, property-owning adult males.[117]

But the Framers of the Constitution did not entirely neglect the issue of suffrage. Article I, Section 2 says that in elections for members of 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."[118] Section I of the Seventeenth Amendment, ratified centuries later to establish direct elections for U.S. Senators, applies the same requirement to elections for members of the U.S. Senate.[119] These Voter Qualifications Clauses thus offer a limited right to vote: anyone allowed to participate in a state's legislative elections must also be allowed to participate in that state's congressional elections.[120] By tying federal suffrage to state suffrage, the Framers also answered the question of who could vote in federal elections without dictating those qualifications to the states.[121]

Although the language of the clauses suggests that voter

States does not confer the right to vote in state elections . . . if a State adopts an electoral system, the Equal Protection Clause of the Fourteenth Amendment confers upon a qualified voter a substantive right to participate in the electoral process equally with other qualified voters."). The lack of an affirmative right to vote in the federal Constitution contrasts with state constitutions, forty-nine of which contain such a provision. *See generally* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014) (discussing state constitutional guarantees of suffrage).

116. *See* U.S. CONST. amend. X ("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.").

117. Raskin, *supra* note 10, at 1395.

118. U.S. CONST. art. I, § 2.

119. U.S. CONST. amend. XVII, § 1.

120. United States v. Classic, 313 U.S. 299, 314–15, 325 (1941) (holding that qualified voters have a constitutional right, secured by the original Voter Qualifications Clause, to have their votes counted in federal primary elections for the House of Representatives); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665 (1966) ("[T]he right to vote in federal elections is conferred by Art. I, § 2, of the Constitution.").

121. For an argument that the Voter Qualifications Clauses protect pro-democracy values and should prevent states from imposing voter qualification statutes that do not satisfy heightened scrutiny, see generally Tolson, *supra* note 5.

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qualifications must be identical in both state and federal elections, the Supreme Court has held that this is not true, so long as the federal qualifications are less restrictive. In *Tashjian v. Republican Party of Connecticut*—a rare case involving the Voter Qualifications Clauses—the plaintiffs challenged a rule allowing voters unaffiliated with a political party to vote in federal primary elections but not in state primary elections.[122] The Supreme Court upheld the rule.[123] Having surveyed the history of the original Clause in Article I, the Court determined that "[f]ar from being a device to limit the federal suffrage, the [Voter] Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections."[124] The Court held that voter qualification laws are valid if all voters eligible to vote in state legislative elections are also eligible to vote in federal elections.[125] As a practical matter, however, states typically choose to impose the same qualifications on voters in both state and federal elections.[126]

B. FOURTEENTH AMENDMENT AND SUFFRAGE AMENDMENTS

State power to define the electorate diminished after the Civil War. The first blow came in 1868 with the ratification of the Fourteenth Amendment,[127] which contains two clauses restricting state electoral power: the Reduction in Representation Clause and the Equal Protection Clause. The Reduction in Representation Clause reduces a state's congressional representation if the state disenfranchises male citizens over the age of twenty-one for any reason other than committing a crime.[128] This Clause has never been enforced by Congress,[129] and the judiciary has refused to compel compliance.[130] In

122. Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 225–27 (1986).

123. *Id.* at 229.

124. *Id.* at 228.

125. *See id.* at 229.

126. Most state-imposed voter qualification laws do not even distinguish between state and federal elections. *See e.g.*, Fla. Stat. § 97.041 (2016); Md. Code, Election Law § 3-102 (2010).

127. 15 Stat. 706 (1868) (proclaiming ratification of the Fourteenth Amendment).

128. U.S. CONST. amend. XIV, § 2.

129. Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 434 (2015).

130. *See* Saunders v. Wilkins, 152 F.2d 235, 237–38 (4th Cir. 1945); Dennis v. United States, 171 F.2d 986, 993 (D.C. Cir. 1948). Both cases held that the question

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contrast, courts often enforce the Equal Protection Clause, which prohibits each state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[131] The Supreme Court has held that this language "restrains the States from fixing voter qualifications which invidiously discriminate."[132]

A few voter qualifications have failed to satisfy this standard. Most famously, the Court held in *Harper v. Virginia* that states cannot condition suffrage on a person's wealth or ability to pay taxes.[133] The Court has also held that states cannot disenfranchise military personnel,[134] and it struck down a law restricting suffrage in school board elections only to people who owned property, leased property, or were parents or guardians of children attending schools within the school district.[135] None of these voter qualification laws passed muster under the Equal Protection Clause.

Nevertheless, the Fourteenth Amendment has not entirely displaced state power over voter qualifications. The Supreme Court has repeatedly indicated that states may deny suffrage based on nonresidence or noncitizenship.[136] But beyond these examples, the boundary between invidious and permissible qualifications remains murky.

After *Harper*, courts began subjecting election laws to a sliding-scale balancing test.[137] Laws that severely restrict voting rights must be "narrowly drawn to advance a state interest of compelling importance."[138] If a law fails this strict scrutiny (as it likely will), it will be deemed invidious and unconstitutional. But

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of whether a state should be penalized under Section 2 of the Fourteenth Amendment is a political question best answered by Congress, not the courts.

131. U.S. CONST. amend. XIV, § 1.

132. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966).

133. *Id.*

134. Carrington v. Rash, 380 U.S. 89, 95 (1965).

135. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 631–32 (1969).

136. Hill v. Stone, 421 U.S. 289, 297 (1975) (stating that voter qualifications based on residence, citizenship, and age do not need to be justified by a "compelling state interest"); Sugarman v. Dougall, 413 U.S. 634, 635–36, 648–49 (1973) ("[I]mplicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights."); Carrington v. Rash, 380 U.S. 89, 91 (1965*)* ("Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot.").

137. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (providing the original articulation of the balancing test).

138. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

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if a law imposes "reasonable, nondiscriminatory restrictions" on voters, it will be subject to less exacting scrutiny and will likely be upheld.[139] The ambiguity within this test is intentional; the Supreme Court has explained that "[r]ather than applying any 'litmus test' that would neatly separate valid from invalid restrictions, we [have] concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."[140]

Other constitutional amendments are clearer in how they restrict state discretion. Since 1870, the Fifteenth Amendment[141] has explicitly banned voter qualifications (and other election laws) that "deny or abridge" the right to vote "on account of race, color, or previous condition of servitude."[142] Over the following century, a series of social movements successfully convinced the country to ratify additional constitutional amendments that similarly prohibit voting discrimination based on sex (Nineteenth Amendment),[143] failure to pay a poll tax or other tax in federal elections (Twenty-Fourth Amendment),[144] and age over eighteen years old (Twenty-Sixth Amendment).[145] Together with the Fourteenth Amendment, these four "Suffrage Amendments" have successively diminished state power to establish voter qualifications.

Each amendment contains an Enforcement Clause that empowers Congress to enforce its provisions through "appropriate legislation."[146] The judiciary has not independently interpreted the meaning of each Enforcement Clause, but the Supreme Court has subjected legislation enforcing the Fourteenth Amendment to a "congruence and proportionality" test.[147] This standard

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139. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

140. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 190 (2008).

141. 16 Stat. 1131 (1870) (proclaiming ratification of the Fifteenth Amendment).

142. U.S. CONST. amend. XV.

143. *Id.* amend. XIX.

144. *Id.* amend. XXIV.

145. *Id.* amend. XXVI.

146. *Id.* amends. XIV, § 5; XIX, § 2; XIV, § 2; XVI, § 2.

147. City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (for enforcement legislation to survive constitutional scrutiny, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). Given the similar structure of the Enforcement Clause, Congress's power to enforce the Suffrage Amendments is also likely constrained by the congruence and proportionality test. However, the Thirteenth Amendment also contains an Enforcement Clause, U.S. CONST. amend. XIII, § 2, and uncertainty lingers as to

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requires courts to (1) identify the scope of the constitutional right that the legislation is meant to remedy or prevent,[148] (2) "examine whether Congress has identified a history and pattern" of state conduct violating this constitutional right,[149] and (3) determine whether the legislation's remedy is congruent and proportional to the violation.[150] The larger the scope of the constitutional right, and the stronger Congress's record of constitutional violations, the more likely the legislation will be deemed congruent and proportional.[151] If legislation fails this requirement, then it is considered an unconstitutional attempt to "redefine" the substance of the Amendment rather than to "enforce" it.[152]

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whether legislation enforcing the Thirteenth Amendment may be justified under a standard more lenient than the congruence and proportionality test. In *Jones v. Alfred H. Mayer Co.*, the Supreme Court held that the Thirteenth Amendment's Enforcement Clause gives Congress the ability to "rationally . . . determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." 392 U.S. 409, 440 (1968). If this standard differs from congruence and proportionality, unique reasons may justify why Congress's power to enforce the Thirteenth Amendment should be greater than its power to enforce the Fourteenth Amendment or Suffrage Amendments. *See generally* Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. U. L. REV. 77 (2010) (exploring the history of the Thirteenth Amendment's Enforcement Clause and arguing that a limited form of *Jones* scrutiny should apply to legislation enforcing the Thirteenth Amendment). Regardless, the Supreme Court has hinted that Fifteenth Amendment enforcement legislation is subject to the congruence and proportionality test, and it has given no reason to suspect that the remaining three Suffrage Amendments' Enforcement Clauses would be interpreted any differently. *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (suggesting that Congress's powers to enforce the Fourteenth and Fifteenth Amendment are "parallel").

148. Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).

149. *Id.* at 368.

150. *Flores*, 521 U.S. at 520.

151. Additionally, because of the large scope of (1) "fundamental" constitutional rights and (2) the constitutional rights of suspect and quasi-suspect classes to be free from discrimination, laws enforcing these rights require less evidence of constitutional violations and are more likely to be upheld. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) (holding that enforcement legislation designed to remedy or deter state discrimination against a suspect or quasi-suspect class, such as women, requires less evidence of constitutional violations than legislation aimed at discrimination against non-suspect classes); Tennessee v. Lane, 541 U.S. 509, 531–34 (2004) (upholding enforcement legislation requiring states to accommodate people with disabilities in courthouses because "access to the court" is a fundamental constitutional right and sufficient evidence showed that states were systematically denying this right to people with disabilities).

152. *Flores*, 521 U.S. at 519. Many pieces of legislation meant to enforce Fourteenth Amendment rights have been struck down under this standard, including legislation prohibiting state discrimination based on disability and age. *Bd. of Trustees of Univ. of Ala.*, 531 U.S. at 374 (disability); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000) (age).

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However, the congruence and proportionality test does not limit Congress to passing enforcement legislation that prohibits conduct already prohibited by the Amendment's own terms. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional."[153]

The reach of this enforcement power is sometimes broad enough to allow Congress to supplant voter qualification laws that appear valid on their face. For instance, the Supreme Court has upheld Fifteenth Amendment enforcement legislation that prohibits states from making "literacy" a voter qualification, even though literacy tests do not directly violate the Fifteenth Amendment.[154] Literacy tests were commonly used to prevent people of color from voting, and the Court deemed "literacy" was being used as proxy for "race."[155] Since racial voter qualifications are prohibited by the Fifteenth Amendment, it held Congress could use its enforcement power to prohibit such proxies.[156]

Beyond literacy tests, Congress's ability to abolish voter qualifications remains largely untested. But one certainty is that the Enforcement Clauses afford Congress no authority to *impose* voter qualifications. The Fourteenth Amendment and Suffrage Amendments protect certain classes from disenfranchisement. In contrast, to impose a voter qualification is, by definition, to disenfranchise. Disenfranchisement cannot remedy or prevent disenfranchisement, let alone do so congruently or proportionally. Thus, Congress can use its enforcement powers to expand the electorate, but not to contract it.[157]

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153. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

154. *Compare* Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 52–54 (1959) (upholding literacy voter qualification as constitutional) *with* 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).

155. *See Katzenbach*, 383 U.S. at 308, 333–34.

156. *See id.*

157. This reasoning echoes the "one-way ratchet theory" of *Katzenbach v. Morgan*, which posits that Congress's enforcement power "is limited to adopting measures to enforce the guarantees of the Amendment; . . . Congress [has] no power to restrict, abrogate, or dilute these guarantees." 384 U.S. 641, 651 n.10 (1966). In other words, under the one-way ratchet theory, constitutional amendments act as a floor that enforcement legislation cannot go below. *Katzenbach v. Morgan* was decided before

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The overall effect of the Fourteenth Amendment and Suffrage Amendments has been to circumscribe, both directly and indirectly, state power over voter qualifications. The Fourteenth Amendment directly prohibits states from imposing voter qualifications that invidiously discriminate, such as wealth-based qualifications.[158] The Suffrage Amendments directly ban specific voter qualifications based on race,[159] sex, [160] inability to pay a poll tax or other tax (for federal elections),[161] and age over eighteen years old.[162] Indirectly, the Fourteenth Amendment and Suffrage Amendments limit state authority by empowering Congress to enforce their protections.[163] Congress may use this authority to outlaw facially-valid voter qualifications that states have used as proxies for unconstitutional qualifications.[164]

But these amendments have not made the federal government all powerful. Congress cannot use its enforcement

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Flores, which first articulated the congruence and proportionality standard. S. Elizabeth Wilborn Malloy, *Whose Federalism?*, 32 IND. L. REV. 45, 55 (1998). Commentators have suggested that *Flores* rejected the one-way ratchet theory. *E.g., id.* at 54; Note, *Section 5 and the Protection of Nonsuspect Classes After* City of Boerne v. Flores, 111 HARV. L. REV. 1542, 1543 (1998). But more accurately, it rejected the principle that Congress may create "new" constitutional rights. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997). Even after *Flores*, the Court has never held that Congress may use its enforcement power to diminish *existing* constitutional rights. At least one commentator has suggested that the enforcement power should allow Congress to enforce some constitutional rights by restricting others, such as by "expanding Free Exercise rights at the expense of Establishment Clause rights." Rachel Toker, *Tying the Hands of Congress:* City of Boerne v. Flores, 33 HARV. C.R.-C.L. L. REV. 273, 286 n.82 (1998). But even this ability would not allow Congress to enforce the Fourteenth Amendment or a Suffrage Amendment by imposing a voter qualification; restricting the right to vote does not conceivably protect any other constitutional right. At most, disenfranchising one group may enhance the voting power of another group—for example, Congress could attempt to enforce the Nineteenth Amendment by banning men from voting. This would certainly help redress the diminished political power of women. But even if Congress marshalled a bulletproof record showing that women suffer from a pattern of egregious disenfranchisement, a court would undoubtedly hold that such legislation does not offer a congruent or proportional remedy. Legislatures and courts alike have historically remedied disenfranchisement with enfranchisement, not with more disenfranchisement. There is little reason to think the courts will dramatically change course and allow Congress to enforce the Fourteenth Amendment or Suffrage Amendments by imposing a voter qualification.

158. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966).

159. U.S. CONST. amend. XV.

160. *Id.* amend. XIX.

161. *Id.* amend. XXIV.

162. *Id.* amend. XXVI.

163. *Id.* amends. XIV, § 5; XIX, § 2; XIV, § 2; XVI, § 2.

164. *See Flores*, 521 U.S. at 520.

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powers to impose qualifications on voters, and enforcement legislation must be remedial, satisfying the requirements of congruence and proportionality. When Congress wishes to escape these confines, it must turn to other constitutional provisions—although they, too, come with limits.

C. ELECTIONS CLAUSE

Long before the Fourteenth Amendment was ratified, the Framers wrote in Article I, Section 2, Clause 4, "[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."[165] The Supreme Court has interpreted this "Elections Clause" as granting states authority to create "a complete code for congressional elections," including regulations "not only as to times and places [of elections], 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."[166]

This state authority, however, is limited by Congress's power to "make or alter such Regulations."[167] States may have the first opportunity to regulate federal elections, but "Congress may "supplement these state regulations or . . . substitute its own,"[168] and to the extent Congress chooses to exercise this power, conflicting state regulations lose their force.[169]

The Supreme Court has even held that Congress's preemptive power under the Elections Clause is stronger than its usual preemptive power under the Supremacy Clause. Unlike other areas of concurrent authority where dividing lines can be drawn between state and federal power, the Elections Clause gives Congress complete authority to override state decisions. When Congress legislates under the Elections Clause, it *unavoidably* displaces a state's ability to regulate federal elections.[170] For this reason, the Court has held that the

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165. U.S. CONST. art. I, § 4, cl. 1.
166. Smiley v. Holm, 285 U.S. 355, 366 (1932).
167. U.S. CONST. art. I, § 4, cl. 1.
168. *Smiley,* 285 U.S. at 366–67.
169. Ex parte Siebold, 100 U.S. 371, 383–84 (1879).
170. Arizona v. Inter Tribal Council of Arizona, 133 S.Ct. 2247, 2256 (2013) [hereinafter ITCA] (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

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"presumption against preemption" does not apply to federal legislation regulating the time, place, or manner of federal elections.[171]

The scope of Congress's Elections Clause authority is both broader and narrower than its power to enforce the Fourteenth Amendment and Suffrage Amendments. The authority is broader in that it allows Congress to adopt non-remedial election legislation. This makes the Elections Clause a tempting provision to use to justify congressionally-imposed voter qualifications. But the authority is also narrower in that it gives Congress no power to regulate state elections—and no authority to pass substantive election laws that fall outside the definitions of time, place, and manner regulations. As discussed in the next Part, the latter prevents Congress from using the Elections Clause to impose voter qualifications.

V. THE LIMITS OF THE ELECTIONS CLAUSE

Although nothing in the text of the Constitution expressly gives Congress the power to establish voter qualifications, proponents of the Federal Noncitizen Voting Ban may argue that establishing voter qualifications in federal elections is an exercise of Congress's power to regulate the "manner" of an election.[172] To date, the question of whether the Elections Clause gives Congress such power has not been definitively answered by the courts and has received little scholarly attention.[173]

However, this interpretation of the Elections Clause is a dangerous slippery slope that, if accepted by the courts, would

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171. ITCA, 133 S.Ct. 2247, 2256 (2013). As Professor Franita Tolson has explained, the Election Clauses create a decentralized scheme where states have autonomy, but not sovereignty, to regulate the time, place, and manner of federal elections. Because Congress may veto state regulations or replace them altogether, Congress alone has such sovereignty. Franita Tolson, *Reinventing Sovereignty? Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1218, 1227 (2012).

172. U.S. CONST. art. I, § 4, cl. 1.

173. The question is alluded to in Tolson, *supra* note 171, at 1201, where the argument is made that the Elections Clause interacts with the Fourteenth Amendment and Suffrage Amendments to give Congress control over voter qualifications. *See also* Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 593–94 (2015) (echoing Tolson's view). However, this argument does not disentangle the question of whether Congress has the power to *impose* voter qualifications from the separate question of whether Congress has the power to *prohibit* voter qualifications. Implicitly, it seems to be concerned only with the first question. This Article, in contrast, is concerned with the second.

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allow Congress to exclude voters of all stripes from participating in federal elections. Fortunately, the Framers guarded against this possibility. This Part shows how the Elections Clause, when examined in light of constitutional history and case law, properly cabins federal authority over elections such that Congress cannot use it to establish voter qualifications.

A. THE FOUNDERS ON THE ELECTIONS CLAUSE AND VOTER QUALIFICATIONS: NEVER THE TWAIN SHALL MEET

When drafting the Constitution, the Framers paid special attention to how federal elections were governed, trying to strike a balance between federal and state control. This section canvasses the Framer's statements on the Elections Clause and related constitutional provisions to show how and why the Framer's intended for the states, not Congress, to impose voter qualifications. The Supreme Court similarly reviewed the Framer's remarks on this issue in *Oregon v. Mitchell*, and Justice Black—writing for himself—concluded that the Framers intended for Congress to have final authority over voter qualifications in federal elections.[174] This section critiques Justice Black's opinion, which has similarly been questioned by more recent Supreme Court decisions.

1. THE HISTORICAL RECORD

The Framers of the Constitution understood the Elections Clause to grant Congress vast powers.[175] Many Framers feared that without the Elections Clause, states would use their authority over the time, place, and manner of federal elections to destroy the federal government.[176] Gouverneur Morris, a delegate at the Constitutional Convention, observed that without

174. Oregon v. Mitchell, 400 U.S. 112, 123 n.5 (1970).

175. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 240 (Max Farrand ed., 1911) [hereinafter 2 RECORDS] (comments of Madison: "[T]he Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections. These were words of great latitude.").

176. A minority (whose view did not carry the day at the Constitutional Convention) feared the opposite: that the Elections Clause would be the death knell of the Union and allow the federal government to dissolve the states. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 195 (Max Farrand ed., 1911) [hereinafter 3 RECORDS] (comments of Maryland Attorney General Luther Martin, a delegate in the Constitutional Convention, to Maryland's state legislature); *see also* Tolson, *supra* note 171 (describing historical fears that the "congressional veto" contained in the Elections Clause would leave states at the mercy of the federal government).

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any congressional oversight, states could simply refuse to hold federal elections;[177] Alexander Hamilton echoed this sentiment in The Federalist Papers.[178] James Madison listed several specific powers that state legislatures might abuse in unforeseen ways to strategically undermine the federal government: whether to hold elections by ballot or voice vote; where to conduct elections; and whether House candidates should run at large, in multimember districts or in single-member districts.[179] These concerns illustrate the expansive scope of the power to regulate the time, place, and manner of federal elections.

A desire to protect federal voting rights also motivated the Framers to adopt the Elections Clause. Madison worried that even if states did not try to manipulate election laws to undermine the federal government directly, they could suppress voters in federal elections.[180] During the ratification debate in Virginia, Madison pointed out that South Carolina chose to overrepresent the city of Charleston in the state legislature by assigning that city a disproportionally large number of representatives. This imbalance diminished the votes of South Carolinians living in other areas. Fearing that the states may perpetuate this type of vote dilution in House elections, Madison argued that the Elections Clause was needed so that Congress could remedy it with a uniform rule.[181] This was but one example of how states could discriminate against certain voters in federal elections.[182] Madison explained the sentiment at the Constitutional Convention was that "[s]hould the people of any state, by any means be deprived of the right of suffrage, . . . it should be remedied by the general [federal] government."[183]

These deliberations indicate the Framers intended for Congress to have substantial authority over federal elections, both to protect its own existence and to safeguard the right to vote. Considered in isolation, these statements may suggest that this authority includes the power to establish voter qualifications

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177. 2 RECORDS, *supra* note 176, at 241 (comments of Morris).

178. THE FEDERALIST NO. 59, at 385 (Alexander Hamilton) (Modern Library, 1941).

179. *See* 2 RECORDS, *supra* note 175, at 240–41 (comments of Madison).

180. *See* 3 RECORDS, *supra* note 176, at 311 (comments of Madison); 2 RECORDS, *supra* note 176, at 241 (comments of Madison).

181. *See* 3 RECORDS, *supra* note 176, at 311 (comments of Madison); 2 RECORDS, *supra* note 175, at 241 (comments of Madison).

182. 3 RECORDS, *supra* note 176, at 311.

183. *Id.*

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in federal elections. Even though the Framers did not explicitly say that the Elections Clause allowed Congress to do so, they did discuss similar powers that Congress could exercise.[184] Many of these powers could arguably have just as great an impact on elections as voter qualifications do, such as the ability to decide where an election is conducted or how strong a person's vote should be relative to voters in neighboring districts. Should Congress be similarly empowered to determine who cannot vote in federal elections?

This question must be considered in light of another election-related constitutional provision the Framers devised: the original Voter Qualifications Clause of Article I, which requires that voter qualifications in federal elections be linked to the qualifications used in state elections.[185] This Clause textually separates the entire topic of voter qualifications from the Elections Clause; the Framers apparently believed voter qualifications were important enough for the Constitution to address directly. The textual separation alone suggests that the Framers did not believe voter qualifications were a subject encompassed by the Elections Clause.

Despite this, the Elections Clause and the original Voter Qualifications Clause could theoretically be reconciled in a way that allows Congress to set voter qualifications—but doing so would be anathema to the Framer's vision. The Voter Qualifications Clause says that voter qualifications in federal elections are tied to the qualifications used in state elections, but it does not explicitly state who—the states or Congress—may decide the content of those voter qualifications. If a voter qualification is a type of "manner" regulation, then Congress could use its Elections Clause authority to establish qualifications to vote in federal elections—and by virtue of the Voter Qualifications Clauses, those same qualifications would then apply to voters in state elections.

But allowing Congress to determine who could vote in *state* elections was far beyond what the Framers intended when drafting the Constitution—so much so that they viewed this argument as an absurdity. Alexander Hamilton expressed as much in The Federalist Papers:

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184. *See* 3 RECORDS, *supra* note 176, at 311 (comments of Madison); 2 RECORDS, *supra* note 175, at 241 (comments of Madison).

185. U.S. CONST. art. I, § 2, cl. 1.

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> Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment . . . .[186]

Nothing in the historical record shows that even a single Framer fathomed giving Congress the power to disenfranchise voters in state elections. All evidence indicates that the Framers drafted the Voter Qualifications Clause with the opposite goal in mind: to allow states to decide who could vote in federal elections.[187]

The Framers even considered and squarely rejected the idea that Congress should have a role to play in imposing voter qualifications. When the original Voter Qualifications Clause was discussed during the Constitutional Convention, Morris proposed an amendment to explicitly empower Congress to create federal voter qualifications or to alter federal voter qualifications established by the states[188]—similar to how the Elections Clause allows Congress to "make or alter" state regulations of the time, place, and manner of federal elections.[189] Madison—who ardently supported giving Congress authority over the times, places, and manner of federal elections[190]—rejected the idea that Congress should determine who may vote.[191] Benjamin Franklin agreed, espousing the principle that the *elected* should not be able to control the *electors*.[192] Oliver Ellsworth believed that the states were in the best position to determine who should vote in federal elections, and he cautioned that if Congress had the authority to decide who was qualified to vote, it could disenfranchise the vast majority and transform the entire country into an aristocracy.[193] Ellsworth also pointed out that most state constitutions at the

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186. THE FEDERALIST NO. 59, at 385 (Alexander Hamilton) (Modern Library, 1941).

187. *See e.g.,* 2 RECORDS, *supra* note 175, at 203 (comments of Madison).

188. *Id.* at 206–07.

189. U.S. CONST. art. 1, § 4, cl. 1.

190. *See supra* notes 179–83 and accompanying text.

191. 2 RECORDS, *supra* note 175, at 203 (comments of Madison: "the right of suffrage is certainly one of the fundamental articles of republican Government, and ought not to be left to be regulated by the [federal] Legislature.").

192. *Id.* at 205 (comments of Franklin).

193. *Id.* at 207 (comments of Ellsworth).

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time strongly protected the right to vote, and he believed the people would not accept a federal constitution that allowed for their disenfranchisement.[194] Pierce Butler feared that federal interference with the right to vote could even lead to a second revolution.[195] In the face of such overwhelming opposition, the proposal resoundingly failed; only the Delaware delegation voted in its favor.[196]

Moving forward, the Framers understood that voter qualifications would be set by the states, and this influenced their conception of the Elections Clause. Responding to concerns that Congress could use its power to regulate the time, place, and manner of federal elections to the detriment of the states, Madison pointed out this fear was unfounded for a simple reason: under the Voter Qualifications Clause, the same people qualified to vote for state legislators would also choose House members. If the states could trust these qualified voters to elect their own state legislators, then the states could also trust these voters to elect House members who would not use the Elections Clause to undermine state sovereignty.[197]

Madison's reasoning necessarily rests on an understanding that the states, not Congress, establish voter qualifications.[198] If the Elections Clause allowed Congress to do so, then his entire argument would unravel; Congress could disenfranchise states rights' advocates and create an electorate that favored using the Elections Clause to harm the states. Thus, not only did the Framers intend for voter qualifications to be beyond Congress's power over the time, place, and manner of federal elections, this limitation even served as a justification for giving Congress such power.

But the most definitive statement by the Framers that the Elections Clause does not empower Congress to establish voter qualifications appears in The Federalist Papers. There, Hamilton dismissed fears that Congress could use its authority under the Elections Clause to favor wealthy voters.[199] He noted that since wealthy voters were dispersed throughout the country and lived

194. 2 RECORDS, *supra* note 175, at 201 (comments of Ellsworth).
195. *Id.* at 202 (comments of Butler).
196. *Id.* at 206.
197. *See id.* at 241 (comments of Madison).
198. *See id.* (comments of Madison).
199. THE FEDERALIST NO. 60 (Alexander Hamilton).

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among less wealthy voters, Congress could not, as a practical matter, design election procedures that singled out wealthy voters for special treatment. The only way that Congress could feasibly favor wealthy voters would be by creating wealth-based voter qualifications, but he asserted this was a power the Constitution denied to Congress:

> The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the [federal] legislature.[200]

To Hamilton, fears that Congress could use the Elections Clause to create an aristocracy were completely unfounded. As he assured readers of The Federalist Papers, Congress is constitutionally barred from disenfranchising voters who lack wealth.[201]

The great weight of history thus shows that the Framers intended for Congress to have extensive, but not unlimited, authority over federal elections. A regulation of the "manner" of an election may not be defined in the Constitution, but history tells us something is *not* a manner regulation: a voter qualification. As far as the Framers were concerned, the ability to establish voter qualifications remained a power possessed by the states alone.

As a matter of originalism, this could be the end of the inquiry: the Framers intended to prevent Congress from using the Elections Clause to establish voter qualifications, so the Federal Noncitizen voting ban cannot be justified as an exercise of Congress's Election Clause powers. However, the courts have not always agreed with this assessment.

2. JUSTICE BLACK'S MISREAD

Reviewing the same constitutional history, Justice Hugo

200. THE FEDERALIST NO. 60 (Alexander Hamilton).
201. *See id.* (Alexander Hamilton).

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Black came to a different conclusion about the meaning of the Elections Clause in *Oregon v. Mitchell*.[202] In this case, the Supreme Court considered the constitutionality of several amendments to the Voting Rights Act of 1965 that Congress enacted in 1970. One of the challenged provisions established a minimum voting age of eighteen in all federal and state elections.[203] This case was decided before ratification of the Twenty-Sixth Amendment, and at the time, many states required people be at least twenty-one years old to vote in state and federal elections.[204] Several states challenged the provision establishing a minimum voting age as an unconstitutional intrusion on their right to establish voter qualifications.[205]

The Court fractured over whether Congress mandate a minimum voting age; not even a plurality of Justices agreed on the judgment.[206] Four Justices would have held that Congress create a minimum voting age in both federal and state elections through its power to enforce the Equal Protection Clause of the Fourteenth Amendment.[207] A different set of four Justices would have held the opposite: Congress has no power to dictate the voting age in either federal or state elections. Justice Black split the difference, reasoning that Congress could establish a minimum voting age in federal elections, but not in state elections.[208] Although no other Justice joined his reasoning, Justice Black's decision carried the day because each part of it was supported (for different reasons than his own) by one of the sets of four Justices.[209]

Unlike the Justices who believed that the Fourteenth Amendment allowed Congress to mandate a minimum voting age in all elections,[210] Justice Black rooted his decision in the

202. Oregon v. Mitchell, 400 U.S. 112, 123 n.5 (1970).

203. *Id.* at 117.

204. Sarah Fearon-Maradey, *Disenfranchising America's Youth: How Current Voting Laws Are Contrary to the Intent of the Twenty-Sixth Amendment*, 12 U.N.H. L. REV. 289, 292 (2014).

205. *Oregon*, 400 U.S. at 117.

206. *Id.* at 118.

207. *Id.* at 143–44, 240 (opinion of Douglas, J.; joint opinion of Brennan, White, and Marshall, JJ.).

208. *Id.* at 117–18.

209. *See id.*

210. *Oregon*, 400 U.S. at 143–44, 240 (opinion of Douglas, J.; joint opinion of Brennan, White, and Marshall, JJ.).

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Elections Clause.[211] He conceded that the Voter Qualifications Clauses allow states to establish voter qualifications for state and federal elections. But he asserted that Congress could use its Elections Clause authority to override such qualifications as they pertained to federal elections.[212] Under his view, a voter qualification was a type of "manner" regulation, and because the Elections Clause gives Congress power over the manner of federal elections, he believed congressional power over voter qualifications was an exception to both the general rule that states decide qualifications and the requirement of the Voter Qualifications Clause that state and federal qualifications be linked.[213] In other words, the Elections Clause allowed Congress to dictate voter qualifications, but only in federal elections.

Justice Black supported his view by seizing upon the remarks of Madison and other Framers who argued that the Elections Clause would allow Congress to establish House of Representatives districts and define their boundaries.[214] As discussed earlier,[215] Madison supported giving these powers to Congress,[216] and he believed Congress could use those powers to prevent states from diluting the votes of people living in certain areas.[217] Justice Black believed that vote dilution amounted to a voter qualification, or more precisely, that it was a manifestation of "the geographical qualification embodied in the concept of congressional districts."[218] Under his reasoning, because Framers like Madison intended for the Elections Clause to give Congress power over redistricting, the Framers intended for Congress to regulate "geographical qualifications" placed on voters. Therefore, since Congress could regulate this type of voter qualification in federal elections, Congress could similarly impose other voter qualifications in federal elections—such as the voting age.[219]

A historical flaw with Justice Black's analysis is that the Framers never conceived of "geography" as a voter qualification.

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211. Oregon v. Mitchell, 400 U.S. 112, 119–20 (1970).
212. *Id.*
213. *See id.* at 121–23.
214. *Id.* at 122, 123 n.5.
215. *See supra* Part V(A)(1).
216. 2 RECORDS, *supra* note 175, at 240–41 (comments of Madison).
217. *See id.* at 241 (comments of Madison); 3 RECORDS, *supra* note 176, at 311 (comments of Madison).
218. *Oregon*, 400 U.S. at 122.
219. *See id.*

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Although they did not define voter qualifications explicitly, the Framers described voter qualifications as substantive requirements that would completely prohibit some person from casting a ballot. For instance, a property ownership requirement, which Hamilton discussed in The Federalist Papers,[220] ensured that voters without property would be turned away from the polls. In contrast, the boundaries of House district lines do not, in and of themselves, prevent any person from casting a ballot, regardless of where a person lives. Although the power to draw House district lines could lead to vote dilution, and the Framers recognized this as a problem, they never equated this type of voter harm with disenfranchisement.[221]

More broadly, if the Framers considered voter qualifications to be a type of "manner" regulation, then they would not have repeatedly said otherwise during and after the Constitutional Convention.[222] Recall that Hamilton dismissed fears that Congress could use its Elections Clause authority to favor wealthy voters because the power to establish voter qualifications, such as property ownership requirements, remained with the states.[223] This argument becomes nonsensical if Congress does, in fact, have such power. Madison's federalism argument—that state control over voter qualifications ensured that Congress would not use its Elections Clause powers to abuse the states—would also fall apart.[224]

The Justices in *Oregon v. Mitchell* who believed that Congress had no power to establish a voting age qualification in federal elections echoed the words of the Framers. Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, emphasized the defeat of Morris's proposal at the Constitutional Convention that would have explicitly given Congress control over voter qualifications.[225] Justice Stewart also compared the

220. THE FEDERALIST NO. 60 (Alexander Hamilton).

221. *See* 3 RECORDS, *supra* note 176, at 311 (comments of Madison); 2 RECORDS, *supra* note 175, at 241 (comments of Madison).

222. A fuller account of the Framers views is included in Part V(A)(1) of this Article.

223. THE FEDERALIST NO. 60 (Alexander Hamilton).

224. *See* 2 RECORDS, *supra* note 175, at 241 (comments of Madison).

225. The principle that "rejected prior versions of legislation indicate the meaning of the final version" has been used by the judiciary to interpret ambiguous legislation. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 579–80 (2006) (citing Doe v. Chao, 540 U.S. 614, 621–23 (2004)) ("Congress's rejection of the very language that would have achieved the result the Government urges here weighs heavily against

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text of the Elections Clause, which does not directly address voter qualifications, with that of the Voter Qualifications Clause, arguing that "[i]t is plain . . . that when the Framers meant qualifications they said 'qualifications.'"[226] Justice Harlan advanced a similar argument and cited to The Federalist No. 52, in which Hamilton asserted that the Voter Qualifications Clause should be "satisfactory to every State, because it is conformable to the standard [voter qualifications] already established, or which may be established, by the State itself."[227]

Despite these protests, Justice Black's decision carried the day in *Oregon v. Mitchell*. But since no other Justice joined Justice Black's opinion, his reasoning did not become precedent.[228] Decades would pass before the Court again examined the limits of the Elections Clause, and when the question finally did arise again, the Court began to more clearly turn against the idea that Congress could establish voter qualifications.[229]

B. Current Understandings of the Elections Clause

Beyond *Oregon v. Mitchell*, few cases have interpreted the extent of congressional power under the Elections Clause, and the Supreme Court has never definitively held that power over voter qualifications is beyond the Clause's scope. But two more recent cases, *U.S. Term Limits v. Thornton*[230] and *Arizona v. Inter Tribal Council of Arizona* (*ITCA*),[231] cast serious doubt on Justice Black's views.

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the Government's interpretation.").

226. Oregon v. Mitchell, 400 U.S. 112, 288 (1970).

227. *Id.* at 211 (quoting THE FEDERALIST NO. 52 (James Madison)).

228. *See* ITCA, 133 S.Ct. 2247, 2258 n.8 (2013).

229. In the interim, the Court decided in *Tashjian* that voter qualifications in state and federal qualifications could differ so long as the qualifications in federal elections were more lenient. Tashjian v. Republican Party of Conn., 479 U.S. 208, 225–27 (1986); *see supra* Part IV(A). However, that case involved a challenge to differing qualifications established under *state* law; it did not discuss Congress's Elections Clause authority or hold that Congress had the power to create voter qualifications. *Tashjian,* 479 U.S. at 210–11. The Court justified its decision in part by pointing to *Oregon v. Mitchell*, which held that Congress could establish a minimum voting age in federal elections. *Tashjian,* 479 U.S. at 210–11. The Court did not endorse Justice Black's reasoning in *Oregon v. Mitchell*. *Tashjian*, 479 U.S. at 229. As discussed in Part V(B)(2) of this Article, the Court has recently expressed significant doubt that his interpretation of the Elections Clause has precedential value.

230. U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).

231. *ITCA*, 133 S.Ct. 2247.

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1. OF CANDIDATES AND VOTERS: U.S. TERM LIMITS V. THORNTON

In the 1995 case *U.S. Term Limits v. Thornton*, the Supreme Court held that the Constitution prevents states from placing term limits on members of Congress.[232] Although this case does not directly address whether Congress has power under the Elections Clause to establish voter qualifications, it does answer an analogous question: whether the *states* have power under the Elections Clause to establish *candidate* qualifications.[233] Much of the reasoning the Court used in its *U.S. Term Limits* analysis is equally applicable to the question of whether Congress can establish voter qualifications.

The Court noted that the Constitution provides lists of candidate qualifications in the "Candidate Qualification Clauses."[234] The first of these clauses—Article I, Section 2, Clause 2—requires a candidate for the House of Representatives be at least twenty-five years old, a citizen of the United States for seven years, and an inhabitant of the state where they run.[235] Similarly, Article I, Section 3, Clause 3, requires that a candidate for Senate be at least thirty years old, a citizen of the United States for nine years, and an inhabitant of the state where they run.[236]

At issue in *U.S. Terms Limits* was whether the Candidate Qualification Clauses prescribed an exclusive set of candidate qualifications or they merely established minimum qualifications that states could supplement.[237] The Court considered an argument that the Elections Clause, by giving states the first opportunity to regulate the times, places, and manner of federal elections, empowers them to create additional federal candidate qualifications. Like *Oregon v. Mitchell,* which considered the argument that a voter qualification is a type of "manner" regulation,[238] the argument in *U.S. Term Limits* turned on whether a candidate regulation is a type of "manner" regulation.[239]

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232. U.S. Term Limits v. Thornton, 514 U.S. 779, 783 (1995).
233. *Id.* at 832.
234. *Id.* at 782–83.
235. U.S. CONST. art. I, § 2, cl. 2.
236. *Id.* § 3, cl. 3.
237. *U.S. Term Limits*, 514 U.S. at 782–83.
238. *See* Oregon v. Mitchell, 400 U.S. 112, 121–23 (1970).
239. *U.S. Term Limits*, 514 U.S. at 832.

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Unlike the fractured Court in *Oregon v. Mitchell*, a majority of Justices held in *U.S. Term Limits* that the Elections Clause does not grant states power to establish federal candidate qualifications.[240] The Court reasoned that the Elections Clause allows states and Congress to enact only "procedural" election regulations; to support its view, it cited the list of potential time, place, and manner regulations that Madison mentioned during the Constitutional Convention—all of which were deemed procedural.[241] Substantive election regulations, such as who qualifies to run for office, were held to be beyond the authority granted by the Elections Clause.[242]

The Court did not consider whether *voter* qualifications are similarly "substantive," but the reasoning indicates that they are. The difference between substantive and procedural rules are notoriously tricky to define in any legal context, but in remarking on the difference between them in *U.S. Term Limits*, the Court said that procedural election regulations do not include regulations designed "to dictate electoral outcomes, [or] to favor or disfavor a class of candidates."[243] Candidate qualifications satisfy both criteria. By limiting whom voters can support in an election, candidate qualifications dictate electoral outcomes by preventing the election of any person deemed ineligible to run. Similarly, by excluding candidates who do not meet the qualifications, the class of candidates who meets the qualifications is unquestionably "favored."

Voter qualifications similarly satisfy the Court's criteria. By limiting who can vote in an election, a voter qualification dictates that the electoral outcome will be decided exclusively by people who are enfranchised. Similarly, voter qualifications favor the classes of candidates supported by enfranchised voters. Like candidate qualifications, voter qualifications fit the definition of a "substantive" election regulation.

Flaws do exist with the Court's delineation of procedural from substantive election regulations. Any number of facially procedural regulations could potentially fit under one or both of the *U.S. Term Limits* criteria. For instance, the Court characterized regulations of election times and places as

240. U.S. Term Limits v. Thornton, 514 U.S. 779, 832 (1995).

241. *Id.* at 833–34; *see supra* note 179 and accompanying text.

242. *U.S. Term Limits*, 514 U.S. at 833–34.

243. *Id.*

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procedural regulations.[244] But a jurisdiction could hold an election at a time or a place inconvenient to a particular group of voters. The resulting diminished participation of that group could dictate the electoral outcome, or at least disfavor the class of candidates that group supports. The Court did not consider possibilities like these in *U.S. Term Limits*.[245]

However, these flaws are not fatal to the Court's test, nor do they open the door to treating voter qualifications as procedural regulations. To the extent a time or place regulation is used to dictate electoral outcomes, it could simply cease to be a procedural regulation. Moreover, unlike time or place regulations, which may or may not be used to dictate electoral outcomes or favor a class of candidates, candidate qualifications and voter qualifications inherently satisfy these criteria. If a person cannot run, they cannot win; if a person cannot vote, their preferred candidate is less likely to win. Laws restricting ballot access or disenfranchising voters thus unavoidably influence electoral outcomes. In all circumstances, candidate and voter qualifications meet the Court's definition of substantive.

Additionally, the Court noted in *U.S. Term Limits* that if the Elections Clause empowered states to establish federal candidate qualifications, then it would similarly empower Congress, which has the authority to "make or alter" manner regulations, to do so as well.[246] In the Court's view, the historical record showed that the Founders intended to deny Congress any authority over federal candidate qualifications.[247] Notably, much of this historical evidence is contained in the same writings and statements that the Framers made against giving Congress power over federal *voter* qualifications, as the Framers often spoke of candidate and voter qualifications together. For instance, to bolster its reasoning that a candidate qualification is not a "manner" regulation, the Court referenced Hamilton's assertion in The Federalist No. 60 that the only practical ways Congress could favor the wealthy in elections would be "by prescribing qualifications of property either for those who may elect [voters] or be elected [candidates]," and that neither power was granted to Congress by the Elections Clause.[248]

244. U.S. Term Limits v. Thornton, 514 U.S. 779, 832–33 (1995).

245. *See id.*

246. *Id.* at 832.

247. *Id.* at 832–33.

248. *Id. at* 833 (quoting THE FEDERALIST NO. 60 (Alexander Hamilton)).

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Thus, although the Court in *U.S. Term Limits* addressed only candidate qualifications, the constitutional history the Court discussed equally demonstrates that the power to establish voter qualifications is beyond the scope of the Elections Clause.[249] Because the Court relied on this history to declare candidate qualifications unconstitutional in *U.S. Term Limits*, the Court would most likely use it to reach the same conclusion about voter qualifications if that question were ever squarely put before it. Two decades after *U.S. Term Limits*, the Court came even closer to expressly making this conclusion the law of the land.

2. CLARITY IN THE 21ST CENTURY: *ITCA*

The Supreme Court made its strongest assertion to date that qualifications are not a type of "manner" regulation in *Arizona v. Inter Tribal Council of Arizona* (*ITCA*).[250] In this case, the Court considered whether the National Voter Registration Act of 1993 (NVRA)[251] preempted an Arizona voter registration law. The NVRA requires the Elections Assistance Commission (EAC) to develop a federal voter registration application ("Federal Form") that people can use to register to vote for federal elections,[252] and it commands states to "accept and use" this Federal Form.[253] The EAC must consult state governments when developing the Federal Form, and the EAC has authority to adopt state-specific instructions that inform voters of each state's particular voting requirements.[254] The NVRA also allows states to create their own state voter registration forms.[255]

At issue in *ITCA* was whether Arizona's documentary proof-of-citizenship requirement was preempted.[256] The EAC included a requirement on the Federal Form that people swear, under penalty of perjury, to be a citizen.[257] An Arizona law, however, required people who registered to vote using the Federal Form to attach to it documentation proving the person's citizenship, such as a copy of a birth certificate, a driver's license that states the person is a citizen, or documentary evidence of naturalization. If

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249. U.S. Term Limits v. Thornton, 514 U.S. 779, 832–33 (1995).
250. ITCA, 133 S.Ct. 2247, 2257 (2013).
251. 52 U.S.C. §§ 20501–20511 (Supp. II 2015).
252. § 20508(a)(2).
253. § 20505(a)(1).
254. § 20508.
255. § 20505(a)(2).
256. *ITCA*, 133 S.Ct. at 2254.
257. *Id.* at 2251.

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a person submitted a Federal Form without such a document, the person was not registered to vote.[258] Arizona argued that this law did not violate the NVRA because the state still "accepted and used" the Federal Form as one component of the voter registration process; documentary proof of citizenship was merely an additional requirement.[259]

The Court rejected this argument and interpreted the words "accept and use" to mean that states must register to vote any person who submits the Federal Form without additional documentation.[260] The Court justified its holding by noting how another provision of the NVRA, which requires states to register to vote any applicant who timely postmarks a completed and valid voter registration form, would make little sense if the states could mandate that applicants also fulfill other requirements to register.[261] The Court also reasoned that the Federal Form is a "backstop" that allows people to register to vote (at least for federal elections) without having to fulfill the requirements that a state may place on people who register using the state's own form. If Arizona could require that applicants provide documentary proof of citizenship regardless of whether the applicant used the Federal Form or a state form, then the Federal Form would no longer serve as this backstop, and it would "cease[] to perform any meaningful function."[262]

But most relevant to the constitutionality of congressionally-imposed voter qualifications was the Court's discussion of Arizona's constitutional avoidance argument. Arizona contended that if the NVRA were interpreted to preempt its documentary proof-of-citizenship requirement, then the NVRA would unconstitutionally interfere with Arizona's ability to enforce its voter qualifications—specifically, the qualification of citizenship.[263] The Court acknowledged that the NVRA was passed pursuant to Congress's Election Clause authority, and citing *U.S. Term Limits* and Justice Harlan's dissent in *Mitchell v. Oregon*, it explicitly stated that "the Elections Clause empowers Congress to regulate *how* federal elections are held,

258. ITCA, 133 S.Ct. 2247, 2251 (2013).
259. *Id.* at 2254.
260. *Id.* at 2260.
261. *Id.* at 2255.
262. *Id.* at 2255–56.
263. *ITCA*, 133 S.Ct. at 2257.

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but not *who* may vote in them."[264] The Court reasoned that the states have an exclusive power to impose voter qualifications on voters in federal elections, and to effectuate this power, states may also adopt procedural regulations that enforce those qualifications.[265] Thus, if interpreting the NVRA to preempt Arizona's proof-of-citizenship requirement (a procedural regulation) would "preclude" Arizona from enforcing its citizenship voter qualification, that interpretation would present serious constitutional doubts.[266] To avoid those doubts, the Court would have needed to consider whether Arizona's alternative interpretation of the "accept and use" requirement was fairly possible, despite its shortcomings.[267]

However, the Court held that interpreting the "accept and use" requirement to preempt Arizona's law did not raise any constitutional doubts because Arizona retained alternate means to enforce its voter qualifications.[268] The Court noted that Arizona could request the EAC add a documentary proof-of-citizenship requirement to the Arizona-specific instructions that accompany the Federal Form and seek judicial review if the EAC did not grant Arizona's request.[269] Arizona could then attempt to prove before the reviewing court that without receiving documentary proof of citizenship from voter registration applicants, the state would be unconstitutionally precluded from enforcing its voter qualifications, and if Arizona's argument succeeded, that court could then order the EAC to amend the Arizona-specific instructions to include a documentary proof-of-citizenship requirement.[270] Because these options were available to Arizona, the Court held that interpreting the NVRA to preempt Arizona's law did not raise the specter of unconstitutional interference with Arizona's voter qualification power.[271]

At first glance, this discussion in *ITCA* may seem to lay to rest any notion that the Elections Clause gives Congress power over voter qualifications. For the first time, a majority of Justices

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264. ITCA, 133 S.Ct. 2247, 2258 (2013).
265. *Id.* at 2258–59 (2013); *see also id.* at 2266 (Thomas, J., dissenting).
266. *Id.* at 2258–59.
267. *Id.* at 2259.
268. *ITCA*, 133 S.Ct. at 2259.
269. *Id.* at 2259–60.
270. *Id.* at 2260.
271. *Id.* at 2259.

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explicitly said that the states had the exclusive power to mandate federal voter qualifications, and Congress's Elections Clause authority was limited to regulating only "how" elections are conducted. Quoting the Framers, the Court said, "Prescribing voting qualifications, . . . '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.'"[272]

Despite the certainty expressed in these words, this reasoning is dictum. The Court in *ITCA* addressed only a question of statutory interpretation; the constitutional issue of whether the Elections Clause gives Congress authority over voter qualifications was not squarely before the Court.[273] While the Justices acknowledged that their interpretation would have raised serious constitutional doubts *if* alternative means of enforcement were not available to Arizona, the existence of such alternatives allowed the Court to avoid those doubts.[274] Even if the Court was unable to avoid a constitutionally suspect interpretation, it still would not have had occasion to definitively resolve those constitutional doubts in this case. The Court's reasoning as to why its interpretation of the NVRA would, if circumstances were different, lead to constitutional doubts is thus not necessary to justify the Court's decision.

Nevertheless, this dictum is strong evidence of how the Court would treat the Federal Noncitizen Voting Ban if its constitutionality were challenged. The Court's statements in *ITCA* about the limited scope of the Elections Clause reiterate the themes the Court expressed in *U.S. Terms Limits*, and they are a far cry from Justice Black's view in *Mitchell v. Oregon*.[275] These cases show how the Court's thinking about the interplay between the Elections Clause and the Voter Qualifications Clauses has evolved, with a majority of current Justices believing that the former vests Congress with ultimate power over federal election procedures and the latter vest states with power over voter qualifications.

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272. ITCA, 133 S.Ct. 2247, 2258 (2013) (quoting THE FEDERALIST NO. 60 (Alexander Hamilton)).

273. *See id.* at 2254.

274. *Id.* at 2259.

275. In a footnote in *ITCA*, the Court went as far as to expressly disclaim Justice Black's reasoning and endorse the views of the dissenting Justices in *Oregon v. Mitchell* who did not share his views on the Elections Clause. *Id.* at 2258 n.8.

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These cases, combined with the strong historical evidence that the Framers intended for Congress to have no role in determining who could vote in federal elections, show the argument that the Elections Clause allows Congress to ban noncitizens from voting—or anyone else from voting—has no leg to stand on. However, the Elections Clause is not the only provision in the Constitution that appears to give Congress such power.

VI. IMMIGRATION FEDERALISM

Outside of the Elections Clause and Suffrage Amendments, no constitutional provisions explicitly give the federal government electoral powers. However, various constitutional provisions delegate other powers to Congress that, at their peripheries, allow Congress to regulate some aspects of elections. For instance, the Supreme Court has upheld Congress's use of its tax and spending power under Article I, Section 8 to create a voluntary public campaign finance system for presidential elections.[276] Congress may also use its authority over the federal workforce to regulate the campaign activities of federal employees.[277] If constitutional provisions that are facially unrelated to elections give Congress some authority over elections, a new question is raised: can Congress use any of these provisions to impose voter qualifications?

Senator Simpson thought as much when he authored the Federal Noncitizen Voting Ban. He argued that Congress's power to regulate immigrants justified the Ban's constitutionality.[278] To understand the error of this claim requires an understanding of constitutional immigration doctrine and the history of noncitizen suffrage.

The Constitution says little about immigration directly. The clearest reference is in the Naturalization Clause of Article I, which empowers Congress to "establish an uniform Rule of Naturalization."[279] This is the only provision that explicitly allows Congress to regulate immigration. But as the Supreme Court has noted, how the United States treats citizens of other countries can have international ramifications.[280] To protect the

276. Buckley v. Valeo, 424 U.S. 1, 90–91 (1976).
277. United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 102–03 (1947).
278. 142 Cong. Rec. 8664–65 (1996) (statement of Sen. Simpson).
279. U.S. CONST. art. I, § 8, cl. 4.
280. Arizona v. United States, 567 U.S. 387, 394–95 (2012).

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federal government's constitutional role in overseeing foreign affairs, the Court has interpreted the Constitution to give Congress not only the authority to regulate naturalization but also to establish rules governing immigration generally.[281] This implicit federal immigration power emanates from several constitutional sources, including the Naturalization Clause, the portion of the Commerce Clause that allows Congress to regulate international commerce, and the federal government's inherent power to conduct foreign relations.[282]

The federal immigration power does not totally divest states of their own authority to regulate noncitizens, but the extent of state power varies depending on the type of regulation. Immigration policies come in two forms: "core immigration laws" (or simply immigration laws) and immigration-related "alienage laws."[283] Core immigration laws regulate the heart of immigrant affairs: the admission and deportation of noncitizens.[284] In contrast, alienage laws regulate the conduct and rights of noncitizens while they are present within the country.[285] Congress has power to adopt both types of laws, but as this Part explains, states are much more limited.[286]

A. CORE IMMIGRATION LAWS: STRUCTURAL PREEMPTION

The federal government alone decides who may immigrate and stay within the country.[287] Even in the absence of a conflicting federal statute, the Constitution "structurally preempts" states from adopting core immigration laws.[288] This

281. Arizona v. United States, 567 U.S. 387, 394–95 (2012); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of [C]ongress.").

282. Toll v. Moreno, 458 U.S. 1, 10 (1982); *Arizona*, 567 U.S. at 394–95.

283. For in-depth discussion of these legal categories, see Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 523–27 (2001) and Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013).

284. Abrams, *supra* note 273, at 603.

285. *Id.* at 618.

286. *Id.* at 606–07, 610–11.

287. *See* DeCanas v. Bica, 424 U.S. 351, 354–55 (1976) (stating that the "[p]ower to regulate immigration is unquestionably exclusively a federal power" and defining "regulation of immigration" as "determination[s] of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain").

288. Abrams, *supra* note 283, at 603, 606–07, 615. This is true even to the extent a state law regulation of admissions or deportations may overlap with another field of

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principle is perhaps best illustrated by one of the earliest Supreme Court cases that recognized federal authority over immigration: *Chy Lung v. Freeman*.[289] A California statute prohibited certain classes of noncitizens, including "lewd and debauched women," from entering the country if the master or owner of the vessel that transported them from overseas did not pay a bond.[290] A woman from China was denied entry under this law and detained aboard her vessel, but she was released into police custody after contesting her confinement.[291] The California Supreme Court considered her case and ordered she be denied admission to the country; she appealed to the U.S. Supreme Court arguing the statute was unconstitutional.[292]

The Court agreed with her and struck down the law.[293] Although the California statute did not violate a federal statute or rule, it was structurally preempted by the Constitution.[294] "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."[295] The Court reasoned, "If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."[296]

B. ALIENAGE LAWS: STATUTORY PREEMPTION

In contrast, Congress and state legislatures share authority

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law that traditionally has fallen within a state's historic police powers. *See* Henderson v. Mayor of City of New York, 92 U.S. 259, 272, 274 (1875) (holding that any state law attempting to restrict immigrant admissions "is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States"). *But see* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (arguing that federal control over core immigration laws is better explained by statutory preemption than structural preemption).

289. Chy Lung v. Freeman, 92 U.S. 275 (1875).

290. *Id.* at 276.

291. *Id.*

292. *Id.* at 276–77.

293. *Id.* at 281.

294. *Chy Lung*, 92 U.S. at 280.

295. *Id.* Strictly, *Chy Lung* only held that the power to *exclude* (or admit) immigrants was exclusively federal. The Court would later clarify that the power to "exclude" from admission was the same as the power to "expel." Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.").

296. *Chy Lung*, 92 U.S. at 280.

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to enact alienage laws.[297] Unlike Congress, states do not possess a specific "immigration power"; rather, a state's authority to regulate noncitizens' conduct stems from its general police powers.[298] States often regulate noncitizens in areas such as employment, land ownership, social services, and education.[299]

Nonetheless, state authority to enact alienage laws is restricted in ways that Congress's power is not. The foremost limitation is the Supremacy Clause: although state alienage laws are not structurally preempted by the Constitution, Congress may still *statutorily* preempt such laws.[300] To determine whether a state alienage law is statutorily preempted, a court will subject it to a traditional preemption analysis.[301]

The three traditional types of statutory preemption are express preemption, implied field preemption, and conflict preemption. Express preemption is the simplest; it occurs when a federal statute, on its face, prohibits certain state laws.[302] Implied field preemption occurs when Congress regulates an area of law so extensively it "occupies the field," rendering states powerless to pass any law within that field.[303] For instance, in *Arizona v. United States*, the Supreme Court struck down an Arizona alienage law that penalized immigrants for violating federal immigrant registration requirements. Because Congress had occupied the field of "alien registration law," states could not enact laws in that field—even if those laws complemented the

297. DeCanas v. Bica, 424 U.S. 351, 354–56 (1976) (explaining that state laws governing immigrants are not structurally preempted by Congress's immigration authority unless they regulate immigrant admissions or deportations, and determining that such laws are valid unless preempted by federal statutes).

298. *Id.* at 356 (holding that the state police power allowed California to prohibit employers from "knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers").

299. In addition to *DeCanas,* which concerned a state law regulating immigrant employment, examples of cases reviewing state alienage laws include Oyama v. California, 332 U.S. 633, 635–36, 647 (1948) (upholding state law prohibiting immigrants from owning or leasing agricultural land) and Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down state law banning undocumented immigrant children from receiving state-subsidized education at public schools).

300. *See DeCanas*, 424 U.S. at 357; *see also* Hines v. Davidowitz, 312 U.S. 52, 68 (1941) ("[T]he power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but . . . whatever power a state may have is subordinate to supreme national law.").

301. *See Hines*, 312 U.S. at 68.

302. *See, e.g.,* Arizona v. United States, 567 U.S. 387, 397–99 (2012).

303. *Id.* at 399–401.

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federal scheme.[304]

Conflict preemption occurs when a state law implicitly violates a federal statute in one of two ways: (1) by making compliance with both the state statute and federal statute impossible, or (2) by creating an obstacle to the fulfillment of the federal legislation's purpose. This type of preemption is also illustrated by *Arizona v. United States*, in which the Court separately struck down an Arizona alienage law that criminally punished undocumented immigrants who sought or obtained employment.[305] The Court held that Arizona's law stood as an obstacle to fulfilling the purposes of the Immigration Reform and Control Act, which Congress intentionally designed not to criminalize such conduct.[306]

In theory, and sometimes in practice, state alienage laws survive a statutory preemption analysis. But compared to other areas of law where Congress and the states share authority, the courts have circumscribed state alienage power to an unusual extent. Courts tend to be highly skeptical of state alienage laws, and some scholars argue that courts maintain an implicit presumption *in favor* of preemption[307]—a reversal of the usual norm.[308] In part, this might be explained by the murky distinction between "core immigration laws" and "alienage laws." Almost any alienage law could conceivably impact whether an immigrant enters or stays within the country and therefore intrude upon Congress's exclusive power over core immigration issues.[309] The greater the intrusion, the more likely courts will hold that a state alienage law is statutorily preempted.[310] Thus, even state power to regulate noncitizen conduct that does not directly touch upon admissions or deportations is constrained by

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304. Arizona v. United States, 567 U.S. 387, 399–401 (2012).

305. *Id.* at 403–06.

306. *Id.*

307. David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 122–24 (2013); *see also* Abrams, *supra* note 283, at 627 (arguing that the more a state alienage law implicates foreign relations, the more likely courts will hold that a federal law preempts it).

308. Traditionally, courts will not interpret a federal statute to "the historic police powers of the States . . . unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

309. For this reason and others, many scholars argue that the analytic difference between alienage laws and core immigration laws is meaningless and should be discarded. *See* Rubenstein, *supra* note 307, at 119–20; Matthew J. Lindsay, *Disaggregating "Immigration Law"*, 68 FLA. L. REV. 179, 193–94 (2016).

310. *See* Abrams, *supra* note 283, at 627.

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deference to Congress.

C. ALIENAGE DISCRIMINATION AND THE POLITICAL FUNCTION EXCEPTION

In addition to the constraints of preemption, the Equal Protection Clause limits how noncitizens can be regulated. The Supreme Court has held that classifications based on alienage, like those based on race or nationality, are inherently suspect and subject to close judicial scrutiny.[311]

Nonetheless, courts still routinely uphold laws discriminating against noncitizens, especially federal laws. Under the "plenary power doctrine," courts insulate core immigration laws from most constitutional challenges—even when noncitizens are deprived of rights normally protected by the Constitution—on the theory that Congress's authority over immigration flows is absolute.[312] Alienage laws are subject to closer scrutiny,[313] but even here, courts are unlikely to invalidate federal alienage laws. The only circumstance in which the Supreme Court has cast doubt on the federal government's power to discriminate against noncitizens has been when the executive branch sought to detain noncitizens indefinitely.[314]

In contrast, state alienage laws are often held to violate the Equal Protection Clause. The difference between state and federal power is illustrated by *Graham v. Richardson* and *Mathews v. Diaz*. In the former, the Supreme Court struck down a state law that restricted noncitizen access to welfare benefits as "invidious discrimination,"[315] but in the latter, it upheld a comparable federal law.[316] The Court reasoned that equal

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311. Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

312. *See generally* Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345 (2007) (discussing history and scope of the plenary power doctrine).

313. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 379 & n.18 (2004).

314. *See* Zadvydas v. Davis, 533 U.S. 678, 689–90, 695 (2001) (construing federal statute to allow temporary, but not indefinite, detentions of removable noncitizens whose home countries refuse their return, because indefinitely detaining noncitizens would raise serious constitutional doubts); *see* Clark v. Martinez, 543 U.S. 371, 377–78, 381 (2005) (extending the *Zadyydas* interpretation to detentions of excludable noncitizens whose home countries refuse their return).

315. Graham v. Richardson, 403 U.S. 365, 382–83 (1971).

316. Mathews v. Diaz, 426 U.S. 67, 87 (1976).

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protection principles demanded closer scrutiny of state alienage laws because "a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business."[317]

Nonetheless, the Equal Protection Clause does allow states to discriminate against noncitizens in some instances—including in allocations of the franchise. *Sugarman v. Dougall* is the first in a line of decisions that established the "political function" exception, which allows states to exclude noncitizens from influencing decisions that "go to the heart of representative government."[318] The Supreme Court in *Sugarman* struck down a New York law that prohibited noncitizens from working as public employees in competitive civil service positions.[319] But the opinion emphasized that if the law had prevented noncitizens from working in only those government positions that exercised policy discretion, it likely would have passed constitutional muster.[320] Such a law would, in the Court's view, be comparable to a state law excluding noncitizens from suffrage.[321] The Court recognized that it had never decided whether noncitizens had a constitutional right to vote but noted that "implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights."[322] This point remains dicta, but it echoes the traditional view that the states, not Congress, are responsible for imposing voter qualifications.

Paradoxically, *Sugarman* seems like a tempting case to use to justify the Federal Noncitizen Voting Ban: if states can disenfranchise noncitizens, and Congress can preempt state alienage laws, then could Congress not pass its own citizenship voter qualification? This reasoning stretches *Sugarman* too far. Not only is *Sugarman*'s pronouncement on noncitizen voting dicta,[323] the opinion says nothing about congressional authority,

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317. Mathews v. Diaz, 426 U.S. 67, 85 (1976).

318. Sugarman v. Dougall, 413 U.S. 634, 635–36, 646–47 (1973); *see also* Gregory v. Ashcroft, 501 U.S. 452, 461–63 (1991) (tracing the evolution of the political function exception).

319. *Sugarman*, 413 U.S. at 646.

320. *Id.* at 646–48.

321. *Id.* at 648–49.

322. *Id.* at 649.

323. For further discussion on *Sugarman*'s dicta, see Rosberg, *supra* note 10, at 1100–02.

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nor does it discuss the constitutional provisions that define the boundaries between state and federal electoral powers. These issues are fully analyzed in the next Part.

VII. THE CONSTITUTIONAL BORDERS TO CONGRESS'S POWER OVER VOTER QUALIFICATIONS

Despite the breadth of congressional authority to regulate noncitizens, the Constitution prevents Congress from imposing citizenship voter qualifications. This may seem doubtful at first glance; after all, Congress has exercised its immigration power in many fields that have traditionally been the domain of the states under the Tenth Amendment, such as education, employment, and land ownership.[324] Adding "voter qualifications" to this list may not seem like much of a stretch of federal power.

However, the Tenth Amendment is not the only constitutional provision that defines the boundary between federal and state authority. The Tenth Amendment is a "negative" limit on the federal government that excludes from federal authority any power not delegated to it. Other parts of the Constitution constrain how the federal government can use the powers that *are* delegated to it. These "affirmative" limits are exceptions to federal powers; they prevent Congress from adopting certain laws that the Tenth Amendment, by its own force, would allow.

After further exploring the concept of affirmative limitations, this Part argues Voter Qualifications Clauses are themselves affirmative limitations. For structural and historical reasons, these clauses grant states the exclusive power to establish voter qualifications—and thus prevent Congress from using any of its delegated powers, no matter how extensive they may be, from imposing qualifications on voters.

A. AFFIRMATIVE LIMITS ON CONGRESSIONAL AUTHORITY

Although the Tenth Amendment is the traditional check on federal authority, it is far from the strictest. So long as Congress acts within the scope of a delegated power, the Tenth Amendment lets Congress legislate as it pleases. The Tenth Amendment transforms constitutional silence into a limit on congressional

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324. *See* Oyama v. California, 332 U.S. 633 (1948); Plyler v. Doe, 457 U.S. 202 (1982).

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authority, but it does not narrow the extent to which Congress can use the powers it does have.[325]

In contrast, affirmative limits on congressional authority modify the scope of one or more of Congress's delegated powers. They are akin to exceptions to a general rule by recognizing that Congress has been delegated a general power and preventing Congress from using that power in a specific way.

Most affirmative limits are found in the Bill of Rights and Reconstruction Amendments. They prohibit the federal government from using its delegated powers to abridge fundamental individual rights, such as freedom of speech,[326] the right to a jury trial,[327] and due process.[328] Without these exceptions to federal authority, Congress could potentially use its Commerce Clause power to, for instance, prohibit people from criticizing certain businesses or use its currency power to summarily execute coin counterfeiters.

Other affirmative limits are designed to protect state sovereignty. The most famous of these "federalist" affirmative amendments is the Eleventh Amendment, which embodies the principle of state sovereign immunity.[329] In *Seminole Tribe of Florida v. Florida*, the Supreme Court considered Florida's constitutional challenge to a federal law that was passed pursuant to the Indian Commerce Clause.[330] This law allowed

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325. *See* cases cited *supra* note 299; United States v. Darby, 312 U.S. 100, 124 (1941) (describing the Tenth Amendment as stating "but a truism that all is retained which has not been surrendered" and construing the Amendment "as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end"); *see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985) (holding that the Tenth Amendment did not prevent Congress from regulating states, even in their sovereign capacities). The only scenarios in the Tenth Amendment that act as an affirmative limit on federal authority is when Congress attempts to directly command state legislatures to pass laws or state executives to administer federal programs; neither is permitted. New York v. United States, 505 U.S. 144, 176–77 (1992) (state legislatures); Printz v. United States, 521 U.S. 898, 935 (1997) (state executives); *see also* James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1278, 1283–86 (1994) (contrasting the Tenth Amendment's reservation of powers with affirmative limitations on Congressional authority and discussing the anti-commandeering exceptions).

326. U.S. CONST. amend. I.

327. *Id.* art. III, § 2; *Id.* amends. VI, VII.

328. *Id.* amends. VII, V.

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

330. Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 47 (1996).

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Native American tribes to sue states that failed to negotiate with them in good faith to form compacts regulating certain gaming activities. The Court recognized that the Tenth Amendment did not reserve to the states any power to regulate commerce with Native American tribes; such authority belonged exclusively to Congress.[331] Nonetheless, the Court struck down the law for unconstitutionally abrogating state sovereign immunity in contravention of the Eleventh Amendment: "[e]ven when the Constitution vests in Congress *complete* law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power . . . and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[332]

In other words, when considering whether a federal law unconstitutionally infringes upon state sovereignty, the analysis does not necessarily stop once the court determines that the law does not exceed the scope of Congress's delegated powers. In some circumstances, an area of law might be "completely" federal, yet Congress's control over it remains restricted by states' rights provisions other than the Tenth Amendment.

The Eleventh Amendment is not the only federalist affirmative limitation the Supreme Court has opined upon. In *Garcia v. San Antonio Metropolitan Transit Authority*,[333] the Court similarly characterized the New States Clause, which governs how Congress may admit new states to the union,[334] as categorically restraining Congress from using its state admission authority to merge multiple states together or create new states within existing states without first obtaining the consent of the affected state legislatures.[335] The Court acknowledged that affirmative limitations on congressional power are few, but noted that they are distinct from the Tenth Amendment because they "carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."[336]

This type of restriction on congressional authority thus

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331. Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 47 (1996).
332. *Id.* at 72–73 (emphasis added).
333. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985).
334. U.S. CONST. art. IV, § 3, cl. 1.
335. *See Garcia*, 469 U.S. at 551.
336. *Id.* at 550.

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functions entirely differently than the Tenth Amendment. The Tenth Amendment ensures that Congress may legislate only within the boundaries of its constitutionally-assigned powers, but it does not dictate how Congress may operate within those boundaries. In contrast, affirmative limitations like the Eleventh Amendment and New States Clause prohibit Congress from exercising its assigned powers in certain ways. Even if in some areas of law, such as commerce with Native American tribes and immigration regulation, Congress's authority may be so broad that the Tenth Amendment reserves no exclusive power to the states, the Constitution does not give Congress a license to ignore those provisions that categorically limit how it can exercise its authority.

B. THE VOTER QUALIFICATIONS CLAUSES AS GRANTS OF EXCLUSIVE POWER TO THE STATES

Falling within the ranks of these affirmative limits are the Voter Qualifications Clauses. Although they are not explicitly phrased as constraints on federal authority, the Constitution's history and structure indicate that the Voter Qualifications Clauses grant to each state an *exclusive* power to impose voter qualifications in federal elections. The clauses thus forbid Congress from using any of its delegated powers from imposing voter qualifications—regardless of how broad those powers may be.

1. HISTORICAL CONTEXT OF THE ORIGINAL VOTER QUALIFICATIONS CLAUSE

Just as constitutional history shows the limited reach of the Elections Clause, so too does it show that the Voter Qualifications Clauses prohibit Congress from using any of its delegated powers to establish voter qualifications. Some of this history was discussed in Part V, but it is equally applicable in demonstrating the meaning of the Voter Qualifications Clauses.

The Framer's intent for the original Voter Qualifications Clause of Article I is most vividly illustrated by the debate over Gouverneur Morris's proposed amendment to the draft Voter Qualifications Clause. Recall that during the Constitutional Convention, he proposed deleting the language requiring federal voter qualifications be linked to state voter qualifications and replacing it with language explicitly allowing Congress to create

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its own voter qualifications.[337] His proposal was driven by his misgiving about making federal voter qualifications "depend[ent] on the will of the states."[338] Oliver Ellsworth retorted that "[t]he states are the best Judges of the circumstances and temper of their own people."[339] His sentiment was echoed by James Madison, Benjamin Franklin, and Pierce Butler, all of whom unambiguously declared that the Voter Qualifications Clause should give only the states the power to disenfranchise voters.[340] Their view carried the day; Morris's amendment overwhelmingly failed.[341]

Not only does this exchange demonstrate that the Framers intended for the original Voter Qualifications Clause to grant power to the states, it also shows that they intended for the states to be the *exclusive* arbiters of voter qualifications. Besides Morris, those who spoke at the Convention emphatically resisted giving Congress any power to disenfranchise.[342] More importantly, all of them—Morris included—spoke as if the only way Congress could have such power was if the Constitution explicitly granted it.[343] Since Morris's amendment was defeated, the Framers did not feel the need to place more explicit language in the original Voter Qualifications Clause denying Congress such power; its meaning was understood.

Even if the Framer's words are ignored, ample circumstantial evidence confirms that the Voters Qualifications Clause is meant to grant states exclusive authority to impose voter qualifications. Before the Constitution was ratified, states were the only entities that could conceivably impose voter qualifications. Federal elections did not yet exist, and the Articles of Confederation gave the Continental Congress no power to regulate state elections.[344] The states alone determined how to allocate suffrage within their borders.

When the Constitution was ratified, it did not disturb this

337. 2 RECORDS, *supra* note 175, at 201 (comments of Morris).

338. *Id.* (comments of Morris).

339. *Id.* (comments of Ellsworth).

340. *Supra* p. 484.

341. 2 RECORDS, *supra* note 175, at 206.

342. *See supra* p. 484.

343. *See id.*

344. The Articles stated that members of the Continental Congress were to be "annually appointed in such manner as the legislatures of each State shall direct." ARTICLES OF CONFEDERATION of 1781, art. V, para. 1.

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state electoral power; it simply added to it. Rather than define voter qualifications for federal elections in the Constitution directly, the Framers tied them to the qualifications used in state elections.[345] Since the original state power to establish qualifications in state elections was exclusive, the coextensive power to establish qualifications in federal elections must also be exclusive.

This reasoning could be countered with an argument that the Voter Qualifications Clauses are not meant to limit congressional authority but merely to restrict both Congress and the states from creating two electorates—one for state elections, the other for federal elections. By tying together voter qualifications in state and federal elections, the Voter Qualifications Clauses indisputably achieve this goal. If this were *all* they were meant to accomplish, then the Clauses would not grant states exclusive authority over voter qualifications in federal elections, and Congress would be free to impose some voter qualifications using its delegated powers.[346]

However, other historical evidence shows that the unification of state and federal electorates for the sake of consistency is not the only reason, nor even the principal reason, the Framers inserted the original Voter Qualifications Clause into the Constitution. Their main motivation was to limit federal power. In addition to the discussion of Morris's rejected amendment, Hamilton remarked in the Federalist Papers that voter qualifications in federal elections are "unalterable by the [federal] legislature."[347] Adams similarly said that "the right of suffrage . . . ought not to be left to be regulated by the [federal] Legislature."[348] Absolute expressions such as these signify that the Framers meant for voter qualifications to be beyond Congress's authority without exception.

Had the Framers intended for Congress to play a role in establishing voter qualifications, they would have said this in the Constitution explicitly, as they did when delegating other electoral powers to Congress.[349] In designing the Elections

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345. *See* U.S. CONST. art. I, § 2, cl. 1.

346. This view assumes that Congress cannot use the Voter Qualifications Clauses to create state voter qualifications. *See supra* Part V(A)(1).

347. THE FEDERALIST NO. 60 (Alexander Hamilton).

348. 2 RECORDS, *supra* note 175, at 203 (comments of Madison).

349. This reasoning echoes the familiar canon of statutory construction, "[W]here Congress includes particular language in one section of a statute but omits it in

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Clause to grant states the authority to regulate federal election procedures, the Framers made clear that Congress could "make or alter" those regulations.[350] In contrast, the Voter Qualifications Clauses do not include any mention of congressional authority.[351] Since the Framers chose to explicitly state that the Elections Clause was *not* an exclusive grant of power to the states, the lack of similar language in the Voter Qualifications Clauses implies that those clauses *do* afford states an exclusive power.

2. AVOIDING CONSTITUTIONAL SURPLUSAGE

Furthermore, if states do not possess *exclusive* power to set federal voter qualifications, then the Voter Qualifications Clauses accomplish little more than the Tenth Amendment would by its own terms.[352] Had the Framers chosen not to specify whether Congress or the states could establish federal voter qualifications, the Tenth Amendment would have reserved states that power by default. Yet this power would not have been exclusive. To the extent Congress could have shoehorned voter qualification laws under the scope of one or more of its delegated powers, the Tenth Amendment would have tolerated them. By interpreting the Voter Qualifications Clauses to grant states an *exclusive* authority to impose voter qualifications, they serve a distinct role from the Tenth Amendment and are saved from being constitutional surplusage.

This argument is in some tension with the Supreme Court's view in *U.S. Term Limits* that the Tenth Amendment cannot "reserve" to the states power over federal elections, since federal elections did not exist before the Constitution was ratified—but the two are reconcilable.[353] Under the Court's reasoning, if states were to have any power over federal elections, then the Constitution should have affirmatively granted states that

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

350. U.S. CONST. art. I, § 4, cl. 1 (Elections Clause).

351. *Compare* U.S. CONST. art. I, § 4, cl. 1 (Elections Clause) *with* U.S. CONST. art. I, § 2, cl. 1 *and* U.S. CONST. amend. XVII, § 1 (Voter Qualifications Clauses).

352. U.S. CONST. amend. X ("The powers not delegated to the Unites States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

353. U.S. Term Limits v. Thornton, 514 U.S. 779, 802 (1995).

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power—regardless of whether it was exclusive or concurrent.[354] However, the Court in *U.S. Term Limits* could conveniently point to other constitutional provisions that supplied the content of federal candidate qualifications.[355] If the Constitution were *completely* silent on the subject—not spelling out any such qualifications directly, while also not delegating power to decide qualifications to either Congress or the states—then the Court would have needed to decide which of the two levels of government could establish them. In such a circumstance, the Court would have been forced to either jettison its reasoning that the Tenth Amendment cannot reserve what never existed and give primary (but not exclusive) power over federal candidate qualifications to the states, or it would have had to assign that power exclusively to the federal government. Most likely, the Court would have followed the usual understanding of the Tenth Amendment and deferred to the states, since the principle of limited powers applies strongly against the federal government throughout constitutional law.

Similarly, in the absence of the Voter Qualifications Clauses, the Tenth Amendment would have reserved to the states a primary—but not exclusive—power to establish voter qualifications. Thus, if the Voter Qualifications Clauses reserved to states concurrent power over voter qualifications, then they would unnecessarily duplicate an effect of the Tenth Amendment. Undermining this point is the historical fact that the Tenth Amendment did not exist at the time that the original Voter Qualifications Clause of Article I became effective, and therefore this result is less absurd than it seems. But when the Constitution was ratified, the Framers understood it to already contain the principle of limited federal power that the Tenth Amendment later codified.[356]

Moreover, well after the Tenth Amendment was ratified, the Framers of the Seventeenth Amendment created the second Voter

354. U.S. Term Limits v. Thornton, 514 U.S. 779, 802 (1995).

355. U.S. CONST. art. I, § 2, cl. 2.; § 3, cl. 3.

356. *See* THE FEDERALIST NO. 32 (Alexander Hamilton) ("[A]s the plan of the [Constitutional] [C]onvention aims only at a partial union or consolidation [of the states], the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."); *see also* ARTICLES OF CONFEDERATION OF 1781, art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

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Qualifications Clause for Senate elections.[357] This further indicates that the clauses play a role different than a narrow prototype of the Tenth Amendment, or else it would not have been necessary to add a second clause. By interpreting the Voter Qualifications Clauses as giving the states sole power to impose federal voter qualifications, they are elevated from constitutional surplusage to a key feature of American federalism.

3. *ITCA* REDUX AND THE SUPREMACY OF THE VOTER QUALIFICATIONS CLAUSES

The Supreme Court has also indicated that the Voter Qualifications Clauses give states exclusive authority to impose voter qualifications. Although not a constitutional case, a background question in *ITCA* was whether, and to what extent, Congress could interfere with state authority to impose voter qualifications.[358] The Court indicated that the Voter Qualifications Clauses give states authority to establish voter qualifications in federal elections, and although it did not explicitly say that *only* the states have such authority, its reasoning compels this conclusion.[359]

Recall that in *ITCA*, federal and state law imposed different requirements on people using the Federal Form to register to vote.[360] The NVRA required voter registration applicants using the Federal Form to affirm their citizenship under penalty of perjury. Arizona law required that applicants additionally provide documentary proof of citizenship.[361] The Supreme Court held that the NVRA preempted Arizona's requirement.[362]

An issue the Court considered was whether the NVRA unconstitutionally interfered with Arizona's right under the Voter Qualifications Clauses to impose voter qualifications.[363] The Court characterized Arizona's documentary proof-of-citizenship requirement as a tool designed to enforce Arizona's separate citizenship voter qualification law,[364] and it explained that state authority to impose voter qualifications must also allow states to

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357. *See* U.S. Const. amend. XVII.
358. ITCA, 133 S.Ct. 2247, 2257–58 (2013).
359. *Id.*
360. *Id.* at 2251.
361. *Id.*
362. *Id.* at 2260.
363. *ITCA*, 133 S.Ct. at 2257–59.
364. *Id.* at 2259 n.9.

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pass laws enforcing those qualifications.[365] The Court thus reasoned that if a federal law "precluded" states from enforcing their citizenship voter qualifications, then it would probably violate the Voter Qualifications Clauses.[366] In other words, assuming state-imposed voter qualifications are not impermissibly discriminatory,[367] Congress cannot overturn them or make them impossible to enforce.[368]

This principle implies that the states alone possess authority to establish voter qualifications. If the Voter Qualifications Clauses prevent Congress from destroying state-imposed voter qualifications, then they also must prevent Congress from directly imposing its own qualifications on voters. In either instance, Congress defines the electorate and instructs states on who they can or cannot turn away from polls. The harm inflicted is identical; states are deprived of their "constitutional authority to establish qualifications . . . for voting."[369]

Significantly, the Court announced this principle in a case that implicated one of Congress's broadest preemptive powers: the authority to regulate immigration. Arizona's documentary proof-of-citizenship requirement was a classic alienage law designed to single out noncitizens for different treatment.[370] Since Congress can preempt state alienage laws with little fear of violating the Tenth Amendment, the Court could have simply characterized the dispute in *ITCA* in terms of immigration doctrine and avoided any discussion of constitutionality. Instead, the Court went out of its way to recognize that independent of the Tenth Amendment, the Voter Qualifications Clauses prevent Congress from usurping state power over citizenship voter qualifications.[371] This makes evident that even when Congress

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365. ITCA, 133 S.Ct. 2247, 2258–59 (2013) ("[T]he power to establish voting requirements is of little value without the power to enforce those requirements.").

366. *Id.*

367. The Court did not purport to disturb the understood exceptions for enforcing the Fourteenth Amendment and Suffrage Amendments. *See supra* Part IV(B).

368. *See ITCA*, 133 S.Ct. at 2258.

369. *See id.* at 2257.

370. Although the documentary proof of citizenship law applied to every Federal Form applicant regardless of their citizenship status, and thus did not *itself* treat noncitizens differently, similar "sorting" laws have been upheld as state alienage laws. *See* Arizona v. United States, 567 U.S. 387, 409–16 (2012) (upholding as consistent with federal law a state requirement that police officers verify the immigration status of any person they stop for a lawful purpose and suspect is an undocumented immigrant).

371. *See ITCA*, 133 S.Ct. at 2257–59.

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legislates using its broad immigration power, it is not immune from the affirmative limitations of Voter Qualifications Clauses.

This should lay to rest the debate over whether Congress's immigration authority allows it to disenfranchise noncitizens. The Federal Noncitizen Voting Ban prevents states from determining whether noncitizens should be able to vote, inflicting the same harm on state sovereignty over voter qualifications that concerned the Court in *ITCA*. Simply pointing to Congress's immigration authority is not enough to save the law, because *ITCA* also indicates that the Voter Qualifications Clauses place affirmative limits on Congress even when it regulates noncitizens. The reasoning behind *ITCA* inexorably leads to one conclusion: the Federal Noncitizen Voting Ban, and any other congressionally-imposed voter qualification, is unconstitutional.

C. CONSTITUTIONAL COLLISION: CONGRESS'S EXCLUSIVE POWERS AND STATES' RIGHTS UNDER THE VOTER QUALIFICATIONS CLAUSES

Even though the Voter Qualifications Clauses grant states exclusive authority to establish voter qualifications, Congress may attempt to impose a voter qualification using one of its own exclusive powers. For instance, Congress could attempt to salvage the Federal Noncitizen Voting Ban by recasting it as a core immigration law. To do this, Congress could amend the Ban to penalize noncitizen voters by directly subjecting them to deportation. States are structurally preempted from passing deportation laws, and Congress would be legislating in area where it has exclusive control.[372] But the Ban would still condition voter eligibility on citizenship, and states have exclusive power to establish voter qualifications. In this collision of "exclusive" powers, something must give; they cannot both be truly exclusive.

Because of the Supremacy Clause, one might instinctively assume that when state and federal constitutional powers conflict, the federal power is supreme. But the Supremacy Clause does not purport to create an internal hierarchy of constitutional powers, and it offers no guidance on how to resolve federalism disputes involving coequal constitutional provisions.[373] In a

372. *See* Part VI(A), *supra*, for a discussion of Congress's exclusive power over core immigration laws.

373. *See* U.S. CONST. art. VI, cl. 2.

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challenge to a federal deportation statute that applies to noncitizen voters, the federal government and an opposing state could equally claim that the Constitution delegates to it alone a supreme power that the other is usurping.

Fortunately, courts are often tasked with interpreting laws that have conflicting components and have developed a wealth of case law to guide their decision making. Five tools courts use to reconcile these disputes are (1) legislative and constitutional history,[374] (2) the principle that an explicit provision supersedes the possible implications of other provisions,[375] (3) the rule that specific provisions govern general provisions,[376] (4) the doctrine of implied repeals,[377] and (5) the constitutional avoidance canon.[378]

Of these, the last two tools do not help resolve a conflict between exclusive congressional and state constitutional powers. The doctrine of implied repeals instructs courts to invalidate an old provision when a newer provision irreconcilably conflicts with it.[379] It is of little help when the contradictory provisions were enacted simultaneously. The constitutional avoidance doctrine is similarly unhelpful because it instructs courts to, where possible, give effect to laws that do not raise serious constitutional doubts.[380] This doctrine has no effect when interpreting the Constitution itself.

The remaining three tools are applicable, and each reveals that the states' authority over voter qualifications triumphs. The first tool, constitutional history, has already been discussed at length—and it supports the argument that the state authority should prevail. The history of the Constitution is replete with examples of the Framers discussing how the states alone, not Congress, have the authority to establish voter qualifications. No historical record shows the Framers ever contemplated any exceptions that would allow Congress to use its delegated powers,

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374. LARRY M. EIG, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 29, at 43–46 (2011).

375. *See* ITCA, 133 S.Ct. 2247, 2258 (2013).

376. LARRY M. EIG, *supra* note 374, at 10.

377. *Id.* at 30.

378. *Id.* at 23.

379. However, implied repeals are disfavored. For a comprehensive discussion of this canon, see generally Watt v. Alaska, 451 U.S. 259 (1981).

380. *See* Rescue Army v. Mun. Court of City of Los Angeles, 331 U.S. 549, 569 (1947) (declaring that the judiciary avoids constitutional questions "if the record presents some other ground upon which the case may be disposed of; . . . or if a construction . . . is fairly possible by which the question may be avoided.").

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including its immigration power, to impose voter qualifications.[381]

Additionally, state voter qualification supremacy is supported by the principle that constitutional provisions *expressly* governing an area of law prevail over provisions that could be read to *implicitly* govern that area.[382] When the Supreme Court said in *ITCA* that voter qualifications were not "manner" regulations, it reasoned that "[o]ne cannot read the Elections Clause as treating implicitly what these other constitutional provisions [the Voter Qualifications Clauses] regulate explicitly."[383] This reasoning can equally apply to other constitutional provisions that delegate authority to Congress: none of them mention voter qualifications. The Voter Qualifications Clauses, alone of all constitutional provisions, explicitly regulate voter qualifications. Other provisions cannot implicitly give Congress authority over voter qualifications when the Voter Qualifications Clauses explicitly give such power to the states.

Finally, state authority to impose voter qualifications prevails because of the canon of construction *generalia specialibus non derogant*. It instructs the judiciary to interpret laws such that specific provisions govern general provisions.[384] The Voter Qualifications Clauses gives states power over one specific field—voter qualifications—making it much narrower than the broader provisions giving Congress authority over immigration, interstate commerce, or other fields that may overlap with elections. As a narrow grant of power to the states, the Voter Qualification Clauses supersede these general grants of power to Congress afforded by other constitutional provisions.

This principle has been applied to cabin Congress's constitutional authority before in a strikingly similar way. In *Railway Labor Executives' Ass'n v. Gibbons*, the Supreme Court considered a constitutional challenge to a federal statute requiring a single bankrupt company, the Railway Labor Executive Association ("Railway Labor"), to pay benefits out of its estate to former employees who could not find new jobs.[385] Railway Labor argued that because the statute regulated the

381. For further discussion, see Parts V and VII(A) of this Article.

382. *See* ITCA, 133 S.Ct. 2247, 2258 (2013).

383. *Id.*

384. 82 C.J.S. Statutes § 482 (West 2017).

385. Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 457, 465 (1982).

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terms of its bankruptcy, the statute was passed pursuant to the Bankruptcy Clause,[386] which lets Congress "establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States."[387] Since the statute targeted only *one* company in bankruptcy, Railway Labor argued it was unconstitutional because it was not a "uniform" bankruptcy regulation.[388] The government countered that the law could be justified under the Commerce Clause, which allows Congress to regulate interstate commerce and contains no uniformity requirement.[389]

The Court agreed with Railway Labor, holding that the statute fell under the gambit of the Bankruptcy Clause[390] and failed to satisfy that Clause's uniformity requirement.[391] More importantly, the Court dismissed the idea that Congress could use its broader authority under the Commerce Clause to enact nonuniform bankruptcy regulations.[392] Since the Bankruptcy Clause granted Congress a narrower power over the field of bankruptcy, the Court refused to allow Congress to use its wider Commerce Clause power to achieve what the Bankruptcy Clause implicitly forbade. To hold otherwise would have "eradicate[d] from the Constitution a limitation on the power of Congress to enact bankruptcy laws."[393] In other words, the specific limits of the Bankruptcy Clause govern the general terms of the Commerce Clause.

The relationship between these clauses is almost identical to the relationship between Congress's immigration power (and other broad powers) and the Voter Qualifications Clauses. Congress's immigration authority, like its Commerce Clause power, allows it to legislate over a wide field of law. Like the Bankruptcy Clause, the Voter Qualifications Clauses grant a narrower power (here, to the states) over a distinct but overlapping field of law—voter qualifications. Just as the Bankruptcy Clause's narrow grant of power to adopt uniform bankruptcy laws prevents Congress from using wider constitutional powers to pass nonuniform laws, the Voter

386. *See* Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 457, 465 (1982).
387. U.S. CONST. art. I, § 8, cl. 4 (emphasis added).
388. *See Ry. Labor Executives' Ass'n*, 455 U.S. at 469–70.
389. *Id.* at 468.
390. *Id.* at 467–68.
391. *Id.* at 471.
392. *Id.* at 468–69.
393. *Ry. Labor Executives' Ass'n*, 455 U.S. at 469.

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Qualifications Clauses' narrow grant of power to the states constrains Congress from using wider constitutional powers to pass voter qualifications. If Congress did use its immigration power, or any other power, to achieve what the Voter Qualifications Clauses forbade, it would destroy a constitutional restriction on Congress's authority.

Cases like *Railway Labor* illustrate how the Constitution can be, at times, in tension with itself. Fortunately, the judiciary's interpretive tools ensure such tensions are not fatal. In the clash between states' exclusive authority to impose voter qualifications and Congress's own exclusive powers over other fields of law, using these tools leads to the one conclusion: the states' authority is supreme.

VIII. CONCLUSION

The Voter Qualifications Clauses prevent Congress from imposing qualifications on voters for no small reason. The Framers designed the Constitution to foster democracy, and to help achieve that goal, they denied the federal government the power to exclude people from political participation. The states alone were given the sacred responsibility of choosing who is ineligible to vote. Despite respecting the Framers' design initially, Congress decided to flout it by creating the Federal Noncitizen Voting Ban—and more congressionally-imposed voter qualifications are rapidly approaching. Federal disenfranchisement, once inconceivable in this country, is now a reality.

This subversion of the Constitution cannot stand. Congress must repeal the Federal Noncitizen Voting Ban and cease its efforts to deprive people of the right to vote. If Congress refuses, then the courts must intervene and strike down any voter qualification it creates. By vigorously safeguarding the exclusive right of the states to impose voter qualifications, we can end the tyranny of federal disenfranchisement that the Framers strove to prevent.

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