Introduction

The Lost Story of Federal Voting Rights Enforcement

Questions about the scope of Congress's authority over voting rights and election administration have long shaped American constitutional debate. Today, that tension is more acute than ever, and the uncertainty over where federal power ends and state sovereignty begins has made even modest legislation vulnerable to judicial invalidation. In recent years, the U.S. Supreme Court has been especially aggressive in policing the boundaries of congressional authority, sharply limiting Congress's ability to remedy systemic inequities and instead asserting that control of the franchise rests primarily with the states. Yet the Court's approach overlooks a deeper historical truth. From the founding era to the present, Congress has at times asserted its power robustly and creatively, even in periods of judicial obstruction, and its role in shaping the nation's electoral landscape has always been pivotal – even when contested, uneven, or ineffective.

Take, for example, the election of Charles Miller Shelley, a brigadier general in the Confederate Army and, later, a congressman representing Alabama's Fourth Congressional District. While Shelley has been lost to history, he was no different than many other Democrats in the late 1870s. He first served as a soldier in the "Lost Cause," and then, following the Confederacy's defeat, embraced a brutal formula for regaining and holding political office in the post–Reconstruction South: violence, intimidation, and the wholesale suppression of Black votes. Shelley's voter suppression efforts paid significant dividends for his political ambitions. The congressional district that he would go on to represent was a Democratic gerrymander that had packed many of the state's Republican and African American voters in the district.[1] Yet Shelley had good reason to believe that his quest to win the seat in the majority Republican district would be successful. In his first congressional run in 1876, Democrat Shelley was able to emerge victorious because voters split between

[1] "Smith v. Shelley," in James H. Ellsworth (ed.), *Digest of Election Cases: Cases of Contested Elections in the House of Representatives, Forty-Seventh Congress* (Washington, D.C.: Government Printing Office, 1883), p. 19 ("The census returns of 1880 now show that there are now in the counties composing the district 135, 881 persons of the negro race and 32, 855 white persons" and there is "a majority of 18,000 Negro Republican voters over white Democratic voters in the district.").

the two Republican candidates. His next re-election campaign in 1878 was easier than his 1876 effort because of the Democrats' overwhelmingly successful voter suppression tactics in that short two-year period: Shelley received 55 percent of the vote even though, in terms of whole numbers, he received almost 9,000 fewer votes than he had in his plurality win two years earlier.[2] The trend held and Shelley was re-elected in 1880 and again in 1882.

Thanks to adverse court decisions during this period, Black voters in the fourth district faced an uphill battle in challenging their disenfranchisement, difficulties that should have guaranteed Shelley's victory for the foreseeable future. In *United States v. Reese*, decided in March of 1876, the Supreme Court invalidated Section 4 of the Enforcement Act of 1870, which provided criminal penalties for "all persons who shall, by force, bribery, threats, intimidation, or other unlawful means, … hinder, delay, prevent, or obstruct … any citizen from doing any act required to be done to qualify him to vote or from voting at any election[.]"[3] Congress enacted the 1870 Act pursuant to its power under both the Fifteenth Amendment, which prohibits race-based voting discrimination, and the Elections Clause of Article I, Section 4, which empowers Congress to enact legislation that governs the time, place, and manner of federal elections.

In invalidating Section 4, the Court ignored that the statute was predicated on dual sources of authority. Focusing solely on Congress's power to enforce the Fifteenth Amendment, the Court held that the statute exceeded the scope of this authority by criminalizing the actions of state officials for any denial of the ballot rather than just race-based denials.[4] According to the Court, "states, as a general rule, regulate[] in their own way all the details of all elections."[5] Because the Fifteenth Amendment did not alter this basic structure, Section 4 represented "a radical change in the practice and…should be explicit in its terms."[6]

For most students of this period, the judicial invalidation of Section 4 of the Enforcement Act was the end of the story for the unfortunate voters in the fourth district, and a triumph for Southern Redeemers laying the groundwork for a White ruling class to govern after the withdrawal of federal troops from the South.[7] But the

[2] Ibid.

[3] *United States v. Reese*, 92 U.S. 214, 217 (1876) (quoting Act of May 31, 1870, 16 Stat. 140 (1870)). The Court also invalidated Section 3 of the statute, which penalized election officials who wrongfully prevented individuals from performing actions necessary to qualify as voters. Ibid., 218.

[4] Ibid., 219 (arguing that Section 4 of the Act interfered with the state's authority to choose the qualification of electors).

[5] Ibid.

[6] Ibid.

[7] See, e.g., Ellen D. Katz, "Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts' (2003) 101 *Michigan Law Review* 2341–2408, 2348, 2350–2352 (noting that "*Reese* and *Cruikshank* thwarted federal power to protect the southern black population and facilitated the end of Reconstruction"); ibid., n. 54 (detailing the scholarly consensus on *Reese* and *Cruikshank*). *But see* Michael Perman, *Struggle for Mastery:*

real story was complicated – more accurately described as a historical labyrinth – and, for this reason, has been easy to overlook.

Intervention actually came not from the courts, but from Congress itself. The House of Representatives, acting pursuant to its authority to judge the elections of its members under Article I, Section 5,[8] set aside Shelley's 1882 re-election in the Fourth Congressional District because of the extensive disenfranchisement of Black voters. During the election, Democratic County supervisors never opened the polls in Black precincts but manned polling places in majority White locations so that votes could be cast for Shelley.[9] The failure to open polling locations was often followed by stern warnings from election administrators about the illegality of voting in the absence of inspectors.[10] Other supervisors refused to count the election day returns from majority-African American precincts, deeming the votes legally insufficient.[11] In areas where African Americans voted despite the active interference of election officials, ballots were turned over to the sheriff of the County, yet no returns were ever delivered to the election supervisors.[12] Those ballots that were delivered were "held to be irregular, informal, and insufficient" under state law and therefore not counted.[13]

Alabama law provided that election administrator and inspector "malconduct, fraud, or corruption" in the counting of votes was sufficient to challenge an election, but this provision was not effective in preventing the disenfranchisement of Black voters.[14] Instead, it was the House Committee on Elections, when assessing the legality of Shelley's election, who determined that the failure to count legally-cast ballots from qualified voters rendered the election invalid. The Committee concluded, "[T]here must have existed a well-planned and previously arranged conspiracy on the part of Democratic election managers … but such a scheme, if formed, cannot be allowed to be successful, as the committee have no difficulty on the proof in finding that an election was held according to law and what the vote actually was."[15]

Because of these voting irregularities, the Committee determined that the votes of African American electors had been illegally discarded. Once these votes were

Disenfranchisement in the South 1888–1908 (Chapel Hill: UNC Press, 2003) (discussing how Black people continued to vote and build coalitions with other racial groups for decades after the presumed end of Reconstruction).

8 "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." United States Constitution Art. I, s. 5.

9 "Smith v. Shelley," in Ellsworth, *Digest of Election Cases*, p. 37.

10 Ibid., p. 32.

11 Ibid., p. 22.

12 Ibid. (discussing Martin's Precinct, Dallas County and noting that the "ballots were counted, the returns made out, placed in a box, and returned to the sheriff of the county and delivered to him, but when opened by the county supervisors no returns found and none counted").

13 Ibid., p. 36.

14 Ala. Code chap.4, Art. I, § 302(1) (1876).

15 "Smith v. Shelley," in Ellsworth, *Digest of Election Cases*, p. 36.

counted, Congress determined that the actual winner of the election was the contestant, Republican James Q. Smith, rather than Shelley, who had been declared the winner by the state.

The contested election case of *Smith v. Shelley* is a paradigmatic example of how Article I, Section 5, in expressly delegating to Congress the power to judge the elections of its members, became a powerful tool to address race discrimination in voting through means other than judicial enforcement of the Fourteenth and Fifteenth Amendments. The Amendments had significantly broadened the scope of federal power over elections, but unfavorable court decisions and decreased federal military oversight after the 1876 presidential election had neutered their effectiveness.[16] But up to, and even after, the supposed end of Reconstruction, an emboldened Congress used its other constitutional powers over elections – some of which had long lain dormant – to shape state political systems, even as White Southerners aggressively pushed for a return to the racial hierarchy that predated the Civil War.[17] The mid-to-late nineteenth century contains a rich and overlooked history that reveals a repository of federal authority over elections that was triggered (or ignored) less for reasons of federalism, and more so due to pragmatic, principled, or partisan considerations.

In Congress We Trust? Enforcing Voting Rights from the Founding to the Jim Crow Era seeks to disrupt the federalism narrative that has assumed an outsized role in debates over the future of our democracy, offering a new perspective on federal power over elections. Courts and commentators have assumed that the states are supreme in election regulation, but as *Smith v. Shelley* illustrates, Congress's institutional role vis-à-vis the courts and the states in regulating voting and elections has been much more extensive and involved than the legal scholarship has acknowledged to date.

Congressional power is multi-faceted, deriving from the Constitution's individual rights provisions like the Fourteenth and Fifteenth Amendments, which empower that body to enforce the Amendments' terms against the states through "appropriate" legislation.[18] As most scholars recognize, the right to vote protected by these

[16] See generally *Slaughter-House Cases*, 83 U.S. 36 (1872); *Civil Rights Cases*, 109 U.S. 3 (1883).

[17] See, e.g., Chandler Davidson, "The Voting Rights Act: A Brief History," in Bernard Grofman and Chandler Davidson (eds.), *Controversies in Minority Voting: The Voting Rights Act in Perspective* (Washington, D.C.: Brookings Inst., 1992), p. 8 ("In its Reconstruction Act of 1867, passed over [President Andrew] Johnson's veto, Congress required as a condition for readmission to the Union that the rebel states call conventions, to which blacks could be elected as delegates, in order to devise new constitutions guaranteeing voting rights to black men. By the time registration was completed that year, more than 700,000 southern blacks were on the rolls, comprising a majority of registered voters in several former Confederate states.").

[18] Section 1 of the Fourteenth Amendment provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendments is undoubtedly important for understanding the scope of federal power over elections.[19] But our understanding of the scope of this right, particularly when conceptualized as an exercise of political power, is unduly narrow.

During the antebellum era, political rights consisted of a state-defined right to vote, mostly exercised by White men,[20] and a natural right to alter or abolish government, nominally retained by everyone.[21] These rights fall under the umbrella of what I term the "Constitution of Political Rights."[22] With the ratification of the Fourteenth and Fifteenth Amendments, Reconstruction radically changed the

United States Constitution Amend. 14, s. 1. The Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to protect a fundamental right to vote in state elections, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), and the Voter Qualifications Clause of Article I, Section 2, requiring federal voters to "have the qualifications requisite for the electors of the most numerous branch of the state legislature," to create a right to vote in federal elections. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Similarly, the Fifteenth Amendment reads:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

United States Constitution Amend. 15, s. 1. The enforcement provisions in the Fourteenth and Fifteenth Amendments are identical: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." United States Constitution Amend. 14, s. 5, United States Constitution Amend. 15, s. 2.

[19] Franita Tolson, "The Constitutional Structure of Voting Rights Enforcement" (2014) 89 *Washington Law Review* 379–439; Travis Crum, "The Superfluous Fifteenth Amendment?" (2020) 114 *Northwestern Law Review* 1549–1630; Henry L. Chambers, Jr., "Colorblindness, Race Neutrality and Voting Rights" (2002) 51 *Emory Law Journal* 1397–1468; Katz, "Reinforcing Representation"; Michael T. Morley, "Remedial Equilibration and the Right to Vote under Section 2 of the Fourteenth Amendment" (2015) 2015 *University of Chicago Legal Forum* 279–329.

[20] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).

[21] In paragraph 2, the Declaration of Independence decreed that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." United States Declaration of Independence, para. 2 (1776). The right to abolish the government was enshrined, with similar language, in some state constitutions that were ratified the same year. For example, the relevant clause in the Pennsylvania state constitution reads as follows: "[T]he community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal." Constitution of the State of Pennsylvania art. V (1776). The word "majority" was used to qualify "community" in a similar clause in the Constitution of Virginia: "[A] majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal." Constitution of the State of Virginia s. 3 (1776). This right was also contemplated by the Founders as they debated the U.S. Constitution, as evidenced by James Madison's invocation of the "transcendent and precious right of the people to 'abolish or alter their governments' as justification for a new Constitution." James Madison, "The Federalist 40," in John C. Hamilton (ed.), *The Federalist: A Commentary on the Constitution of the United States* (Philadelphia: J.B. Lippincott & Co., 1864), p. 315.

[22] Other political rights include the right to serve on a jury and run for political office. See Akhil R. Amar, "The Bill of Rights as a Constitution" (1992) 100 *Yale Law Journal* 1131–1210, 1164. These rights are beyond the scope of this book. See also Travis Crum, "The Unabridged Fifteenth Amendment" (2024) 133 *Yale Law Journal* 1039–1161.

nature of these rights, who can exercise them and, importantly, which government (state or federal) was charged with their protection.

Federal authority to regulate voting and elections also derives from structural provisions of the Constitution that are less widely studied. These provisions serve as express delegations of power to Congress, rather than the courts, the executive branch, or the states. I refer to these provisions collectively as the "Constitution of Political Structure":

- The Guarantee Clause of Article IV, Section 4, through which Congress "guarantee[s] to every State in this Union a Republican Form of Government";[23]
- The Elections Clause of Article I, Section 4, which allows Congress to "make or alter" state regulations governing the "Times, Places, and Manner" of federal elections;[24]
- Article I, Section 5, which empowers each house of Congress to "be the Judge of the Elections, Returns, and Qualifications of its own members";[25] and
- Section 2 of the Fourteenth Amendment, which requires Congress to penalize states that abridge or deny the right to vote by reducing their representation in the House of Representatives.[26]

While the individual rights provisions of the Fourteenth and Fifteenth Amendments receive an outsize amount of scholarly attention and commentary, this book focuses primarily on how these provisions interact with the Constitution of Political Structure, and in doing so, enrich a narrative that has been incomplete. As this book argues, one of the overlooked legacies of the Reconstruction project is that congressional power to regulate state and federal elections was significantly broader

[23] United States Constitution Art. IV, s. 4. This provision states:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[24] United States Constitution Art. I, s. 4. The text reads:

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

[25] United States Constitution Art. I, s. 5.

[26] United States Constitution Amend. 14, s. 2. This section provides that:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

when Congress acted pursuant to its authority under the Constitution of Political Structure, or alternatively, enacted legislation pursuant to more than one source of constitutional authority under the Constitutions of Political Structure and Political Rights. This legislative framework stands apart from the legal fiction that currently exists – that Congress regulates elections, both state and federal, in a singular, clause-bound fashion, the perimeter of which is determined by our federalist system. Yet, it is this latter interpretation, which gained prominence after Congress completely retreated from its multi-clausal approach in enforcing Reconstruction at the turn of the twentieth century, that currently holds sway in the Supreme Court's jurisprudence.

I.1 CAN CONGRESS DO THAT? CRAFTING ELECTION POLICY AMID JUDICIAL UNCERTAINTY

In the 1950s and 1960s, the greatest barrier to meaningful civil rights legislation was not the Supreme Court; instead, it was the Senate filibuster. Sitting in juxtaposition to this fact is that one of the greatest advocates for civil rights during this period was the Senate majority leader, and later President, who had stolen the 1948 Democratic Senate primary election – his first theft was a 1930 college election[27] – by stuffing the ballot box in a majority-minority precinct in a remote Texas County.[28] Thanks to precinct thirteen in Jim Wells County, Lyndon Baines Johnson defeated former Texas governor Coke Stevenson by eighty-seven votes. This precinct was controlled by the head of the Democratic Machine in South Texas, George Berham Parr (the so-called "Duke of Duval"[29]) who used fraudulent votes to help Johnson eke out the win in repayment for Johnson's assistance in helping Parr to obtain a presidential pardon for his income tax conviction two years earlier.[30] This fraud would not have been possible but for Parr's control of the Latino vote in the County until 1975, depriving these voters of any meaningful control over selecting their candidate of choice.[31]

Odd start for a man who stewarded some of the earliest civil rights legislation through the Senate in the 1950s, and as President in the 1960s, delivered the most

[27] Robert A. Caro, *The Years of Lyndon Johnson: The Path to Power* (New York: Penguin Books, 1981), p. 25 ("To obtain the power that he wanted, Lyndon Johnson, who was alleged to have won his seat in the United States Senate in a stolen election in 1948, stole his first election at college, in 1930…He was, in fact, so deeply and widely mistrusted at college that the nickname he bore during all his years there was 'Bull' (for 'Bullshit') Johnson.").

[28] Robert A. Caro, *The Years of Lyndon Johnson: The Means of Ascent* (New York: Vintage Books, 1990), p. 187.

[29] Ibid., p. 186.

[30] Ibid., p. 191 (noting that "Coke Stevenson was going into the campaign with his great popularity. But before the campaign began, Johnson had a 25,000-vote head start.").

[31] David Montejano, *Anglos and Mexicans in the Making of Texas, 1836–1986* (Austin: University of Texas Press, 1987).

expansive federal legislation to protect minorities in a century.[32] On June 11, 1964, a bipartisan majority of the Senate voted, for the first time, to end a filibuster of a federal civil rights bill, invoking cloture after 75 days and clearing the way for the passage of the Civil Rights Act of 1964.[33] Earlier civil rights bills, enacted in 1957 and 1960, had only seen the light of day because Johnson, as Senate majority leader, had negotiated compromises with the southern bloc to ensure passage (although these compromises had substantially weakened the impact of these bills).[34] Seeking to avoid similar difficulties with the proposed Voting Rights Act, President Johnson conferred with the relevant stakeholders behind closed doors, gaining agreement on key terms among civil rights leaders, civic leaders, authorities from southern states, and key Republican congressmen prior to introducing the measure on Capitol Hill.[35]

The passage of the Voting Rights Act of 1965 represented a watershed moment for federal voting rights policy, comprehensively changing our political system rather than adhering to the incremental change that had defined federal intervention up to that point.[36] It was clear that the question of whether Congress had the power to enact this legislation was as much a question about political will and maneuvering as it was about constitutional constraints. Yet, in the more than half century since the passage of the Voting Rights Act, Congress has consistently tied its own hands when enacting

[32] Caro, *The Means of Ascent*. In 1948, Johnson ran for the Senate as a traditional states' rights, segregationist southern politician. According to his biographer, Robert Caro:

> On civil rights, [Johnson] attacked President Truman's attempts to create a FEPC [Fair Employment Practices Committee] ('because if a man can tell you whom you must hire, he can tell you whom you cannot employ'), and to end the poll tax (because "it is the province of the state to run its own elections'). He was against the proposed laws against lynching "because the federal government has no more business enacting a law against one form of murder than against another.'

Ibid., 196.

[33] John H. Averill, "Civil Rights Bill: Swift Senate Passage Expected Filibuster Silenced, 71 to 29," *Los Angeles Times*, June 11, 1964; "Senate Approves 1, Defeats 3 Rights Bill Amendments: Byrd Starts All-Night Filibuster," *Atlanta Daily World*, June 10, 1964.

[34] "Advance Agreement on Voting Rights Sought: President Johnson, Aids Consult with Negro Leaders, GOP on New Legislation," *Los Angeles Times*, March 9, 1965.

[35] Ibid.

[36] Section 5 of the Voting Rights Act ("VRA") requires covered states to, prior to implementing changes to their voting laws, seek confirmation from the federal government that the proposed changes do not establish a "qualification, prerequisite, standard, practice, or procedure" for voting that has "the purpose and … the effect of denying or abridging the right to vote on account of race or color." Voting Rights Act of 1965, Pub. L. No. 89–110, codified as amended at 52 U.S.C. § 10301 (2012), s. 5. Section 5 prohibits those changes that have a "retrogressive" effect on minority communities – i.e., minorities are worse off under the new law than its predecessor. *Beer v. United States*, 425 U.S. 130, 141–142 (1976). Under the VRA, nine states – mostly in the deep South, along with a few jurisdictions scattered throughout several other states – were covered by Section 5 until the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), which invalidated the Act's coverage formula. United States Department of Justice, "Jurisdictions Previously Covered by Section 5," www.justice.gov/crt/jurisdictions-previously-covered-section-5 [https://perma.cc/BBE3-Z28J] (last updated November 29, 2021).

new legislation, feeding into the judicially crafted fantasy that Congress's power over elections must be rarely used, narrowly construed, and specifically targeted.

Congress's acquiescence in these artificially constructed boundaries was on full display when the 116th Congress introduced its very first bill in the House of Representatives, H.R. 1, aptly titled the "For the People Act of 2019."[37] Proposed pursuant to the Elections Clause, H.R. 1 was Congress's most ambitious attempt to restructure our system of federal elections in a generation. Among other things, the bill addresses campaign spending, expands voter registration, proposes independent redistricting commissions, prohibits felon disenfranchisement, and bolsters election security.[38] By upending the manner in which federal elections are traditionally regulated, which is primarily through state law, H.R. 1 would have been one of the most novel and expansive exercises of federal power over elections in decades.[39] Had it ever become law, however, H.R. 1 would have been on a collision course with one of the most conservative Supreme Courts in history. Congress has regulated federal elections at various points in our history, but federal legislation has become relatively rare as the Court has increasingly rejected the expansive exercise of federal authority in this domain.

During its short lifespan, the bill saw its fair share of opposition. For example, the Heritage Foundation, a conservative think tank and lobbying organization,[40] argued that H.R. 1 is unconstitutional because the proposed law would interfere with the states' constitutional authority to determine voter qualifications and administer elections.[41] Its report on the bill alleged that H.R. 1 would "[s]eize the authority of states to regulate voter registration and the voting process by forcing states to implement early voting, automatic voter registration, same-day registration, online voter registration, and no-fault absentee balloting."[42]

Congress's reliance on the Elections Clause as the sole justification for the 2019 version of the Act invited this critique. Although the subject of the Clause is the

[37] For the People Act of 2019, H.R. 1, 116th Cong. (2019).

[38] In March 2019, the House passed H.R. 1 by a vote of 234 to 193, but then Majority Leader Mitch McConnell did not bring the bill to the Senate floor. Ella Nilsen, "House Democrats Just Passed a Slate of Significant Reforms to Get Money Out of Politics," *Vox*, March 8, 2019, www.vox.com/2019/3/8/18253609/hr-1-pelosi-house-democrats-anti-corruption-mcconnell [https://perma.cc/CJV8-NKMG] (describing H.R. 1 as "dead on arrival in the Senate"). The bill was reintroduced in the 117th Congress as H.R. 1, the "For the People Act of 2021." For the People Act of 2021, H.R. 1, 117th Cong. (2021).

[39] The VRA and in particular, its preclearance regime, imposed federal oversight for certain state political systems. Voting Rights Act of 1965, Pub. L. No. 89–110, codified as amended at 52 U.S.C. § 10301 (2012). The Elections Clause gives Congress comprehensive power to regulate federal elections and does not require any continuing evidence of racial discrimination for federal oversight to remain valid. See Franita Tolson, "Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act" (2012) 65 *Vanderbilt Law Review* 1195–1259, 1228–1233.

[40] Heritage Foundation, "About Heritage," www.heritage.org/about-heritage/mission [https://perma.cc/6B4L-PHCJ].

[41] Heritage Foundation, "The Facts about H.R. 1 – The For the People Act of 2019," February 1, 2019, www.heritage.org/sites/default/files/2019-02/FS_182_0.pdf [https://perma.cc/E85Q-HH2M].

[42] Ibid., 1.

"times, places, and manner" of federal elections,[43] H.R. 1 arguably went further, with provisions that also had implications for voter qualifications such as its requirement that individuals with felony convictions be enfranchised for federal elections.[44]

In the 2021 version of H.R. 1, Congress heeded this message. Relying on the Elections Clause, the Guarantee Clause, and the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, the 117th Congress reintroduced H.R. 1, now titled the "For the People Act of 2021," as the first bill in both the House and the Senate (as S.R. 1) in the new Congress. Congress attempted to short circuit the federalism-based arguments that threatened to derail the first H.R. 1 by invoking additional constitutional provisions that empower it to regulate both voter qualification standards and the time, places, and manner of federal elections. Notably, these are not provisions that fell out of the sky in the two years between versions of the bill; rather, their inclusion reflected Congress's belated realization that it had substantially underestimated the scope of its own authority.[45] Although these bills never became law,[46] H.R. 1/S.R. 1 could provide a practical blueprint for how

[43] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." United States Constitution Art. 1, s. 4.

[44] Franita Tolson, "The Elections Clause and the Underenforcement of Federal Law" (2019) 129 *Yale Law Journal Forum* 171–184.

[45] See Statement of Franita Tolson, *The Elections Clause: Constitutional Interpretation and Congressional Exercise*, H. Comm. on House Admin., 117th Cong. (July 12, 2021) (written testimony), available at https://docs.house.gov/meetings/HA/HA00/20210712/112883/HHRG-117-HA00-Wstate-TolsonF-20210712.pdf; Statement of Franita Tolson, *Evidence of Current and Ongoing Voting Discrimination*, Subcomm. on the Const., C.R. & C.L. of the H. Comm. on the Judiciary, 117th Cong. (July 27, 2021) (written testimony), available at https://docs.house.gov/meetings/JU/JU10/20210727/113962/HHRG-117-JU10-Wstate-TolsonF-20210727.pdf; Statement of Franita Tolson, *Restoring the Voting Rights Act: Combating Discriminatory Abuses*, Subcomm. on the Const. of the S. Comm. on the Judiciary, 117th Cong. (September 22, 2021) (written testimony), available at www.judiciary.senate.gov/imo/media/doc/Tolson%20Testimony1.pdf.

[46] In September 2021, a key Democratic Senator who opposed H.R. 1/S.R. 1 in its current form, Senator Joe Manchin from West Virginia, worked with a group of Democratic Senators to propose a narrower version of national legislation – The Freedom to Vote Act. Wendy R. Weiser, Daniel I. Weiner, and Emil M. Pablo, "Breaking Down the Freedom to Vote Act," Brennan Center for Justice, September 23, 2021, www.brennancenter.org/our-work/research-reports/breaking-down-freedom-vote-act [https://perma.cc/M9NC-ZSBN]. In January 2022, Senate Democrats combined into an omnibus election bill the Freedom to Vote Act with another proposed piece of voting legislation: The John Lewis Voting Rights Act. Brian Naylor, "The Senate is Set to Debate Voting Rights: Here's What the Bills Would Do," *National Public Radio*, January 18, 2022, www.npr.org/2022/01/18/1073021462/senate-voting-rights-freedom-to-vote-john-lewis-voting-rights-advancement-act [https://perma.cc/NK4B-2LFY[. That bill, otherwise known as the Voting Rights Advancement Act, or H.R. 4, was passed by the House on December 6, 2019, and would respond to the Supreme Court's decision in *Shelby County v. Holder*, which struck down the coverage formula for the Voting Rights Act of 1965. Caitlyn Oprysko, "House Passes Voting Rights Package Aimed at Restoring Protections," *Politico*, December 16, 2019, www.politico.com/news/2019/12/06/house-passes-voting-rights-package-077112 [https://perma.cc/NG8S-YWPV]. On January 18, 2022, the day after Martin Luther King Jr.'s Birthday (observed), Senate Democrats brought the combined Freedom to Vote / John R. Lewis Voting Rights Advancement Act to the floor for debate. Carl Hulse, "Senate Opens Voting Rights Debate, With Legislative Defeat Looming," *New York Times*, January 18,