NOTES

A VOTE PROPERLY CAST? THE CONSTITUTIONALITY OF THE NATIONAL VOTER REGISTRATION ACT OF 1993

> As long as ours is a representative form of government, . . . the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.
> —*Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

> [I]nherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible.
> —*Oregon v. Mitchell*, 400 U.S. 112, 124 (1970).

INTRODUCTION

The United States of America has long been an inspiration to others as a model of democratic government. Beginning with the colonial battle cry "no taxation without representation" over 200 years ago, Americans, despite their many differences, have long agreed that government must rest on the consent of the people as determined at the ballot box. The right to vote, which was once limited to white male property owners, now extends to any person meeting minimum age, residency, and citizenship qualifications. In effect, nearly every American age 18 or older may cast a ballot in a local, state or federal election.

Ironically, however, fewer and fewer Americans are exercising this right. The United States undoubtedly has one of the lowest voter participation rates in the industrialized world.[1] Voter turnout for presidential elections tends to exceed that for all other elections, and yet barely half of eligible Americans have voted in recent presidential contests.[2] Turnout for local,[3] state,[4] primary,[5] and off-year congressional elections[6] has been even lower. In effect, less than half the American population decides

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1. During the 1980s, the highest voter turnout rate in an industrialized country in which voting was not mandatory occurred in Belgium at 94%. Of major European nations, West Germany had 87% voter turnout during this same period, the United Kingdom 74%, and France 70%. Only Switzerland, at 49%, had a lower turnout rate during the 1980s than the United States. RUY A. TEIXEIRA, THE DISAPPEARING AMERICAN VOTER 8 (The Brookings Institute ed. 1992).

2. Turnout for the 1988 presidential election was 52.8%. TEIXEIRA, *supra* note 1, at 1. This amount improved to 54% in 1992. S. REP. NO. 6, 103d Cong., 1st Sess. 2 (1993).

3. For example, less than 21% of eligible voters cast their ballots in the March 14, 1995 special election held to fill a vacant City Council seat in San Jose, California. Mary Anne Ostrom and Scott Herhold, *Dando, Maben Face May Runoff*, S.J. MERC. NEWS, Mar. 15, 1995, at 1B.

4. In the statewide November 1994 election in California, only 36.4% of eligible voters participated. Jerome Karabel, *If Clinton Turns Right, Democrats Will Lose*, S.F. EXAM., Dec. 9, 1994, at A21.

5. For instance, in the June 1994 primary in California only 35% of eligible voters cast their ballots. *Id.*

6. Only 36% of the eligible electorate participated in the 1986 and 1990 elections for Congress.

who shall occupy the elected offices of the nation's cities, states, and federal government.

For a people who have always taken great pride in their democratic heritage, this is an ironic circumstance indeed. While the American electorate admittedly can influence the political process in a variety of other ways, when it comes to actually casting a ballot the United States is fast becoming the world's leading non-participatory democracy. Tens of millions of eligible voters regularly remain on the sidelines and play no role in this element of the American political process.[7] This trend has worsened steadily since the early 1960s.[8]

According to the United States Congress, however, this state of affairs is not an immutable one. In an effort to increase citizen participation in federal elections.[9] Congress recently passed the National Voter Registration Act of 1993 ("NVRA" or the "Act").[10] President Bill Clinton signed the Act into law on May 20, 1993, and for most states it became effective on January 1, 1995.[11] This Article explores whether passage of NVRA was a valid exercise of the constitutional power of Congress to regulate federal elections, but first some background information on the intent behind the statute and its provisions is in order.

Noting that the explanation Americans most frequently offer for not voting is that they are not registered, Congress singled out state voter registration laws[12] as one cause of the low turnout rate.[13] While debating NVRA, Congress labeled these procedures "discriminatory and unfair," and an unreasonable hindrance on the fundamental right to vote.[14] Declaring that "[i]t is the duty of the Federal, State and local govern-

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TEIXEIRA, *supra* note 1, at 6. This amount increased to 38.8% in 1994. Kevin Galvin, *Voters Found to be 'De-aligning' from Parties*, S.J. MERC. NEWS, June 26, 1995, at 4A.

7. Approximately 44% of eligible voters did not participate in the 1992 presidential election. H.R. REP. NO. 9, 103d Cong., 1st Sess. 3 (1993).

8. Turnout for the 1960 presidential election was 65%. However, 1968 was the last contest in which turnout exceeded 60%. Since then, voter participation has hovered between 52-57%. This decline is especially precipitous when compared with voter turnout for presidential elections last century: between 1840 and 1916 voter participation only once dipped below the 60% level, and turnout of 80% of eligible voters was not unusual. TEIXEIRA, *supra* note 1, at 9.

9. To avoid numbing repetition and for purposes of style, the terms "federal election" and "congressional election" are used interchangably in this Article, even though the latter is technically part of the former.

10. 42 U.S.C. § 1973gg et seq. (Supp. 1993).

11. To say that NVRA was enacted under politically charged circumstances would be putting it mildly. Similar legislative efforts had been made as far back as the 1970s, only to fall victim to partisan bickering over a range of issues. More recently, President George Bush vetoed a "motor voter" bill in 1992. Were it not for a two-year window (1993-95) in which Democrats controlled both Congress and the White House, NVRA likely never would have become law. Republicans in the 103rd Congress almost uniformly opposed it, claiming such detailed regulation of voter registration, even for federal elections, unjustly interfered with state sovereignty, imposed unreasonable costs on states, and increased opportunities for voter fraud. *See* Minority Views, S. REP. NO. 6, *supra* note 2, at 50-57; H.R. REP. NO. 9, *supra* note 7, at 34-37.

12. All 50 states except North Dakota have some form of advance or election-day registration. For detailed analyses of how state voter registration laws burden potential voters, see Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615 (1987); Mark Thomas Quinlivan, Note, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. PA. L. REV. 2361 (1989).

13. Congress acknowledged that many elements factor into a full explanation of why voter turnout is so low in the United States, but enacted NVRA on the ground that the law "is one positive action Congress can take to give the greatest number of people an opportunity to participate." H.R. REP. NO. 9, *supra* note 7, at 3.

14. S. REP. NO. 6, *supra* note 2, at 2; H.R. REP. NO. 9, *supra* note 7, at 5.

ments to promote the exercise" of the right to vote, NVRA requires states to adopt uniform voter registration procedures for federal office elections.[15]

By simplifying and expanding the registration process, NVRA seeks to increase voter participation in federal elections. While debating the Act two years ago, Congress noted that at least 85—90% of registered voters cast their ballots in recent presidential elections.[16] Yet, before NVRA, only about 60% of eligible Americans were registered to vote.[17] Congress therefore reasoned that at least part of the solution to the low turnout problem lies in getting more people to register.[18]

NVRA's prescriptions for the registration process are thorough and quite detailed.[19] Under the Act, states must allow all applicants for driver's licenses to register to vote on the same form—commonly referred to as "motor voter."[20] Registration forms also must be made available at most state public agencies, including libraries, schools, county clerk's offices, and welfare bureaus.[21] Further, NVRA provides for uniform (and convenient) mail and day-of-election registration.[22] Detailed rules govern when state election officials may purge voters from registration lists.[23] One important deviation from most state laws is that voters, so long as they have not moved, may not be purged simply for not voting.[24]

NVRA thus is a frontal assault on the burdens state registration laws have placed in the past on the right to vote.[25] The onus of initiating the registration process has clearly shifted from the citizen to state government.[26] Now, in states that have fully

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15. As defined by NVRA, "Federal office" refers to the Senate, House of Representatives, President, and Vice President. NVRA took this definition from the Federal Election Campaign Act of 1971. See 2 U.S.C. § 431(3). NVRA's limitation to federal elections is required by the Constitution: it was reaffirmed in Oregon v. Mitchell that Congress has no authority to regulate local and state elections, other than to rid them of constitutional infirmities. 400 U.S. 112 (1970). In practice, however, NVRA will have a substantial impact on state registration procedures because currently only two states (Illinois and Mississippi) separate registration for federal elections from that for state and local contests. The remaining 48 states maintain a unitary system of voter registration. Telephone Interview with Holly Wiseman, Assistant U.S. Attorney, Civil Rights Division, Voting Section, U.S. Department of Justice (Aug. 29, 1995).

16. S. REP. NO. 6, *supra* note 2, at 2; H.R. REP. NO. 9, *supra* note 7, at 3.

17. H.R. REP. NO. 9, *supra* note 7, at 3. Elections experts have calculated that there were 190 million eligible voters in the United States at the beginning of 1995. However, only 120 million of these were registered to vote. B. Drummand Ayres, Jr., *Law to Ease Voter Registration Has Added 5 Million to the Rolls: But Ultimate Success Hinges on Actual Turnout*, N.Y. TIMES, Sept. 3, 1995, at 1, 27.

18. S. REP. NO. 6, *supra* note 2, at 2; H.R. REP. NO. 9, *supra* note 7, at 3.

19. In Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1413 (9th Cir. 1995), the U.S. Court of Appeals for the Ninth Circuit criticized the Act as a "complex statute of ten sections bearing the marks of legislative draftsmanship similar to those borne by the Internal Revenue Code." See discussion of this case *infra* at note 37.

20. 42 U.S.C. § 1973gg-3.

21. 42 U.S.C. § 1973gg-5.

22. 42 U.S.C. §§ 1973gg-2 & 4.

23. 42 U.S.C. §§ 1973gg-6(c) & (d).

24. 42 U.S.C. § 1973gg-6(a)(3).

25. Studies done before NVRA was enacted concluded that eliminating three particular impediments—closing dates, purging for non-voting, and being able to register only during working hours—would account for the vast majority of the increase in turnout. Teixeira, *supra* note 1, at 12. NVRA eliminates the latter two impediments, but allows states to maintain a closing date of no more than 30 days. The "motor voter" element of the Act is also expected to be effective because approximately 85-90% of eligible voters obtain or renew a driver's license every four years. S. REP. NO. 6, *supra* note 2, at 5.

26. The United States is the only Western democracy lacking some form of compulsory or auto-

implemented NVRA, requests for clerical assistance in most state offices must be met with the following reply, or something like it: "How can I help you? And, by the way, would you like to register to vote? Here are the forms."[27] Congress apparently intended this result: "It must be remembered that the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority."[28]

While there are obviously no guarantees that new registrants will actually turn out on election day, NVRA represents the federal government's attempt to turn around the currently abysmal rate of electoral participation.[29] At least with regard to increasing voter registration, the law has had an immediate impact. Initial data suggest that voter registration has already markedly increased in states that have fully complied with NVRA.[30] Nationally, approximately five million voters were registered during the first eight months that the law was in effect.[31] The bulk of the new registrations have taken place at state departments of motor vehicles.[32]

Besides its broad sweep, the most striking aspect about the Act is its imperative tone. States are required to do whatever is necessary, including amending their own constitutions, to comply with the law's detailed provisions.[33] All costs of administering the law are borne by the states, with no financial assistance from the federal government. Even though the majority of states already had some form of agency-based and mail registration before NVRA,[34] and the costs of implementing the law are far from clear,[35] the unfunded mandate element of the law has been the source of

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matic registration. James, *supra* note 12, at 1631. The American system of placing the entire burden of registration on the individual has been described elsewhere as "obsolete." Quinlivan, *supra* note 12, at 2376.

27. 42 U.S.C. § 1973gg-5(a)(6)(B)(i).

28. S. REP. NO. 6, *supra* note 2, at 3.

29. Various studies done by political scientists using statistical models concluded that liberalizing registration procedures would increase voter turnout by 7-9%. *See generally* TEIXEIRA, *supra* note 1, at 110-112.

30. Twenty-six states saw registration rates increase three to thirteen times above normal levels during the first month (January 1995) that NVRA was in effect. Elizabeth Spaid, *'Motor-Voter' May Steer Future Election Outcomes Rather than Boon for Democrats, Law Prompts Flood of Independents*, CHRIST. SC. MONITOR, Apr. 3, 1995, at 3. Referring to the drastic increase in registration rates, Georgia Secretary of State Max Cleland remarked: "We have never witnessed anything like this in Georgia history." Ben Smith III, *Motor Voter Law Driving up Registration Rates in Ga.*, ATLANTA J./ATLANTA CONST., Mar. 4, 1995, at C1.

31. B. Drummond Ayres, Jr., *Law to Ease Voter Registration has Added 5 Million to the Rolls, N.Y. TIMES, Sept. 3, 1995, at 1. It has been estimated that the law might register 20 million new voters by the November 1996 elections. Spaid, supra* note 30, at 3. Long-term projections vary, but optimistic estimates predict that 80-85% of the eligible electorate, or 40 million additional voters, might be registered under NVRA by the year 2000. Ayres, at 1.

32. Telephone Interview with Holly Wiseman, *supra* note 15. See also Ayres, *supra* note 31, at 1.

33. 42 U.S.C. § 1973gg-2(a).

34. Prior to NVRA, 27 states and the District of Columbia had some form of both "motor voter" and mail registration. Fourteen of these states also permitted voters to register at other state agencies. S. REP. NO. 6, *supra* note 2, at 7.

35. The Congressional Budget Office estimated that it would cost states and municipalities approximately $20 million per year for each of the first five years to comply with NVRA. S. REP. NO. 6, *supra* note 2; H.R. REP. NO. 9, *supra* note 7. U.S. Postmaster General Marvin Runyon testified before Congress that the Act would cost the U.S. Postal Service $2.1 million in 1995, because it requires the Service to provide third-class rates to voter registrars. Greg Pierce, *Postal Chief says 'Motor-Voter' Will Eventually Force Rate Boost*, WASH. TIMES, May 5, 1995, at A8. Other cost estimates vary widely. For example, a spokesman for U.S. Senator Paul Coverdell (R-Ga.) put the figure at $3 million annually, plus $6.6 million in initial costs, for Georgia alone. Interview with Chris Allen (National

considerable political consternation.

More precisely, as this Article went to press on November 1, 1995, six states had been sued by the U.S. Department of Justice[36] for non-compliance with NVRA: California,[37] Pennsylvania,[38] Illinois,[39] South Carolina,[40] Michigan,[41] and Virginia.[42] Most of these states have refused to comply on Tenth Amendment[43] grounds, claiming that NVRA unconstitutionally infringes on the sovereign independence of state government agencies.[44] Several governors have also expressed concerns about possible increases in voter fraud. As a result of these lawsuits, the legal jousting over

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Public Radio broadcast, Apr. 4, 1995). The State Department of Finance in California initially estimated that it would cost the state $38 million per year to implement the law; former California Secretary of State Tony Miller, however, put the figure closer to $5 million. L.A. TIMES, Jan. 24, 1995, at 1. California Governor Pete Wilson later revised his estimate to $18 million per year. S.F. CHRON., July 25, 1995, at A11. Congressman Paul Gillmor (R-Oh.) claimed it will cost Ohio $20 million per year to comply with NVRA, but offered no evidence to support this estimate. Gillmor, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. LEGIS. 395 (1993).

36. NVRA permits the Attorney General to enforce the law and also creates a private right of action. 42 U.S.C. § 1973gg-9.

37. The battle over NVRA in California started in the summer of 1994 when Gov. Wilson ordered state agencies not to comply with the Act until Congress appropriated funds to offset California's implementation costs. Governor's Exec. Order No. W-98-94 (Aug. 12, 1994). On July 24, 1995, the U.S. Court of Appeals for the Ninth Circuit in Voting Rights Coalition v. Wilson declared NVRA to be constitutional. 60 F.3d 1411 (9th Cir. 1995). The Ninth Circuit's decision affirmed the U.S. District Court's ruling in Wilson v. United States, 878 F.Supp. 1324 (N.D. Cal. 1995). As a result of a permanent injunction issued by the district judge, California has been complying with NVRA since June 19, 1995, pending the outcome of further appeals. On October 23, 1995, Gov. Wilson asked the Supreme Court to review the Ninth Circuit's ruling. California's petition for writ of certiorari was still pending when this article went to press.

38. In Ass'n of Community Org. for Reform v. Ridge, 1995 U.S. Dist. LEXIS 3933 (E.D. Pa. March 30, 1995) (mem.), NVRA was upheld by a U.S. District Court in Pennsylvania. As a result of that decision, Pennsylvania immediately began complying with NVRA and did not pursue additional legal challenges.

39. On June 5, 1995, the U.S. Court of Appeals for the Seventh Circuit upheld NVRA in Ass'n of Community Org. for Reform v. Edgar, 56 F.3d 791 (7th Cir. 1995), *aff'g* 880 F. Supp. 1215 (N.D. Ill. 1995). Shortly thereafter, Illinois began complying with NVRA and declined to file a petition for writ of certiorari with the U.S. Supreme Court. However, Illinois at that time opted to switch to a dual registration system, so that voters in that state will have to register separately for state or local elections. Only federal elections in Illinois will be governed by NVRA. See Ass'n of Community Org. for Reform v. Edgar, 1995 U.S. Dist. LEXIS 8147, at *2 (June 8, 1995) (mem.).

40. In one of his last official acts before leaving office, outgoing Governor Carroll Campbell vetoed NVRA compliance legislation in January 1995. The U.S. Attorney General filed suit against South Carolina one month later. On November 10, 1995, U.S. District Court Judge Matthew Perry upheld NVRA and ordered South Carolina to comply with the Act.

41. Governor John Engler signed NVRA compliance legislation into law in January 1995, but soon afterwards ordered some state agencies not to comply with NVRA. On December 13, 1995, a U.S. District Court in Michigan ordered the state to implement the act.

42. Governor George Allen vetoed NVRA compliance legislation in May 1995. On July 3, 1995 several public interest organizations sued Virginia in federal court to force it to comply with NVRA. The U.S. Department of Justice joined the lawsuit three days later. On October 3, 1995, a U.S. District Court in Virginia rejected the state's constitutional challenge, and Gov. Allen shortly thereafter declared that he would comply with the Act.

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

44. Political dimensions continue to surround the debate over NVRA: each of the six states sued thus far for non-compliance has a Republican governor. Not all states, however, have been so dour about implementing the new law. An official with the Indiana State Elections Board described the mood there as one of "excitement" over NVRA's potential to increase voter participation in Indiana. Telephone Interview with John Koenig, Indiana State Elections Board (Jan. 27, 1995).

NVRA's constitutionality is likely to continue into 1996, if not later. In light of the number of states involved, an eventual ruling by the U.S. Supreme Court would not be a surprising development, especially if the law is struck down by a lower federal court. This, however, is increasingly unlikely. As of January 1, 1996, NVRA had been upheld by six federal district courts and two federal appellate courts.

If Congress had any doubts about its constitutional power to enact the National Voter Registration Act, the legislative history certainly does not betray them. When it adopted NVRA, Congress claimed to be acting pursuant to its power under Article I of the Constitution to regulate elections for Congress: "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 by Law may make or alter such Regulations, except as to the Place of chusing Senators."[45] While Congress also asserted that the Fourteenth and Fifteenth Amendments permitted Congress to promulgate the Act, this Article, for the sake of brevity, focuses exclusively on whether the Elections Clause authorized Congress to enact NVRA.[46]

To answer this question, two crucial issues need to be addressed. First, does Article I, Section 4 empower Congress to regulate the subject of voter registration? Second, assuming Congress may indeed set uniform rules for voter registration, does the Elections Clause permit Congress essentially to conscript the states to carry them out? To address these issues, this Article is organized into four parts. Part I assesses the original intent of the Framers for the Elections Clause. Part II examines the states' initial understanding, as expressed during their ratifying conventions, of the scope of congressional power under Article I, Section 4. Part III analyzes Supreme Court decisions that have construed both the Elections Clause and breadth of congressional power to regulate federal elections. Finally, Part IV discusses what role, if any, the Tenth Amendment, and particularly the Court's recent decision in *New York v. United States*,[47] should play in adjudicating the constitutionality of the National Voter Registration Act. I ultimately conclude that the Elections Clause almost certainly permits Congress to legislate on the subject of voter registration, but that the exact limits of congressional authority to conscript state executive functions are less clear. At a minimum, however, the Necessary and Proper Clause appears to justify NVRA's heavy reliance on the states to carry out its provisions. I further conclude that if there are limits on the power of Congress to act under Article I, Section 4, they were intended primarily to be textual and political, and consequently do not arise out of the Tenth Amendment, except possibly in the most extreme of circumstances. For these reasons, I believe Congress was fully within its constitutional powers when it enacted the National Voter Registration Act.

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45. U.S. CONST. art. I, § 4, cl. 1. For purposes of style and convenience, the Elections Clause will occasionally be referred to here as Article I, Section 4, even though Section 4 actually contains two clauses.

46. The House and Senate committee reports on NVRA offered no detailed factual findings to support their argument that state voter registration laws before NVRA offended the Reconstruction Amendments. Federal court decisions construing the Act have focused almost exclusively on the Elections Clause, and have not discussed the Fourteenth or Fifteenth Amendments in great detail, if at all.

47. New York v. United States, 112 S. Ct. 2408 (1992).

I. VIEWS OF THE FRAMERS

A. Introduction

Since the case law construing the Elections Clause is actually rather sparse, some understanding of what the Framers originally intended is helpful. The issue of federal elections, and what role Congress should play in regulating them, engendered remarkably little debate during the Constitutional Convention. As a result, the Elections Clause emerged from the Committee of Detail on Monday, August 6, 1787 substantially resembling the final version that was adopted the following month. Generally, the view that fixed rules on the times, places, and manner of federal elections should be interpolated into the Constitution was rejected in favor of a more flexible approach. As Hamilton noted in the Federalist Papers, the Convention decided to place such power "primarily" with the state legislatures, but "ultimately" in Congress.[48]

Rufus King, a delegate from Massachusetts, noted that "no probability has been suggested" of Congress abusing its authority to regulate its own elections.[49] Nonetheless, not all delegates were so convinced: Charles Pinckney and John Rutledge, from South Carolina, offered an amendment that would have left administration of federal elections exclusively in the hands of the states.[50] The only substantial recorded comment on this proposal came from James Madison:

> The necessity of a General Government supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local convenience and prejudices. The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures . . . supposes that the result will be somewhat influenced by the mode . . . .*These were words of great latitude.* It was impossible to foresee all the abuses that might be made of the discretionary power.[51]

In fact, this is the only recorded speech of any length at the Convention on the Elections Clause.

In the Federalist Papers, Madison further reasoned that if the American people could be relied upon to elect judicious state legislatures, then they surely could be invested with the same trust when voting for the House of Representatives.[52] And no Congress elected in a thoughtful fashion, Madison concluded, would be prone to abuse its power to regulate its own elections.[53] Madison implied not only that states might abuse their power to control congressional elections, but that the accountability of Congress to the people would prevent congressional abuse of the privilege.[54]

Other delegates at the Constitutional Convention advanced arguments in favor of the Elections Clause that would be made again when the Constitution went to the states for ratification. Governor Morris of Pennsylvania maintained that "the states

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48. THE FEDERALIST NO. 59, at 362 (Alexander Hamilton) (C. Rossiter ed. 1961).
49. 1 WILBOURN E. BENTON, 1787: DRAFTING THE U.S. CONSTITUTION 647 (1986).
50. *Id.* at 646.
51. *Id.* at 647 (emphasis added).
52. *Id.*
53. *Id.*
54. *Id.*

might make false returns and then make no provisions for new elections."[55] Roger Sherman of Connecticut asserted that the Elections Clause was intended to give Congress the power to make entirely new regulations, "in case the states should fail or refuse altogether."[56]

The Convention not only rejected Pinckney and Rutledge's motion; it further expanded the scope of congressional power so that Congress could not only alter state laws, but also make new ones of its own.[57] By August 9, 1787, Article I, Section 4 was essentially in its final form.[58] It would not be amended again until 1913, when Senators became directly elected.[59]

B. Hamilton's Views in the Federalist Papers

In the Federalist Papers, Alexander Hamilton explained in more detail why the Constitutional Convention had concluded that Congress had to have the power to regulate its own elections. Most of his arguments presaged those made later in the state ratifying conventions. The most oft-repeated was the first Hamilton offered on the subject: "I am greatly mistaken . . . if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation.*"[60]

With his eye towards possible controversy in the state ratifying conventions, Hamilton asserted that the federal government would intervene only "whenever extraordinary circumstances might render that interdisposition necessary to its safety."[61] The Framers' main concern, as Hamilton described it, was to provide a safety valve in the event states failed altogether to hold congressional elections.[62] In Hamilton's view, most justified was the federal government's interest in ensuring that there be a uniform time for congressional elections.[63]

The possibility of conspiracy dominated Hamilton's thinking on the subject of federal elections. He conceded that there was some risk in placing such power in the hands of Congress, but concluded that there was no other way to guarantee the existence of the federal government.[64] Hamilton emphasized (and perhaps exaggerated) the chances of several state governments, or even foreign ones, jealous of the success of the new nation, conspiring to thwart the holding of elections for Congress, effectively dissolving that body.[65]

At the same time, Hamilton downplayed the odds that the federal government itself could ever harbor such conspiratorial propensities. He argued that since the House of Representatives would be a national body, it would likely be composed of

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55. *Id.* at 648.
56. *Id.*
57. *Id.*
58. *Id.* at 649.
59. U.S. CONST. amend. XVII.
60. THE FEDERALIST No. 59, at 362 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (emphasis in original).
61. *Id.*
62. *Id.* at 363.
63. *Id.* No. 61, at 375-76.
64. *Id.* No. 59.
65. *Id.*

diverse factions with inconsistent and divergent interests.[66] Noting the great variance in the methods that would be used to select the President, Senate, and House of Representatives, Hamilton concluded that there was little chance the several branches of the government could conspire to undermine the right of the people to elect the House of Representatives.[67]

In a theme Madison would later emphasize in Virginia's ratifying convention, Hamilton asserted that the ultimate check against congressional abuse was political in nature:

> Would they [Congress] not rather boldly resolve to perpetuate themselves in office by one decisive act of usurpation[?] . . . Would they not fear that citizens, not less tenacious than conscious of their rights, would flock from the remotest extremes of their respective States to the places of election, to overthrow their tyrants and to substitute men who would be disposed to avenge the violated majesty of the people?[68]

C. Conclusion: Views of the Framers

These debates permit a few general conclusions helpful to assessing the constitutionality of NVRA. First, although the circumstances under which Congress would preempt state law were assumed to be infrequent, the scope of the Elections Clause was conceded to be fairly broad. As Madison remarked, "[T]hese were words of great latitude."[69] Article I, Section 4 reflected a policy choice to give Congress the means it would need to safeguard the integrity of the electoral process. Second, Hamilton hinted at what the people's remedy would be if Congress tried to manipulate election processes to create an aristocracy. Such casual talk about overthrowing governments admittedly must be placed in historical context, but it does reflect a preference for the give-and-take of the political process, if Congress ever went too far.

Unfortunately, the recorded speeches of the Constitutional Convention and the Federalist Papers shed little light on two issues crucial here to ascertaining the constitutionality of the National Voter Registration Act: the ceiling of congressional authority under Article I, Section 4—whether it includes the power to control voter registration procedures—and the ability of Congress to use state executive and administrative agencies to implement federal election laws.[70] The debates in the ratifying conventions fortunately shed some light on the former, but say nothing about the latter.

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66. *Id.* No. 60, at 390-91.
67. *Id.* at 391.
68. *Id.* at 395.
69. BENTON, *supra* note 49, at 647.
70. The Framers obviously had general notions about the extent to which state legislatures and executives could be conscripted to execute federal law. However, I do not explore these here because in my view the Elections Clause, due to the specific nature of the subject it regulates, implicates a special arrangement in this regard. Moreover, the Supreme Court in *Ex parte* Siebold, 100 U.S. 371 (1879), construed it as such. Consequently, the relationship that exists between the state and federal governments under Article I, Section 4 cannot be compared to the Framers' more general ideas about commandeering of state governments.

II. STATE RATIFYING CONVENTIONS

A. Introduction

In light of the oppressive methods the English used to rule the American colonies before the Revolution, the states' reservations about giving Congress a constitutionally-based power to control its own elections were understandable. However, these concerns were qualitatively different than those preoccupying some of the states today with the National Voter Registration Act. Two hundred years ago, the states were most worried about possible misuse of "place" regulation. More precisely, some of the Ratifiers feared that Congress, by locating polling places in remote settings, would effectively disenfranchise particular classes of voters, and essentially establish an aristocracy. Objections to the Elections Clause were also grounded on more general concerns about placing such vast power in the hands of only one sovereign. This appeared to contravene the otherwise strong emphasis in the new government on checks and balances. However, despite these misgivings, the Constitution was ratified with the Elections Clause fully intact.

Since he had spoken so favorably of it at the Constitutional Convention, James Madison was a natural advocate for the Elections Clause at the Virginia ratifying convention. There, Madison told the other delegates that the issue the Constitutional Convention had to address was one of first impression: where to place the authority to regulate an electoral process that had never taken place before.[71] Writing specific provisions into the Constitution, Madison noted, was rejected as impractical.[72] The states were deemed the most appropriate government bodies initially to regulate federal elections because they are "best acquainted with the situation of the people."[73] Madison reiterated the two main reasons the Convention decided to give Congress the power to preempt state laws: to ensure uniformity and prevent the dissolution of the House of Representatives.[74]

Opponents and proponents alike agreed that the authority of Congress under Article I, Section 4, because it was so undefined, was fairly sweeping. For example, Patrick Henry, a staunch anti-Federalist, declared that "[T]he power over the manner admits of the most dangerous latitude. They may modify it as they please . . . .I look on [the Elections Clause] . . . as the most fatal plan, that could . . . enslave a free people."[75] George Mason, another Virginia delegate, noted that most delegates agreed that federal interference would only be justified if a state legislature neglected or refused to make regulations, or was prevented from doing so by rebellion or invasion.[76] Hence, Mason argued, the broad language of the Elections Clause could be abandoned

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71. 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1295 (J. Kaminski et al. eds., 1990) (hereinafter DOCUMENTARY HISTORY). In U.S. Term Limits, Inc. v. Thornton, 115 S.Ct. 1842 (1995), the Supreme Court agreed with Madison's view when it rejected a Tenth Amendment argument that states could "reserve" powers over federal elections. The Court reasoned that all powers states hold over federal elections have been delegated to them by the Constitution, and thus could not have been "reserved" within the meaning of the Tenth Amendment: "No state can say, that it has reserved, what it never possessed." *Id.* at 1854 (internal quotations omitted).

72. *Id.*

73. *Id.* at 1260.

74. *Id.*

75. 9 DOCUMENTARY HISTORY 1071 (John P. Kaminski, et al. eds., 1990).

76. 10 DOCUMENTARY HISTORY, *supra* note 71, at 1290-91.

in favor of specific exceptions written into the Constitution.[77]

While conceding the potentially vast nature of congressional power, proponents of the Elections Clause sketched out their own dramatic scenarios for what might happen if the states were given the exclusive power to regulate federal elections. James Wilson of Pennsylvania, for instance, exclaimed that

> [i]f those legislatures possessed, uncontrolled, the power of prescribing the times, places, and manner of electing members of the House of Representatives, the members of one branch of the general legislature would be the tenants at will of the electors of the other branch; and the general government would lie prostrate at the mercy of the legislatures of the several states.[78]

Other commentators were more sanguine, and thus incredulous at the ferocity of the states' reaction to Article I, Section 4: "Marvelous, indeed, must be the sagacity of him who discovers art, design, and despotic power wrapped up in this very harmless clause!"[79] Madison himself agreed that congressional control over time, place, and manner could potentially be extensive, but downplayed the likelihood that such power would be exploited or misused.[80]

The tone of the debate in the state ratifying conventions reveals that proponents and opponents of the Elections Clause had similar motivations, but different values. Both sides, emphasizing the Machiavellian side of public officials, outlined dramatic (if not implausible) worst-case scenarios of abuses of centralized power. In this sense, the gap between the two sides was not near as wide as it seemed; they should at least have been able to understand each other's concerns, even if they could not agree. The differences between them instead centered around policy priorities. These spirited debates are a prism through which to view the basic values that divided the Federalists and anti-Federalists. James Wilson of Pennsylvania, for one, openly declared that he simply trusted the federal government more than the states:

> Let us suppose [regulation] may be improperly exercised. Is it not more likely so to be by the particular states, than by the government of the United States? Because the general government will be more studious of the good of the whole . . . when the power of regulating the time, place, or manner of holding . . . elections . . . it will be to correct the improper regulations of a particular state.[81]

On the other hand, opponents such as Patrick Henry reminded the other Ratifiers that lack of accountability in government was what drove the young nation to seek independence in the first place.[82] If the amendments some of the states offered during the ratifying conventions are any guide, the delegates viewed the power of Congress to regulate federal regulations to be broad indeed. For example, Virginia, heavily influenced by George Mason on the question, proposed that Article I, Section 4 be amended so that Congress could interfere with state laws only under specific circumstances:

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77. *Id.*

78. 2 DOCUMENTARY HISTORY 403 (Merrill Jensen ed. 1976).

79. *A Letter from a Gentleman in a Neighboring State, to a Gentleman in this City.* Anonymous letter published in eight newspapers from New Hampshire to Maryland by Nov. 28, 1787. 3 DOCUMENTARY HISTORY 385 (Merrill Jensen ed. 1978).

80. 10 DOCUMENTARY HISTORY, *supra* note 71, at 1295.

81. 2 DOCUMENTARY HISTORY, *supra* note 78, at 565-66.

82. 9 DOCUMENTARY HISTORY, *supra* note 75, at 1070-71.

"[C]ongress shall not alter, modify or interfere in the times, places, or manner of holding elections for Senators and Representatives, or either of them, except when the Legislature of any state shall neglect, refuse, or be disabled by invasion or rebellion to prescribe the same."[83]

Massachusetts offered a similar amendment that gained the support of six states. It provided that Congress could not preempt state laws unless "a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress agreeably to the Constitution."[84] However, this amendment was never adopted. Dissenters in Pennsylvania, to no avail, advocated giving the states full control over federal elections.[85]

1. Regulation of the Time, Place, and Manner of Elections

The states' greatest concern was that Congress would use its power to regulate the place of elections to locate polling places in remote and inconvenient settings, which would effectively deny the franchise to those who could not travel long distances to vote. This particular worry occupied debate time at nearly every convention, and was the subject of much discussion amongst the citizenry. James Spencer, who served as a Captain in the Continental Army, wrote to James Madison: "[I]f they Appoint Pepin or Japan, or their ten Miles Square for the place, no man can help it."[86]

In the first newspaper attack in Pennsylvania on the proposed Constitution, the Freeman's Journal on September 26, 1787 ran the following editorial: "Leaving the places subject to the alteration of Congress may also lead to improper consequences and tempt to sinister views. Who in Pennsylvania would think it advisable to elect Representatives on the shore of Lake Erie; or even at Fort Pitt?"[87] During Pennsylvania's ratification debates, William Findley summed up the views of many delegates on the subject: "[T]he modes of election will be appointed in such way as to give the greatest influence to government . . . .The place of elections may be removed so as to take it out of the reach of the lower and middling classes of men."[88] However, proposals to fix the place of elections in the Constitution garnered little support.

In response to these arguments, proponents of the Elections Clause were quick to observe that the states retained the final authority to set voter qualifications for all elections, including federal.[89] Indeed, anti-Federalists deemed this aspect of the electoral process an essential element of state sovereignty, which explained their concerns that Congress, purporting to set the place of elections, might undermine this power.

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83. 10 DOCUMENTARY HISTORY, *supra* note 71, at 1555.

84. 2 J. ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 177 (1876). Massachusetts' amendment was actually modeled on one George Mason initially proposed in a letter to John Lamb dated June 9, 1788. Mason's amendment contained the following additional language: "or shall be prevented from making Elections by Invasion or Rebellion; and in any of these Cases, such Powers shall be exercised by the Congress only until the Cause be removed." 9 DOCUMENTARY HISTORY, *supra* note 75, at 822.

85. "[T]he several states shall have power to regulate the elections for senators and representatives, without being controlled either directly or indirectly by an interference on the part of Congress[.]" 2 DOCUMENTARY HISTORY, *supra* note 78, at 624.

86. 8 DOCUMENTARY HISTORY 425 (John P. Kaminski, et. al. eds., 1988).

87. 2 DOCUMENTARY HISTORY, *supra* note 78, at 147.

88. *Id.* at 510.

89. *See, e.g.*, THE FEDERALIST No. 60, at 394 (Alexander Hamilton) (Edward Mead Earle ed., 1937). "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 legislature."

Hamilton, for one, lightly dismissed the states' arguments: the people, in his view, led by the state governments, would sooner revolt against Congress than acquiesce to such a blatant power grab.[90]

On the other hand, congressional authority over the time of elections was much more acceptable to the states, even to staunch anti-Federalists. Patrick Henry, for instance, railed against possible abuses of the manner provisions, while conceding the value of a uniform time and place for congressional elections.[91] In a letter to William Cushing, Samuel Holden Parsons of Connecticut summed up the rationale for giving Congress control over the time of elections:

> It appears to me proper that Congress should determine the time. Our different legislatures have on this subject gone into different practices. It is necessary all elections should be in season to attend the federal legislature and expedient, at least, they should be in one day throughout the Union. This can only be done by the national authority.[92]

Besides reiterating the strong federal interest in uniformity, proponents of giving Congress the ability to control the time of elections asserted that abuse was especially unlikely in light of the outer limitations imposed by Article I of the Constitution.[93] It was often observed that regardless of what time Congress prescribed for federal elections, the Constitution at a minimum required that one-third of Senators, and all members of the House of Representatives, be elected every two years. However, not all delegates were persuaded: a vocal minority in Pennsylvania proposed that a time for congressional elections be fixed in the Constitution.[94]

Compared to place and time, there was relatively little discussion of the manner of elections. Since the first state voter registration law was not enacted until 1800,[95] questions of manner and procedure necessarily implicated different concerns than those at issue today. Nonetheless, a few comments made during the ratifying conventions suggest that the states viewed congressional power over the manner of elections to be broad enough to include modern-day voter registration.

During Pennsylvania's ratification debate, delegate Thomas McKean directly addressed the issue of ballot procedures:

> If, for instance, the states should direct the suffrage of their citizens to be delivered *viva voce*, is it not necessary that the Congress should be authorized to change that mode, so injurious to the freedom of election, into the mode by ballot, so happily calculated to preserve the suffrages of the citizens from bias and influence? This was one object, I am persuaded, which weighed with the late Convention in framing this clause[.][96]

McKean later reiterated this view, only with a slightly different emphasis:

> In some states the electors vote *viva voce*, in others by ballot; they ought to be

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90. *Id.* No. 60, at 372.
91. 8 DOCUMENTARY HISTORY, *supra* note 86, at 1071.
92. 3 DOCUMENTARY HISTORY, *supra* note 79, at 571.
93. *See, e.g.*, THE FEDERALIST No. 59 (Alexander Hamilton).
94. 2 DOCUMENTARY HISTORY, *supra* note 78, at 629.
95. Massachusetts was the first state to adopt a voter registration law. JOSEPH HARRIS, REGISTRATION OF VOTERS IN THE UNITED STATES 65 (1929).
96. 2 DOCUMENTARY HISTORY, *supra* note 78, at 413.

> uniform, and the elections held on the same day throughout the United States to prevent corruption or undue influence. Why are we to suppose that Congress will make a bad use of this power, more than the representatives of the several states?[97]

McKean's comments suggest that the controlling factor in assessing the validity of congressional control over the manner of elections is not the exact procedural aspect that is regulated, but the purpose behind the legislation.

When viewed in this light, NVRA seems permissible. While ballot procedures admittedly govern a different aspect of elections than voter registration, the policies the Framers deemed so important—uniformity and the accessibility of the electoral process—are implicated with no less force when the purity of the registration process is at issue. The integrity of both of these elements, in a form comprehensible to the average voter, is essential to a free and fair election. Thus, NVRA, if the Framers could know about it, would not likely be seen as an abuse of congressional power. Moreover, if Congress may regulate balloting, as delegates such as McKean maintained, then surely it may also set rules for registration, which is arguably merely a component of the balloting process.

2. The Possibility of Congressional Abuse

To assuage the concerns of opponents of Article I, Section 4, proponents offered two reassurances: first, Congress, assuming the states regulated properly, would rarely exercise this power; and second, even assuming Congress would try to abuse its authority, structural and political constraints would thwart any attempt to undermine the right of the people to elect their federal representatives. Each of these arguments will be discussed in turn.

As noted above, Madison and Hamilton tried to reassure the states that the federal interests the Elections Clause sought to protect were benign and fairly minimal: ensuring uniformity of regulations and preventing the dissolution of Congress. However, what constituted "proper" regulation by state legislatures, so as to avert congressional interference, was never clearly defined. Madison himself said little more than that so long as federal elections are "regulated properly by the State Legislatures, the Congressional control will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the Constitution."[98]

What accounts for the fact that the Framers did not outline more precisely what state legislatures had to do to avoid congressional intervention? Several states, such as Virginia and Massachusetts, tried to codify a more specific standard in their proposed amendments, but they were rebuffed. The best explanation perhaps is the emphasis the Framers placed on flexibility when they designed the Constitution. Specific prescriptions were rejected in favor of more general language whose interpretation could evolve with the country as it grew and changed. Most delegates also probably believed that the odds of Congress ever exercising this authority were fairly slim. Hence, there was really no need to incorporate a list of specific exceptions. Madison, dismissing worst-case scenarios as wildly improbable, likely spoke for many delegates when he

97. *Id.* at 537.
98. 10 DOCUMENTARY HISTORY, *supra* note 71, at 1260.

declared: "We must keep within the compass of human probability."[99]

As for the proper remedy should Congress ever abuse these powers, it was often pointed out during the ratifying debates that "[t]he people will be prejudiced against Representatives chosen in . . . an unjudicious manner."[100] Not surprisingly, these recently-successful revolutionaries placed great stock in their right (and ability) to revolt against an unjust government. Others were more idealistic about the new nation: James Wilson of Pennsylvania, for example, asserted that Congress could be trusted not to misuse its authority over federal elections because its very existence was owed to the people.[101] Historical context aside, however, many delegates viewed the primary check on congressional power under the Elections Clause to be structural and political in nature, and not legal. George Nicholas, a delegate to Virginia's ratifying convention, expressed this sentiment when he declared:

> The possible abuse here complained of, never can happen as long as the people of the United States are virtuous: As long as they continue to have sentiments of freedom and independence; should the Congress be wicked enough to harbour so absurd an idea, as this objection supposes, the people will defeat their attempt, by choosing other Representatives who will alter the law.[102]

Madison made a similar point, but placed more emphasis on the raw give-and-take of the political process:

> If all the people of the United States should be directed to go to elect in one place the Members of the Government would be execrated for the infamous regulation . . . .They would not dare to meet the universal hatred and detestation of the people, and run the risk of the certain dreadful consequences.[103]

The essence of Madison's argument was clear: the appropriate recourse for an unjust regulation was the political process.

Pointing to the structure of the federal government, Madison further concluded that the checks and balances created by the separation of powers helped preserve the people's right to elect their representatives: "Have we not sufficient security against abuse? Consider fully the principles of the Government . . . . [It] is subdivided in three branches . . . . For the powers of Government which in every other country are given to one body, are here given to two."[104] Thus, Madison rested on two arguments: the decentralized nature of federal power would make abuse unlikely, and the machinery of the legislative process would provide redress if such abuse ever occurred.

Other delegates made arguments remarkably similar to those underlying the Supreme Court's opinion—200 hundred years later—in *Garcia v. San Antonio Metropolitan Transit Authority*.[105] For example, James Wilson asserted that state sovereignty under Article I, Section 4 was protected, if not by that clause itself, by the role the Constitution gives the states in the selection of the federal government. To support this view, Wilson cited state legislatures' power to choose Senators and presidential elec-

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99. *Id.*
100. 9 DOCUMENTARY HISTORY, *supra* note 75, at 965.
101. 2 DOCUMENTARY HISTORY, *supra* note 78, at 401.
102. 9 DOCUMENTARY HISTORY, *supra* note 75, at 920.
103. 10 DOCUMENTARY HISTORY, *supra* note 71, at 1295.
104. *Id.*
105. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

tors, the Senate's role in confirming Article III judges, Article V's guarantee that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate," and the states' authority to amend the Constitution.[106]

It admittedly is somewhat anachronistic to speak of legal constraints on congressional power in the 1780s: the Tenth Amendment was not adopted until 1791, and judicial review was still over a decade away. Nonetheless, the specific mention by some delegates of *Garcia*-like "process" theories counsels against importing too strong a role for the courts when the constitutionality of a law enacted under the Elections Clause—such as NVRA—is being challenged. After all, the Framers tried to design the federal government so that the machinery of the legislative and electoral processes could be harnessed to change the status quo. The speeches of some delegates indicate this was the proper recourse if Congress ever abused its authority.

B. Conclusion: State Ratifying Conventions

The debates in the state ratifying conventions unfortunately shed no light on the question of when Congress may use the states as implements of regulation. This is largely because the federalism issues surrounding elections 200 years ago were of a qualitatively different nature than those concerning some of the states today with NVRA. By its plain language, Article I, Section 4 does not speak to the question of the executive power; it merely declares that Congress may legislate on the subject. What explains the Constitution's silence on this point? Perhaps the issue of federal commandeering of state governments was too controversial and was sidestepped. It also might simply have been overlooked, or viewed as unimportant. After all, the abuse the states most feared was how Congress might manipulate the substance of election regulations, and not who merely had to carry them out.

But more likely is that the Framers never envisioned the current scenario. Matters such as administrative cost and the "burden" of executing federal law have no analog in our nation's early history. In the 1780s, the states—with good reason—viewed the ability to control elections as a power and privilege, and not, in today's terms, an unfunded mandate. In this sense, the situation currently surrounding NVRA is unprecedented. Original intent therefore provides no direct answer for what the Constitution requires when states, as with NVRA, actually decline to execute federal election regulations.

There is a clear thrust, however, in some of the Framers' speeches that state sovereignty is a secondary concern when the issue is federal elections. The principal objective of the Elections Clause was to ensure that the right of the people to elect the government was not abridged—whether this was achieved by state regulation or congressional preemption. Fortunately, Supreme Court decisions construing the power of Congress under Article I, Section 4 offer some guidance on this issue, and also on whether the "manner" of elections includes voter registration.

106. 2 DOCUMENTARY HISTORY, *supra* note 78, at 401-04.

III. CASE LAW ON CONTROL OF FEDERAL ELECTIONS

A. Introduction

The Supreme Court has rarely been called upon to address the scope of congressional authority under the Elections Clause. Since Congress has exercised this power on just a few occasions, this is not surprising. The National Voter Registration Act is actually the first federal statute to be promulgated under Article I, Section 4 in over 100 years. As such, most of the decisions construing the breadth of congressional power to regulate federal elections are rather old, but they fortunately do address most of the questions the Framers left unanswered. Put concisely, the federal courts long ago abandoned the limited scope that was originally envisioned for the Elections Clause by Hamilton and Madison. Judicial deference to Congress in this area has been substantial.

The cases are relevant here in two important respects. First, voter registration is a legitimate target of congressional action under the Elections Clause. Second, Congress, according to an older Supreme Court decision, may use the states to implement federal statutes that regulate federal elections. In addition to these points, I will address the following issues in Part III: the Court's treatment of executive branch elections; the role of the Necessary and Proper Clause in an assessment of NVRA's constitutionality; and the Court's recent decision in *U.S. Term Limits, Inc. v. Thornton.*[107] After a brief review of laws enacted under the Elections Clause before NVRA, each of these five points will be discussed in turn.

1. Prior Acts of Congress Regulating Federal Elections

An overview of the other statutes Congress has promulgated under Article I, Section 4 helps place NVRA in historical context. The first Act of Congress to be adopted under the Elections Clause was passed in 1842. It provided that the House of Representatives be chosen by districts, rather than on an at-large basis.[108] This eliminated the common practice of electing a slate of representatives on a single ticket. In 1866, Congress enacted the first rules on time and manner for senatorial elections.[109] Similarly, an Act of Congress passed on February 2, 1872 required that the House of Representatives be uniformly elected on the Tuesday after the first Monday in November. In 1934, Congress last amended the statutes governing the time of elections for the House and Senate, providing that representatives would take office in January of the year after election instead of March.[110]

NVRA is actually not the first time Congress has regulated voter registration procedures.[111] During Reconstruction, Congress enacted a detailed code for the con-

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107. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

108. An Act for the apportionment of Representatives among the several States according to the sixth census, ch. 47, 5 Stat. 491 (1846).

109. An Act to regulate the Times and Manner of holding Elections for Senators in Congress, ch. 245, 14 Stat. 243 (1868).

110. 2 U.S.C. § 1 (1994) (Senate); 2 U.S.C. § 7 (1994) (House of Representatives).

111. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971-1974(e)(1988 & Supp. IV 1992)) and subsequent amendments obviously imposed substantial requirements on state registration processes, but Congress there was acting principally under the Reconstruction Amendments, and not the Elections Clause.

duct of congressional elections.[112] The Supreme Court in *United States v. Gradwell*[113] summarized the comprehensive nature of these statutes: "They made unlawful, false registration, bribery, voting without legal right, making false returns of votes cast, interfering in any manner with the officers of election and the neglect by any such officer of any duty required of him by state or federal law."[114] Additionally, Circuit judges could appoint election officers "to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and intellectual tally sheets."[115] U.S. marshalls were also given wide latitude to prevent breaches of the peace.[116]

Gradwell described federal control of congressional elections under this statutory scheme as being "comprehensive and complete,"[117] but voiced no opinion on whether Congress was within its power when it enacted such a detailed code for the elections process.[118] As the political tide turned against Reconstruction, nearly all these laws were repealed by 1894. Congress would not regulate voter registration again in any detail until the Voting Rights Act of 1965. However, the objective there—eliminating racial discrimination—was obviously very different than that behind NVRA—expanding the number of registered voters. Thus, to the extent that the Reconstruction Amendments play no role in adjudicating NVRA's constitutionality, a different analysis is required here: what is meant by the "manner" of elections?

2. Why Congress May Regulate Voter Registration

Before exploring this question, it is first necessary to address whether control over registration resembles, or is equal to, the power to set voter qualifications, which under the Constitution remains with the states.[119] If voter registration is indeed more like the latter, then NVRA should be unconstitutional.

This inquiry is best begun by distinguishing between substantive and procedural rules. As a matter of plain language, "times, places, and manner" connote control over procedural elements of the electoral process.[120] Literally construed, the power of

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112. An Act to Enforce the Right of Citizens of the United States to vote in the several States of This Union, and for other Purposes, ch. 114, § 19, 16 Stat. 144 (1871); An Act to amend the Naturalization Laws and to punish Crimes against the same, and for other Purposes, Ch. 254, § 5, 16 Stat. 255-56 (1871); An Act making Appropriations for sundry civil Expenses of the Government for the Fiscal Year ending June thirtieth, eighteen hundred and seventy-three, and for other Purposes, Ch. 415, 17 Stat. 348-49 (1873).

113. United States v. Gradwell, 243 U.S. 476 (1917).

114. *Id.* at 483.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Ex parte* Yarbrough, 110 U.S. 651 (1884), however, held that the statute that proscribed interference with federal election monitors was constitutional.

119. Oregon v. Mitchell, 400 U.S. 112 (1970), however, held that Congress could set a national voting age of 18 for federal elections.

120. The Supreme Court in U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995), distinguished the Elections Clause from the Qualifications Clauses on the substantive v. procedural dichotomy, also concluding that the Elections Clause governs only procedural aspects of the federal electoral process: "The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office." *Id.* at 1869. *The Court further noted that most state procedural regulations for federal elections have been upheld. Id.* at 1870. This further supports the conclusion that NVRA, if it too is deemed essentially procedural in nature, must be constitutional.

Congress under the Elections Clause should thus not extend to determining who may cast a ballot, but only to how, when, and where ballots are to be cast. Viewed in this light, there are fundamental differences between voter registration and voter qualifications. Registration is essentially a procedural means of organizing elections and advancing the right to vote. So long as the substantive personal requirements attached to the right to register arise out of state law, and not federal law, a federal registration statute enacted under Article I, Section 4 should not violate the states' right to set voter qualifications.

NVRA meets this requirement. The Act speaks only to how and where registration is to be conducted. It does not lay down a set of personal characteristics that must be met in order to register or vote. While NVRA's prescriptions are indeed detailed, the Act does not cross the line into the realm of voter qualifications.

The more difficult question is whether the power to control the manner of elections gives Congress the authority to promulgate rules for the voter registration process. At least four different arguments, all supported by the cases, compel an affirmative answer. First, the power of Congress to regulate federal elections is vast. It thus should include the authority to craft rules for voter registration. Second, the Supreme Court has permitted Congress to regulate "necessary steps" in the electoral process. In light of its essential administrative role, voter registration falls in this category. Third, the Justices have been especially deferential when Congress has sought to advance certain policies, such as promoting the free choice of representatives or preventing fraud and voter intimidation. A uniform and accessible voter registration system advances these objectives. Finally, the Court explicitly declared in a 1932 case that Congress may legislate on the subject of voter registration. Each of these arguments will be discussed in turn.

In two older but important decisions, the Supreme Court indicated that the authority of Congress to regulate federal elections is indeed expansive. In *Ex parte Siebold*,[121] the Justices addressed the constitutionality of an Act of Congress that criminalized violations of certain state laws regulating federal elections. Writing for the majority, Justice Bradley rejected the petitioners' contention that Congress, when making its own regulations, had to preempt state law completely and occupy the area itself.[122] In holding that Congress could leave intact remaining state law that was not inconsistent, the Court declared that

> *the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it.* When exercised, the action of Congress, so far as it extends and conflicts with the regulation of the State, necessarily supersedes them. This is implied in the power to "make or alter."[123]

On this ground, Justice Bradley held that the federal statute was constitutional.

In *Smiley v. Holm*,[124] the Court defined the legislative procedures states must employ when reapportioning congressional districts. In dictum, Chief Justice Charles Evans Hughes declared that the Elections Clause gives Congress the "authority to

121. Ex parte Siebold, 100 U.S. 371 (1879).
122. *Id.* at 384.
123. *Id.* (emphasis added).
124. Smiley v. Holm, 285 U.S. 355 (1932).

provide a complete code for congressional elections[.]"[125] The Chief Justice also stated that Congress has a "general supervisory power over the whole subject."[126] Since *Smiley*, the power of Congress, if anything, has continued to grow. The Civil Rights Movement of the 1960s engendered a new line of case law on the subject of federal elections. When faced with challenges to the Voting Rights Act legislation that was the product of that era, the Supreme Court continued to affirm that Congress enjoys wide constitutional latitude when it regulates the electoral process.[127] For example, in *Oregon v. Mitchell*[128] the Court held, by a vote of 5-4, that Congress could establish a national voting age of 18 in federal elections. Even though Justice Black was the only justice in the majority to conclude that the Elections Clause gave Congress this authority,[129] *Mitchell* was significant because its holding contravened the entrenched jurisprudential maxim that the power to prescribe voter qualifications, even for federal elections, is held exclusively by the states.

Applying the standard of the above cases to NVRA, registration too should be a legitimate target of this broad power. A "complete code" for federal elections, as the Court declared in *Smiley*, logically must include the methods that are used to keep track of prospective voters. And in light of *Mitchell*'s conclusion that voter qualifications are no longer a sacred province of state electoral autonomy, it is difficult to assert that registration, which is much more analogous to the "manner" of elections than voter qualifications, is beyond the prescriptive jurisdiction of Congress. A different conclusion might be warranted if the Supreme Court had construed the power of Congress under the Elections Clause to be narrow and specific, but this has simply not been the case.

In a society as populated and mobile as the United States, voter registration is an indispensable organizational and administrative tool. Indeed, only North Dakota—one of the least inhabited states—conducts its elections without a voter registration system.[130] Similar to the printing of ballots and the staffing of polling places, registration—regardless of when it occurs—is an essential link in the chain that is the electoral process. Elections in practice could not be conducted, and indeed are not, without it.

In *United States v. Classic*,[131] the Supreme Court declared that Congress under the Elections Clause could regulate vital components of the electoral process. More specifically, the Justices held that Congress could set standards for the conduct of congressional primaries. Writing for the Court, Justice Stone reasoned that Article I, Section 4 had to reach primary elections because they are a "*necessary step* in the choice of candidates for election as representatives in Congress."[132] If it is accepted that registration is also a "necessary step" in the electoral process, it too should fall

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125. *Id.* at 366.

126. *Id.* at 366-67.

127. *See generally* Katzenbach v. Morgan, 384 U.S. 641 (1966) (holding Voting Rights Act of 1965 constitutional).

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

129. *Id.* at 122. The rest of the majority relied on the Equal Protection Clause. See opinion of Douglas, J., concurring. *See Id.* at 144 (opinion of Douglas, J., concurring). *See also Id.* at 240 (opinion of Brennan, White and Marshall, J.J., concurring). Other Justices criticized the expansive interpretation Justice Black advocated for the Elections Clause. *See, e.g., Id.* at 209-12 (opinion of Harlan, J., dissenting).

130. N.D. CENT. CODE § 16.1-02 (1994).

131. United States v. Classic, 313 U.S. 299 (1941).

132. *Id.* at 320 (emphasis added).

within the power of Congress to regulate federal elections. In a technical sense, registration is actually more fit for the *Classic* principle than primary elections, which are not literally required because they could be phased out in favor of a single general election. By contrast, eliminating all forms of voter registration would wreak administrative havoc on the electoral process: it would be almost impossible for states to administer elections or keep track of potential voters.

The Supreme Court has deferred to Congress most often when the policy advanced by a federal election law is to promote the free choice of representatives. For example, in *Ex parte Yarbrough*[133] the Court declared that Article I, Section 4 authorized Congress to enact regulations that seek to deter fraud and voter intimidation.[134] At issue in *Yarbrough* was the constitutionality of an Act of Congress that made it a federal crime to obstruct the lawful exercise of the right to vote on the ground of race or previous condition of servitude. Noting that Congress had regulated federal elections in the past to protect the integrity of the electoral process, the Justices asked rhetorically: "Will it be denied that it is in the power of [Congress] to provide laws for the proper conduct of those elections?"[135] Referring to the other Reconstruction laws that strictly regulated federal elections at that time, *Yarbrough* put the states on notice that when Congress "finds it necessary to make additional laws for the *free, the pure, and the safe exercise of this right of voting*, they stand upon the same ground, and are to be upheld for the same reasons."[136]

Subsequent decisions have granted Congress similar latitude. In *Smiley*, the Supreme Court concluded, albeit in dictum, that the Elections Clause permitted Congress "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."[137] And in *Classic*, Justice Stone noted the constitutional purpose underlying Article I—to promote the "free choice by the people of representatives"[138]—and stated that so long as Congress acted to protect this right, it would be within its constitutional powers.[139] Again, as in *Yarbrough*, the Court emphasized that Congress will be given the most deference when its motive is to protect the purity of the electoral process.[140]

While the facts and historical context underlying *Yarbrough*, *Smiley*, and *Classic* were indeed different than those currently surrounding NVRA, the rationale of those cases applies with no less force to the present. The one hundred years between Reconstruction and the Civil Rights Movement proved that the "free exercise" of the right to vote can certainly hinge on what type of voter registration procedures states decide to use. NVRA's goal of making voter registration uniform and more accessible, if not directly analogous to the objectives deemed so important in *Yarbrough*, *Smiley*, and *Classic*, at least falls within the same genre of legitimate policy interests. Or, put more concisely, NVRA targets voter registration for the right constitutional reasons.

The Supreme Court has never had to address directly whether the manner of an election includes the subject of voter registration. Nonetheless, Chief Justice Hughes

133. *Ex parte* Yarbrough, 110 U.S. 651 (1884).
134. *Id.* at 661-62.
135. *Id.* at 661.
136. *Id.* at 662 (emphasis added).
137. *Smiley*, 285 U.S. at 366.
138. *Classic*, 313 U.S. at 316.
139. *Id.* at 320.
140. *Id.* at 321.

suggested in *Smiley* that the power of Congress does extend this far. Referring to the Elections Clause, the Court declared:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, *registration*, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[.][141]

Since *Smiley* concerned state reapportionment of congressional districts, and not registration, this is just dictum. However, the above language, due to frequent and respected citation, has since become quite authoritative.[142]

In light of the broad authority the Supreme Court granted Congress in this area during the Civil Rights Movement, it is difficult to imagine that the Court, if forced to face the issue today, would counter *Smiley* and hold that Congress could not regulate voter registration under the Elections Clause. Rather, the Justices' primary constitutional concern would likely revolve around NVRA's heavy reliance on the states to carry it out.

3. Using States as Implements of Regulation

The Supreme Court has previously addressed this issue and it is the only occasion on which the Court has explained the extent to which Congress may use the states to implement regulations enacted under the Elections Clause. In *Ex parte Siebold* and *Ex parte Clarke*,[143] companion cases decided on the same day, the Justices had to assess the constitutionality of several federal statutes that regulated elections for Congress. Primarily at issue were two laws that criminalized certain activities including, among other offenses, making false election certificates, interfering with ballot counting, obstructing lawful voting, and interfering with the supervisors of election or U.S. marshalls.[144] Several state judges of election in Maryland and Ohio were convicted under these laws and sentenced to fines and imprisonment.[145] The defendants were found to have obstructed U.S. marshalls and conspired to engage in "ballot stuffing."[146] The main question before the Court was whether a state election official, when administering a federal election, owes a duty to the United States. On this point a lengthy colloquy occurred between two Justices: Justice Bradley, who wrote the majority opinion in *Siebold*; and Justice Field, who wrote the dissenting opinion in *Clarke*. Each of these opinions, and their relevance to NVRA, will be discussed in turn.

Siebold tackled some of the difficult federalism issues left unresolved by the Framers. Justice Bradley, describing the nature of the relationship that exists between the states and the federal government under the Elections Clause, described jurisdiction over federal elections as "cooperative," "co-joint," and "concurrent."[147] By this

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141. *Smiley*, 285 U.S. at 366 (emphasis added).

142. *See, e.g., Mitchell*, 400 U.S. at 122-23. *See also* all six federal court decisions handed down so far in the NVRA litigation *supra* at notes 37-39, 42.

143. *Ex parte* Clarke, 100 U.S. 399 (1879).

144. Rev. Stat. United States, §§ 5515 & 5522; *see also Siebold*, 100 U.S. at 371-74.

145. *Siebold*, 100 U.S. at 373; *see also Clarke*, 100 U.S. at 400.

146. *Siebold*, 100 U.S. at 373.

147. *Id.* at 383-85.

Bradley meant that, when legislating on the subject of congressional elections, the state legislatures and Congress have overlapping obligations and powers.[148] The Court drew an analogy to the Commerce Clause[149] to support its argument that the Constitution occasionally mandates different forms of shared jurisdiction.[150]

The majority in *Siebold* was fully aware that its vision of concurrent authority tended to commingle political accountability, and therefore was perhaps a bad way to make policy. Justice Bradley, however, concluded that the Constitution, in this instance, required concurrent jurisdiction:

> As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself . . . . There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties . . . . But in this case, . . . a concurrent jurisdiction is contemplated, that of the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.[151]

The Court fortunately delineated how its methodology—theoretical in nature despite its unambiguous tone—applied in practice. Not only is federal law supreme, Justice Bradley reasoned, but when regulating congressional elections, state officers are effectively agents of the federal government if Congress decides to use them as such:

> [W]hen, in the performance of their functions, State officers are called upon to fulfill *duties which they owe to the United States as well as to the State*, has the former no means of compelling such fulfillment? . . . It is the duty of the States to elect representatives to Congress . . . . [The United States] is directly interested in the faithful performance, by the officers of election, of their respective duties. *Those duties are owed as well to the United States as to the State.* This necessarily follows from the mixed character of the transaction, — State and national.[152]

The majority further clarified that "[w]here a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account."[153]

The reasoning Justice Bradley employed was essentially utilitarian: he argued that congressional regulation of federal elections would be ineffective if state election officers were "amenable only to the supervision of the State government which appointed them."[154] *Siebold* thus helped answer an important question the Framers and

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148. *Id.* at 391-92.

149. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S. CONST. art. I, § 8, cls. 1 & 3.

150. *Siebold*, 100 U.S. at 385. This analogy is not entirely apt because the Constitution does not require states to regulate interstate commerce. Rather, a state's jurisdiction, so long as it is exercised within the confines of the "dormant" commerce clause, is still entirely discretionary. By contrast, state legislatures under Article I, Section 4 *must* prescribe regulations for the conduct of federal elections. This distinction, had Justice Bradley noted it, actually would have strengthened his ultimate conclusion that state election officials owe a duty to the federal government.

151. *Id.* at 392-93.

152. *Id.* at 387-8 (emphasis added).

153. *Id.* at 389.

154. *Id.*

Ratifiers failed to address: whether state election officials under the Elections Clause may be conscripted to execute federal law. If these officers owe a duty to the United States, as *Siebold* concluded, then of course they can.

Finally, *Siebold* also stands for the proposition that Congress may fully preempt state executive functions:

> [C]ongress may, if it sees fit, assume the entire control and regulation of the election of representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject.[155]

While language such as this indeed sent a strong message to the states during Reconstruction, Justice Bradley had his detractors on the Court. Two Justices dissented from the majority opinion. Justice Field wrote a lengthy dissent in *Ex parte Clarke* that merits closer examination here because it clarified the scope of the majority's prescriptions.[156] In the companion *Clarke* case, the Supreme Court upheld the same congressional statutes at issue in *Siebold*.[157] The nub of the dissent's argument in *Clarke* was that Congress has no power under any part of the Constitution to compel state officers to execute federal law.[158] To support his argument, Justice Field relied on *Kentucky v. Dennison*. There, the Supreme Court had stated that

> [t]he Federal government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State[.][159]

Citing Chief Justice John Marshall in *McCulloch v. Maryland*,[160] Justice Field rejected the majority's vision of concurrent jurisdiction:

> When, therefore, the Federal government desires to compel by coercive measures and punitive sanctions the performance of any duties devolved upon it by the Constitution, it must appoint its own officers and agents, upon whom its power can be exerted. If it seems fit to entrust the performance of such duties to officers of a State, it must take their agency . . . upon the conditions which the State may impose.[161]

Field's arguments dissipated any doubt that the majority viewed the power of Congress to be almost all-encompassing.

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155. *Id.* at 396.
156. *Clarke*, 100 U.S. at 404-22.
157. *Id.* at 403-04.
158. *Id.* at 409-11.
159. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107-8 (1860). (The part of *Dennison* that prohibited federal courts from enforcing the Extradition Clause of the U.S. Constitution was overruled in Puerto Rico v. Branstad, 483 U.S. 219 (1987)).
160. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, (1819). In *McCulloch*, Marshall argued: "No trace is to be found in the Constitution of an intention to create a dependence of the Federal government on the governments of the States for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishments of its ends." *Id.* at 424.
161. *Clarke*, 100 U.S. at 413.

Despite making strong and interesting analytical points, the dissent offered no authority for its proposition that the Framers intended this "anti-commandeering" rule specifically to apply to the Elections Clause. Instead, Justice Field extracted a more general rule from *Prigg v. Pennsylvania*, in which Justice Story had declared: "[T]he national government, *in the absence of all positive provisions to the contrary*, is bound, through its own proper departments, legislative, judicial or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution."[162] The Elections Clause could have been one such "positive provision," but the dissent—not surprisingly—did not explore this possibility.

Siebold's main prescriptions are easy to summarize: Congress has vast authority to preempt state law, and when doing so may conscript state election officers to execute new regulations. Applied to NVRA, this decision would seem to quiet concerns that have been raised about the Act's heavy reliance on the states to carry it out. However, *Siebold* can be distinguished on several grounds. First, NVRA requires states effectively to deputize employees of entirely independent state agencies to perform voter registration, thus essentially transforming them, at least some of the time, into election officials for the federal government. Does this go beyond *Siebold*, which confined itself to cases involving actual state election officers? Perhaps, but in light of the broad power the Necessary and Proper Clause has been construed to give Congress, this is probably a distinction of little constitutional significance.

Along the same lines, *Siebold* did not address the issue of administrative costs. Nor could it; the case involved the constitutionality of a law that did not contain the "unfunded mandate" element so problematic, at least in the minds of some states, with NVRA. The broad language of *Siebold* does, however, imply that even where federal time, place, and manner regulations are a financial burden for the states, such laws still pass constitutional muster. Moreover, Justice Field raised the matter of state resources in his dissent in *Clarke*—seeming to concede that under the majority's rule the administrative cost of executing federal election laws must indeed be borne by the states.

Other distinctions, however, are even more persuasive. First, and perhaps most importantly, the case did not address "commandeering" in the specific context of voter registration. There are important substantive differences between criminalizing particular forms of conduct, as in *Siebold*, and imposing a civil obligation to execute federal regulations. Second, the decision *is* over 100 years old. The factual and technological circumstances under which elections are conducted have changed dramatically since 1879. Thus, if ever forced to adjudicate the constitutionality of NVRA, the Supreme Court could easily distinguish *Siebold*, on the ground that the case is antiquated and was decided under entirely different facts.

4. Congressional Control of Presidential Elections

In *Burroughs & Cannon v. United States*,[163] the Justices were called upon to decide the constitutionality of the Federal Corrupt Practices Act, which regulated donations to presidential election campaigns. The Court began its analysis by acknowledging that the Constitution distinguished between legislative and executive branch elec-

162. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616 (1842) (emphasis added).
163. Burroughs & Cannon v. United States, 290 U.S. 534 (1934).

tions, with Congress having less authority over the latter.[164] For example, the states, and not Congress, control the appointment of presidential and vice-presidential electors.[165]

Nevertheless, Justice Sutherland, writing for an 8-1 majority, upheld the regulations. In declaring the statute constitutional, however, the Court did not cite any particular provision of the Constitution. Rather, the majority noted that the duties of executive branch electors emanate from the Constitution itself.[166] According to the Court, this gives Congress the authority to regulate the conditions under which these electors are chosen:

> The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.[167]

Burroughs was important because its factual limitation to executive branch elections forced the Supreme Court to explain for the first time the exact nature and extent of congressional power over those contests. Prior to *Burroughs*, the Court was able to avoid the question by discussing regulation of federal elections in more general terms.

Oregon v. Mitchell confirmed, if not expanded, the broad authority of Congress to prescribe rules for the selection of presidential and vice-presidential electors. Also by a vote of 8-1, the Court upheld an amendment to the Voting Rights Act that eliminated durational residency requirements for executive branch elections.[168] The Justices, however, could not agree on why the law was constitutional,[169] confirming the opaque nature of congressional power in this particular area. *Mitchell* nevertheless stands for the proposition that where not specifically constrained by the Constitution, congressional power to regulate elections for President and Vice President is no less expansive than that Congress enjoys under the Elections Clause. Justice Black, for one, took this view in *Mitchell*: "It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."[170] NVRA's failure to distinguish between executive and legislative branch elections is therefore probably of little constitutional significance. If NVRA ever reaches the Supreme Court, it is difficult to imagine the Justices upholding the law for one branch of the federal government, but not the other.[171]

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164. *Id.* at 544.

165. U.S. CONST. Art. II, § 1, cl. 2.

166. *Burroughs*, 290 U.S. at 545.

167. *Id.*

168. *Mitchell*, 400 U.S. at 124. The U.S. District Court in Association of Community Orgs. for Reform v. Edgar, 880 F. Supp. 1215 (N.D. Ill. 1995), cited *Mitchell* to support this conclusion with specific regard to NVRA.

169. Chief Justice Burger, along with Justices Stewart and Blackmun, relied on the Necessary and Proper Clause; Justice Black cited the Court's decision in *Burroughs* and the Necessary and Proper Clause; Justice Douglas relied on the Privileges and Immunities Clause of the Fourteenth Amendment; and Justices Brennan, White and Marshall rested on the Enforcement Clause of the Fourteenth Amendment.

170. *Mitchell*, 400 U.S. at 124.

171. Noting that both the President and members of Congress are federal officers, the Supreme Court in *U.S. Term Limits*, 115 S. Ct. at 1855-56, hinted that the power of Congress to prescribe rules

5. The Necessary & Proper Clause

In *McCulloch v. Maryland*,[172] Chief Justice John Marshall held that the Necessary and Proper Clause[173] gives Congress a set of implied powers. Under this supplemental authority, Congress may enact "appropriate" legislation that is "plainly adapted" to carrying out its enumerated powers. The means chosen need not be indispensable or absolutely necessary; they merely must be rationally related to a legitimate constitutional objective.

Two Supreme Court decisions have explained how the Necessary and Proper Clause impacts the ability of Congress to regulate federal elections. *United States v. Classic* declared that the legitimate constitutional objective of Article I, Section 4 is the "right of choice by the people of representatives in Congress."[174] There, the Justices followed the general trend of according Congress expansive authority under the Necessary and Proper Clause, so long as new election rules advanced this goal.[175] The Court concluded that on this ground Congress could regulate congressional primaries.

In *Oregon v. Mitchell*, Justice Black, delivering the judgment of the Court, declared that Congress possessed a "residual power" to regulate federal elections under the Necessary and Proper Clause:

> Finally, and most important, inherent in the concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause.[176]

As discussed above, Justice Black concluded that under this authority Congress could abolish durational residency requirements for presidential elections. Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, concurred in this result in a separate opinion, although they did not accord the Necessary and Proper Clause the same expansive reading as Justice Black.[177] The Necessary and Proper Clause is helpful here because it helps ascertain whether NVRA's substantial reliance on the arms of state governments to register new voters is constitutionally permissible. To answer this question, a two-step analysis is required. First, what is the legitimate constitutional objective of NVRA? Second, what means are rationally related to fulfilling this goal? When it enacted NVRA, Congress exercised its enumerated power to prescribe rules for the manner in which elections are conducted. More precisely, NVRA's legitimate constitutional objective is making voter registration uniform and more accessible. Agency-based registration bears a rational relationship to this goal because it reaches prospective voters in ways other registration methods cannot. Con-

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for presidential elections essentially equals the power Congress has to regulate its own contests.

172. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

173. "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. Art. I, § 8, cls. 1 & 18.

174. *Classic*, 313 U.S. at 320.

175. *Id.*

176. *Mitchell*, 400 U.S. at 124 n.7.

177. *Id.* at 285.

ceptually, agency-based registration thus appears to be constitutionally permissible under the Necessary and Proper Clause.

The more difficult question is whether state government agencies, rather than federal ones, are an appropriate means of carrying out agency-based registration. Why couldn't NVRA simply have relied on the various offices of the federal government to execute its provisions?[178] The states admittedly may not be absolutely essential to fulfilling NVRA's goal, but the tentacles of local government reach potential voters in ways federal government offices cannot. For example, welfare checks are distributed at the state level; it consequently is difficult to imagine the federal government using its own agencies to register welfare recipients to vote. An even better example is driver's licenses, which are also issued exclusively by the states. It has been estimated that 85-90% of the voting age population has a driver's license.[179] Hence, the "motor voter" element of NVRA should give nearly all eligible Americans the chance to register to vote in the next three to five years, when their licenses come up for renewal.

The states therefore are, at a minimum, a far more effective means of achieving the constitutional objectives of NVRA. When seen in this light, NVRA's mandate that states adopt agency-based registration passes the rational basis requirement of *McCulloch*. To the extent that Article I, Section 4 itself does not permit Congress to conscript the states to execute federal law, the Necessary and Proper Clause, at least in this instance, provides independent constitutional support for such federal commandeering.

6. The Supreme Court's Decision in U.S. Term Limits

On May 22, 1995, a sharply-divided U.S. Supreme Court in *U.S. Term Limits, Inc. v. Thornton* struck down state-imposed term limits for members of Congress.[180] The Court held that if congressional terms are to be limited, this must be done through the amendment process prescribed by the Constitution in Article V.[181] Since *U.S. Term Limits* is the first Supreme Court case in several years to deal directly with regulation of federal elections, it deserves special attention here.

Writing for a 5-4 majority, Justice John Paul Stevens argued that primarily at issue was whether the Qualifications Clauses were intended to be exclusive.[182] The Constitution requires that a member of the House of Representatives be at least 25 years old and a citizen of the state represented for at least seven years.[183] On the Senate side, members must be at least 30 years old and a citizen of their state for at least nine years.[184] In addition, Article I mandates that members of Congress reside in the states they represent at the time they take office. These are the only qualifications the Constitution stipulates for membership in Congress. According to the *U.S. Term Limits* majority, when Arkansas voters amended the Arkansas Constitution in 1992 by referendum so that their congressional delegation could not seek re-election,

178. NVRA provides that federal offices may also be used to register voters for federal elections, but only with their consent. 42 U.S.C. §1973gg-5(a)(3)(B)(ii).
179. S. REP. NO. 6, *supra* note 2.
180. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).
181. *Id.* at 1845.
182. *Id.* at 1847.
183. U.S. CONST. Art. I, § 2, cl. 2.
184. U.S. CONST. Art. I, § 3, cl. 3.

the state effectively imposed an additional qualification—lack of prior service.[185]

Textually, the Constitution is silent on whether Congress or the states may add to the minimum residency, citizenship, and age criteria required by Article I. Justice Stevens nonetheless offered three arguments to support the Court's conclusion that the Qualifications Clauses were intended to be exclusive. First, term limits cannot be reconciled with the other provisions in the Constitution that govern federal elections. Second, the Framers' statements during the ratification debates reveal that they did not want states to be able to impose term limits. And third, allowing states to limit congressional terms would undermine the national character of the federal government. The first and last of these points are of particular interest to the NVRA debate.

Citing the Elections Clause and other sections of Article I, the Court maintained that "the text of the Constitution unquestionably reveals the Framers' distrust of the States regarding [federal] elections."[186] According to Justice Stevens, one purpose behind the Elections Clause was "to minimize the possibility of state interference with federal elections."[187] Declaring that the national government was meant to be chosen by the people and not the states, the majority argued that the Constitution "allows the States but a limited role in federal elections, and maintains strict checks on state interference with the federal election process."[188] The Elections Clause, by giving broad preemptive power to Congress, guaranteed that contests for that body would be held regardless of what electoral processes states employed. The Framers' objective, according to Justice Stevens, was that the federal government not be dependent on the states for its existence. The Court concluded that the Framers would never have vested such extensive authority in Congress on procedural matters, and then given the states the ability essentially to undermine it by imposing additional qualifications.[189]

The power of Congress under the Elections Clause was obviously not at issue in *U.S. Term Limits*. Rather, the case concerned the validity of state action. However, the Court's comments suggest that if again faced directly with the question, the authority of Congress, as in the past, will be broadly construed. More precisely, the majority emphasized repeatedly that all powers states possess over federal elections are delegated by the Constitution, and thus are not part of a state's "reserved" or "original" powers.[190] Moreover, in the area of federal elections, Justice Stevens declared that the Constitution gives Congress substantial leeway to step in when the states undermine the uniform character of the national government.[191] This narrow reading of state power, and broad reading of federal power, does not bode well for any state that decides to challenge NVRA's constitutionality in the U.S. Supreme Court. It would be perplexing for the Court to jealously protect the federal electoral process on the term limits issue, and then subsequently hold that Congress could not regulate voter registration for its own elections.

Perhaps most interesting about *U.S. Term Limits* was the Court's discussion of

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185. *U.S. Term Limits*, 115 S. Ct. at 1867.
186. *Id.* at 1859.
187. *Id.* at 1857.
188. *Id.* at 1864.
189. *Id.* at 1858. Writing for the dissent, Justice Clarence Thomas countered that the scope of the congressional "make or alter" power under the Elections Clause has no impact on whether states may impose additional qualifications on their congressional delegation. *Id.* at 1883.
190. *Id.* at 1856.
191. *Id.* at 1857.

policy reasons for striking down Arkansas' constitutional amendment. Justice Anthony Kennedy concurred separately to expand upon the underlying rationale for the majority's decision:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[192]

Thus, Justice Kennedy envisioned a dualistic federal system in which the states and national government operate in distinct and separate spheres, each being prevented by the Constitution from encroaching upon the sovereignty of the other.

More precisely, Justice Stevens claimed that state-imposed term limits overly interfered with the federal government's side of this "coin" of sovereignty: "Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the . . . national character that the Framers envisioned and sought to ensure."[193] The majority ridiculed the notion that the federal government was merely a collection of states, comparing a constitutional world with term limits to the Articles of Confederation.[194] Justice Stevens argued that term limits, by undermining the uniform nature of the federal government, severed the "direct link" the Framers intended to create between the people and Congress.[195] Also, on a more basic level, term limits simply offend the democratic principle that "the people should choose whom they please to govern them."[196]

When applied to a constitutional adjudication of NVRA, the Court's policy analysis in *U.S. Term Limits* offers something for each side in the debate. Justice Kennedy's eloquent defense of American federalism could be construed in favor of the states in the NVRA litigation. The Act's exclusive reliance on the arms of state government could conceivably be found to offend the "two orders of government" rationale underlying *U.S. Term Limits*.[197] If the Court decides eventually to extend the same protection to state sovereignty as it did to federal sovereignty in *U.S. Term Limits*, NVRA could indeed be found unconstitutional.

Upon closer examination, however, this result appears unlikely. Justice Kennedy's concurring opinion notwithstanding, the majority reaffirmed that the area of federal elections is a special one governed by different constitutional precepts. For example, the Court noted that the administration of federal elections is one of the few duties the Constitution explicitly places on the states.[198] Congressional power over federal elections was again deemed supreme and substantial. Justice Stevens pointed to

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192. *Id.* at 1872.
193. *Id.* at 1864.
194. *Id.* at 1855.
195. *Id.*
196. *Id.* at 1845 (internal quotation omitted).
197. In upholding NVRA, the Ninth Circuit emphasized this point when it signalled its concern that the law, depending on how it is applied, might offend the sphere of state sovereignty implicitly deemed sacrosanct in Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995).
198. *U.S. Term Limits*, 115 S. Ct. at 1855.

both specific constitutional provisions and speeches by the Framers to support his conclusion that state sovereignty is simply a secondary concern when congressional elections are at issue. When seen in this light, NVRA's use of state agencies to carry out its detailed provisions is not nearly as offensive as at first glance.

In addition, NVRA is consistent with the majority's vision of a uniform national government linked directly to the people. NVRA creates a uniform voter registration system for federal elections, eliminating the "patchwork" of state laws that existed before. Moreover, by making registration easier for Americans, the Act's underlying purpose is to improve the "direct link" between the voters and federal officers that Justice Stevens deemed so important in *U.S. Term Limits*. Consequently, even though the Court has become increasingly concerned in recent years about protecting states' rights, on the whole *U.S. Term Limits* sends a strong signal that, at least with regard to federal elections, the residual power of Congress still trumps concerns about state sovereignty.

B. Conclusion: Case Law

The Supreme Court's opinions construing the scope of congressional authority to regulate federal elections, have if anything, expanded that power beyond what was originally envisioned by the Framers and Ratifiers over 200 years ago. Although the cases compel the conclusion that NVRA is constitutional, because the Act relies so heavily on the states the its means of implementation need to be examined closely. The Supreme Court in *Siebold* outlined a vision of concurrent jurisdiction that would seem to dictate that when acting under Article I, Section 4, Congress has substantial leeway to conscript the states to carry out federal law. However, *Siebold* is very old, and it did not address the specific issues of voter registration and administrative costs. Its value here is therefore open to question.

While *Siebold* is indeed not authoritative, the Necessary and Proper Clause appears to legitimate NVRA's commandeering of state governments. After all, the states are inherently better equipped to expand the number of registered voters because their agencies and subdivisions come into daily contact with more citizens. However, NVRA must climb one more hurdle under the Necessary and Proper Clause: *McCulloch* specified that the means Congress employs in the exercise of its enumerated powers must be consistent with the "letter and spirit" of the Constitution. This raises an important question: how does this limitation apply, if at all, to NVRA? Might it implicate notions of state sovereignty?

This brings me to the role of the Tenth Amendment, and particularly the Supreme Court's recent decision in *New York v. United States*.[199]

IV. THE TENTH AMENDMENT

A. Introduction

In the last twenty years, the Supreme Court's Tenth Amendment jurisprudence has certainly taken an unsteady course. In 1985 the Court, reversing the 1976 *National League of Cities v. Usery*[200] decision, held in *Garcia v. San Antonio Metropolitan*

199. New York v. United States, 112 S. Ct. 2408 (1992).

200. National League of Cities v. Usery, 426 U.S. 833 (1976).

Transit Authority[201] that state sovereignty was meant to be protected by the role the Constitution gives the states in the process by which representatives are selected, rather than by judicial review. Seven years later, the Justices backpeddled from this "process" theory in *New York v. United States*,[202] when they held that the Tenth Amendment proscribes the practice of conscripting the states to be "regional offices" or "administrative agencies" of the federal government.

This section assesses the relevance of the Tenth Amendment, and these two decisions in particular, to adjudicating the constitutionality of the National Voter Registration Act.[203] The specific problem here for Tenth Amendment purposes is whether NVRA's reliance on the states to carry out its prescriptions intrudes upon state sovereignty in a way prohibited by *New York* or *Garcia*. To answer this question, Part IV is divided into four sections. Section A reviews the holding and rationale of *New York*. Section B examines the arguments in favor of applying *New York*'s anti-commandeering rule to NVRA. Section C counters with two arguments for why *New York* does not control a constitutional adjudication of NVRA. Finally, Section D explores the role of process theories in the specific area of federal election regulation. Each of these points will be discussed in turn.

1. The Holding and Rationale of New York

Writing for the majority, Justice Sandra Day O'Connor breathed new life into the Tenth Amendment when she declared in *New York* that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[204] By a vote of 6-3, the Justices struck down a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985.[205] Specifically at issue was the constitutionality of a "take title" provision that required New York State to arrange for the disposal of all radioactive waste within its borders.[206] Alternatively, upon the owner's request the state would have to take title to the waste; failure to possess the waste promptly would render New York liable for all damages resulting from continuing possession in the hands of the original owner.[207] Congress claimed to be acting under the Commerce Clause when it directed New York to regulate in this fashion.[208]

Framing the issue to be "the circumstances under which Congress may use the

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201. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

202. *New York*, 112 S. Ct. at 2408.

203. One older case directly addressed the role of the Tenth Amendment when Congress acts pursuant to its power to regulate federal elections. United States v. Manning, 215 F. Supp. 272 (W.D. La. 1963), adhered to the general trend of granting Congress expansive authority:

> [N]othing in the language or history of the Tenth Amendment gives the State exclusive sovereignty over the election processes against the federal government's otherwise constitutional exercise of a power within the scope of Article I, Section 4 . . . . In Justice Holmes's phrase, this "is not a controversy between equals." It is necessary at this time to say again, and underscore it, that within the area of delegated power, express or implied, the Tenth Amendment does not reduce the powers of the United States. *Id.* at 277.

While interesting academically, the precedential value of *Manning* as a Tenth Amendment case is dubious in light of the confusion in the Supreme Court that began with *National League of Cities*.

204. *New York*, 112 S. Ct. at 2435.

205. *Id.* at 2435.

206. *Id.* at 2416.

207. *Id.*

208. *Id.* at 2419-20.

states as implements of regulation,"[209] Justice O'Connor promulgated what has been labeled the "autonomy of process" principle to hold the take title provision unconstitutional.[210] In an argument largely grounded on what it claimed to be the original intent of the Framers, the majority asserted that the Constitution empowered Congress to regulate individuals, but not states.[211] While the Tenth Amendment may indeed be only a tautology, according to the Court the Constitution does not permit Congress to interfere with the autonomous processes of state governments.

Justice O'Connor then delineated the circumstances under which Congress may encourage states to regulate. First, Congress can condition a grant of federal funds on a requirement that a state regulate private conduct in a particular way.[212] Second, Congress can offer states a choice between regulating or facing federal preemption.[213] However, the take title provision fell in neither category because it left New York state no choice but to regulate.[214] Declaring that "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all,"[215] the Court struck down the take title provision.

The majority explained at length why the mandatory nature of the law was so constitutionally offensive. However, the essence of its argument was distilled in one paragraph:

> Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels the States to regulate, the accountability of both state and federal officials is diminished.[216]

Concluding that the Tenth Amendment guaranteed to the states a certain measure of autonomy, the Court held that Congress could not harness state legislative and executive processes to carry out federal policy.[217]

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209. *Id.*

210. *See generally* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994).

211. *New York*, 112 S. Ct. at 2421-23.

212. *Id.* at 2423.

213. *Id.* at 2424.

214. *Id.* at 2427-28.

215. *Id.* at 2428.

216. *Id.* at 2424.

217. *Id.* at 2435. It has been argued elsewhere that *New York* was correct about federal conscripting of state legislatures, but wrong about the ability of Congress to rely on state executives to implement federal law. *See* Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993). On this particular point, Justice O'Connor's eagerness to reinvigorate the Tenth Amendment appears to have effected occasional spells of intellectual dishonesty in her argument. For example, she quoted Hamilton from the Federalist Papers to support the proposition that Congress may not commandeer state legislatures: "The New National Government 'must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations.'" *New York*, 112 S. Ct. at 2422 (citation omitted). However, she neglected to incorporate the rest of that particular paragraph: " . . . but [the federal government] must itself be impowered to employ the arm of the ordinary magistrate to execute its own resolutions." THE FEDERALIST No. 16, at 165 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

2. How New York Might Apply to NVRA

Since Justice O'Connor's holding is phrased in such broad terms, it may be argued that *New York* should also apply to the Elections Clause. A few sections of her opinion convey the potential breadth of *New York*'s anti-commandeering fiat:

> [R]egulating pursuant to Congress' direction . . . would, standing alone, present a simple command to state governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject state governments to this instruction.[218]

Later, the majority asserted:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate . . . . Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.[219]

Nowhere is the holding explicitly limited to the Commerce Clause. Nor should it be: the underlying rationale of the case is no less applicable to most other grants of federal power. What if Congress, for example, acting under Article I, conscripted the states to execute federal immigration policy? This would certainly interfere with the autonomous processes of state governments in a way that *New York* would seem to prohibit. The open-ended nature of the decision was probably deliberate, in order to leave the Court the option of expanding (or limiting) the anti-commandeering rule in subsequent cases.[220]

At first glance, the holding of *New York* appears right on point because state governments under NVRA have no choice but to execute laws passed by Congress. Indeed, the Act has been controversial because it strikes right at the heart of what *New York* was all about: choice. NVRA forces state and local officials to take the political heat for the administrative costs of implementing the law, while federal officials get to claim the credit for its benefits. This is exactly the problem *New York* sought to eliminate. In fact, NVRA in some ways seems an even better case for the autonomy of process principle than the take title provision. Although the states were consulted during the legislative process about the potential impact of expanded voter registration,[221] Congress, in its passage of the NVRA, did not seek to forge a political consensus on how to solve the problem at hand, as it had done in passing the Radioactive Waste Policy Act. Rather, the law is yet another unfunded federal mandate; the states were not offered any money to offset implementation costs.

The compulsory nature of the law, and states' reaction to it, admittedly make a

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218. *New York*, 112 S. Ct. at 2428.

219. *Id.* at 2429.

220. There is nevertheless a strong implication that the holding was primarily meant to apply to the Commerce Clause. Justice O'Connor reiterated on several occasions the importance of preserving state autonomy in the area of "federal regulatory programs"—an allusion to laws that compel or prohibit certain forms of private conduct. Moreover, the Court distinguished *Garcia* on the ground that "[*Garcia*] is not a case in which Congress has subjected a State to the same legislation applicable to private parties." *Id.* at 2441.

221. *See* S. REP. NO. 6, *supra* note 2. *See also* H.R. REP. NO. 9, *supra* note 7.

good prima facie case for expanding *New York*'s anti-commandeering rule. However, there are important differences between the Commerce Clause and the Elections Clause, and these differences turn out to be dispositive.

3. Why New York Does Not Apply to NVRA

The most obvious (and important) distinction between NVRA and the take title provision is that Congress was acting under an entirely different section of Article I in *New York*: the Commerce Clause. The Supreme Court indicated as early as *National League of Cities* that different precepts might apply if another part of Article I was at issue, as here.[222] However, in light of the open-ended nature of *New York*, that Congress enacted NVRA under the Elections Clause, standing alone, is an unconvincing distinction. This section offers two arguments for why *New York*'s rule against commandeering should not apply when Congress preempts state law under Article I, Section 4.

The regulation of commerce and the administration of elections are not at all alike. In a laissez faire economy such as that in the United States, commerce is often not regulated at all. As Americans, we have long held a general predilection against government involvement in our private affairs. By contrast, elections are one of the few activities government must carry out for a civilized society to function. Elections could not be held whimsically; nor could their administration be privatized. Rather, elections fall into a small and select class of government functions that are truly essential in nature. Others include policing, providing for the national defense, and coining money.

The Constitution reflects the paramount importance of elections. It mandates that congressional elections be held at least every two years, and prescribes specific conditions under which each branch of the government is to be chosen. The policy question the Framers had to address at the Constitutional Convention was where to place the authority to hold these contests. In this regard, the Elections Clause is a built-in federal mandate.[223] While the administration of elections was seen more as a privilege than a duty 200 years ago, Article I, Section 4 still requires the states to prescribe the initial rules for, and to conduct, federal elections.

By comparison, the Commerce Clause power is entirely discretionary in nature. Congress and the states need not regulate interstate commerce at all, if they so choose.[224] In light of the compulsory nature of state duties under the Elections

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222. *Nat'l League of Cities*, 426 U.S. at 852 n.17.

223. The U.S. Court of Appeals for the Seventh Circuit emphasized this point in upholding NVRA, and described the Elections Clause as a "fatal compromise" of state sovereignty. Acorn v. Edgar, 56 F.3d 791, 794, 796 (7th Cir. 1995). In *U.S. Term Limits*, the Supreme Court agreed with this construction when it concluded that the Elections Clause is one of the few provisions in the Constitution that requires the states to act. *U.S. Term Limits*, 115 S. Ct. at 1855. According to the Court, the mandatory nature of states' obligations reflects the Framers' intent to create a direct link between the American people and the federal government.

224. The Supreme Court recently placed new limits on the power of Congress when it acts under the Commerce Clause. In United States v. Lopez, 115 S. Ct. 1624 (1995), the Justices struck down the Gun-Free School Zones Act of 1990, declaring that Congress could not prohibit gun possession within 1000 feet of a school. While the full scope of the decision will not be clear for some time, *Lopez* is significant because it may reflect a new willingness by the Court to protect certain state and local prerogatives from federal interference. In light of the protection shown for the federal elections process one month later in *U.S. Term Limits*, however, the relevancy of *Lopez* to the NVRA debate is certainly open to question.

Clause, Justice O'Connor's concerns about the accountability of state officials seem misplaced—the states have no choice, unlike under the Commerce Clause, but to make and enforce regulations. Commandeering may be undemocratic, and it may be a bad way to make policy, but the Framers, at least in this instance, decided to turn the states into agents of the federal government. They must prescribe the first set of regulations unless Congress takes preemptive action.

Circumstances admittedly change when Congress exercises its explicit power to make new regulations. When states are administering federal elections under their own rules, they are still to some degree masters of their own destiny, even if they cannot avoid the duty altogether. The Elections Clause gives Congress the power to "make or alter"; it does not say "and also conscript." Thus, it may be argued that the same precepts the Supreme Court applied to the Commerce Clause in *New York* apply here—Congress may not use the states as implements of regulation. Or, as Justice Field put it in his dissent in *Ex Parte Clarke*, the federal government may use state officials only "upon the conditions which the state may impose."[225]

This view, however, ignores the reasons Congress was given the power to preempt state law in the first place. The Framers believed substantial authority in Congress was necessary in order to protect the right of the people to elect the government, and to ensure that all provisions of the Constitution pertaining to the electoral process were respected. The mandatory nature of state duties under the Elections Clause thus reflects a policy choice: state sovereignty, where necessary, was meant to be subsumed to the greater public interest in maintaining the purity of the electoral process. When seen in this light, conscripting the states is implied in the authority to "make or alter." NVRA's heavy reliance on the states to carry out its provisions is an exercise of this implied power. Moreover, no case has ever held that where the power to decide and the duty to implement are separated, as here, the federal government must foot the bill.

The Supreme Court has declared on many occasions that the Tenth Amendment is merely a tautology. In *New York*, Justice O'Connor, generally known to be sympathetic to states' rights, conceded that "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States[.]"[226] The Court nonetheless concluded that the Tenth Amendment was violated because Congress was not actually regulating interstate commerce. Rather, Congress was impermissibly directing New York State to regulate interstate commerce. The factual and legal circumstances surrounding NVRA are different. If it is accepted that voter registration constitutes part of the "manner" of federal elections, then the constitutional power to "make or alter" gives Congress explicit textual authority to pass legislation governing the registration process. The focus then shifts to whether NVRA may use the states as implements of regulation.

The dispositive factor in answering this question is the role of the Necessary and Proper Clause, which was not at issue in *New York*. As discussed in Part III, requiring states to adopt agency-based voter registration seems to pass the rational relationship test handed down in *McCulloch*. As to whether this method is also consistent with the "letter and spirit" of the Constitution, in light of *New York*, this may be open to question. However, the Court has never so animated the "letter and spirit" language that a

225. *Clarke*, 100 U.S. at 413.
226. *New York*, 112 S. Ct. at 2417.

law otherwise permissible under *McCulloch* has been declared unconstitutional. Thus, the real issue here is whether the Tenth Amendment can reduce the delegated powers Article I gives to Congress. Even though *New York* did not explain how its anti-commandeering fiat might impact the scope of the Necessary and Proper Clause, if the Tenth Amendment is really a tautology, the answer should be clear. In this important sense, NVRA is nothing like the take title provision. The former may interfere with state sovereignty, but it does so in a valid exercise of express and implied constitutional authority. On the other hand, *New York* involved a federal statute that tried to masquarade as an expression of a delegated power. The Supreme Court was not fooled.

More recently, in *U.S. Term Limits*, the Justices were called upon to address a Tenth Amendment argument in the specific context of federal elections. The state of Arkansas maintained that the authority to limit terms for its members of Congress was part of its "original powers," and thus was reserved to the state under the Tenth Amendment.[227] Writing for the majority, Justice Stevens rejected this interpretation, concluding that all powers over federal elections are delegated by the Constitution: "Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only 'reserve' that which existed before."[228]

U.S. Term Limits addressed a different aspect of the Tenth Amendment than that at issue in the NVRA debate. Unlike the term limits controversy, NVRA concerns not the textual meaning of the Tenth Amendment, but rather whether the Act impermissibly intrudes on state sovereignty. Hence, as a Tenth Amendment case, *U.S. Term Limits* initially appears of limited relevance to the controversy surrounding NVRA. However, the term limits question did give the Supreme Court an additional opportunity to expand the Tenth Amendment beyond *New York*, and the Justices declined to do so. While Tenth Amendment jurisprudence in the 1990s has indeed been increasingly volatile and convoluted, *U.S. Term Limits* permits the tentative conclusion that state sovereignty arguments will continue to hold little sway with the Court when the issue is federal elections.

4. Process Theories and Federal Elections

New York left unclear to what extent its opinion superseded the "process" theory the Court promulgated in *Garcia* seven years earlier.[229] In fact, whether the two cases can even be reconciled is open to question.[230] Is *New York* an exception to *Garcia*'s general rule that states are to look to the political process for relief when they feel Congress is encroaching on their sovereignty? Or does *New York* represent yet another sea change in the Justices' thinking about the Tenth Amendment? These questions

227. *U.S. Term Limits*, 115 S. Ct. at 1853.

228. *Id.* at 1853-54.

229. For further discussion of process theories, *see generally* JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

230. On this point, *see* Richard E. Levy, *New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 KAN. L. REV. 493 (1993). The inconsistency between *Garcia* and *New York*, to the extent that one exists, can perhaps best be explained by changes in the Court's membership between 1985 and 1992. Two Justices that were in the *Garcia* majority (Brennan and Marshall) left the Court by the time *New York* was decided; their replacements, Justices Souter and Thomas, sided with the majority in *New York*.

unfortunately were left unaddressed. However, this section assumes *Garcia* is not completely dead, and analyzes the role of process theories in a constitutional assessment of NVRA.

As discussed in Parts I and II, many of the Framers and Ratifiers viewed the primary check on the power of Congress to regulate federal elections to be political and structural in nature, and not legal. In this sense, the logic of *Garcia* is especially applicable here: statements by Madison and others who asserted that the Constitution provided adequate safeguards against abuse almost seem lifted straight from the opinion.[231] Therefore, to the extent that *Garcia* is still good law after *New York*, its process theory counsels against using the Tenth Amendment to set aside the National Voter Registration Act, even though the law in some ways does impinge upon state sovereignty.

Perhaps most persuasive is that, with regard to NVRA, *Garcia*'s process argument actually has some merit. Six bills have been introduced in the 104th Congress that would repeal NVRA,[232] delay its enforcement until the federal government appropriates funds to pay for its implementation,[233] or make compliance with the law voluntary.[234] While the motives of the bills' sponsors—all Republicans—may indeed be somewhat partisan, the costs NVRA imposes on state and local governments were the main reason cited for seeking to modify its scope. The states may be unable ultimately to effect a repeal of the Act, but as this Article went to press it appeared likely that NVRA will eventually be "fine tuned" to address some of the states' concerns.[235] More generally, the political climate in Washington has clearly changed in response to states' complaints about the costs of unfunded mandates. With the passage of the Unfunded Mandates Reform Act of 1995, states and municipalities recently were able to secure prospective relief from the expense of laws such as NVRA.[236] Thus, as *Garcia* envisioned, the political process appears to be working.

B. Conclusion: The Tenth Amendment

To summarize, I believe the National Voter Registration Act passes constitutional muster under the Tenth Amendment. The policies underlying *New York*—accountability and choice—do not apply to NVRA because the states have no option but to prescribe rules for, and administer, federal elections. State duties are therefore very different than under the Commerce Clause. The mandatory nature of the Elections Clause, and the broad preemptive authority it has been construed to afford

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231. Or perhaps it was the other way around: *Garcia* is an originalist analysis predicated upon the intent of many of the specific Framers discussed here.

232. S. 218, 104th Cong., 1st Sess. (1995); H.R. 370, 104th Cong., 1st Sess. (1995).

233. S. 91, 104th Cong., 1st Sess. (1995); H.R. 736, 104th Cong., 1st Sess. (1995).

234. H.R. 60, 104th Cong., 1st Sess. (1995); H.R. 326, 104th Cong., 1st Sess. (1995).

235. Telephone Interview with Holly Wiseman, *supra* note 15.

236. Were NVRA enacted today, Congress would be required by statute to consider its implementation costs. On March 22, 1995, President Clinton signed the Unfunded Mandates Reform Act of 1995 into law. Pub. L. No. 104-4, 109 Stat. 48 (March 22, 1995). The Act aims to relieve the governmental and private sectors of the cost of complying with certain types of federal legislation. More specifically, the Act requires Congress to identify funding sources for mandates whose aggregate costs to states and municipalities exceed $50 million, or vote by a three-fifths majority to waive the congressional funding requirement. Courts cannot challenge the quality or conclusions of cost assessments; judicial review is limited to whether a cost analysis was ever performed. This legislation does not affect NVRA because it is not retroactive.

Congress, reflect a policy decision by the Framers to subsume state sovereignty, where necessary, to the greater public interest in a sound and responsive electoral process. Consequently, conscripting the states to carry out new regulations is implied in the power to "make or alter." To the extent such commandeering is not legitimated by the text of Article I, Section 4 itself, this authority alternatively arises out of the Necessary and Proper Clause. Since it is well settled that the Tenth Amendment cannot reduce express and implied constitutional powers, NVRA is constitutional.

Moreover, the political process was exactly the remedy that was intended if Congress ever abused its power to set rules for federal elections. Assuming NVRA crossed this line by overly relying on state resources to carry it out, recent legislative activity in Washington demonstrates that, as the Framers predicted, the political process is self-correcting. This is further reason to keep the Tenth Amendment, and the federal courts, out of the picture. While there may indeed be circumstances under which an Act of Congress that regulates federal elections violates the Tenth Amendment, those circumstances are not present here.[237]

CONCLUSION

The National Voter Registration Act is unique in the history of voting rights enactments. Unlike during Reconstruction or the Civil Rights Movement, the evil Congress seeks to eradicate with NVRA is not racism or other forms of prejudice. Today, at least in theory, any person eligible to vote may do so, regardless of race, religion, sex, national origin, economic status or any other personal characteristic. This basic freedom is found in few other countries the way it is here.

By contrast, the concerns of the 1990s are rather different. The problem now is an unprecedented degree of non-participation that transcends all classes, creeds, and regions of the country. If there is truth to the accusation that Washington is out of touch, this is maybe because it can afford to be: at least 40% of eligible citizens regularly fail to cast ballots in federal elections. By doing its part to enable more Americans to get involved in the democratic process, NVRA may well engender the next revolution in voting rights.

Besides being a laudable effort, NVRA is also a constitutional one. To the extent that the law imposes costs on states, or interferes with their sovereignty, it does so in a valid exercise of constitutional authority. Since the American system places the onus of registering on the individual rather than on the state, I believe the Framers would agree that it is within the federal government's power to make the registration process as convenient and accessible as possible for citizens who want to participate. In this sense, policy and constitutional law overlap, and point to the same result.

While Americans may also simply be increasingly apathetic, the administrative necessity of registration should not be turned into a test of how strongly Americans care about exercising their right to vote. As Congress noted before NVRA was enacted, this is not the point. Rather, the objective of our electoral process has always been

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237. Citing *U.S. Term Limits*, both the Seventh and Ninth Circuits suggested that NVRA might violate the Tenth Amendment if state resources were conscripted so extensively that states effectively could not carry out their own elections. However, both courts concluded that at present no such showing could be made. Acorn v. Edgar, 56 F.3d 791, 796 (7th Cir. 1995); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995).

to ascertain the will of the people. When seen in this light, it is remarkable that Congress did not act sooner.

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