

CONGRESSIONAL POWER OVER PRESIDENTIAL ELECTIONS: THE CONSTITUTIONALITY OF THE HELP AMERICA VOTE ACT UNDER ARTICLE II, SECTION 1

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Crimes against the ballot have become so numerous and so serious that the attention of all legislative bodies has been turned with anxious solicitude to the means of preventing them, and to the object of securing purity in elections and accuracy in the returns by which their result is ascertained.¹

After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.²

INTRODUCTION

Congress traditionally responds to electoral crises. The disputed elections of 1800 and 1876 led to constitutional amendment and statutory changes.³ During Reconstruction, Congress reacted to rampant violence and intimidation against former slaves with laws giving federal judges and marshals broad power to squelch interference.⁴ In the 1960s, Congress reacted to the civil rights movement and finally confronted the pervasive suppression of African-American voters by enacting the Voting Rights Act.⁵ And as the Supreme Court predicted in *Bush v. Gore*, the 2000 presidential election has given rise to federal legislation aimed at remedying the obvious defects apparent in Florida and elsewhere.⁶

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1. *In re Coy*, 127 U.S. 731, 755 (1888).

2. *Bush v. Gore*, 531 U.S. 98, 104 (2000).

3. The Twelfth Amendment was adopted following the 1800 Election. Congress enacted the Electoral Count Act to resolve disputed presidential elections following the crisis that flowed from the election of 1876. See *infra* note 115 and accompanying text.

4. For a description of the Enforcement Act of 1870 and Congress' answer to the terror visited on African-Americans in the former Confederacy following the Civil War, see *infra* Part II.A.

5. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

6. *Bush v. Gore*, 531 U.S. at 104.

Those deficiencies have been thoroughly investigated and documented by Congress, state legislatures, and a variety of non-governmental commissions.⁷ According to one study conducted by the California Institute of Technology and the Massachusetts Institute of Technology, a total of four to six million voters—roughly four to six percent of those who voted—were unable to have their choices registered as a result of faulty voting equipment, errors in tabulation, problems in voter registration, and other mistakes endemic to the voting process.⁸ Of those four to six million voters, one and one-half million who cast ballots for the President saw their votes go uncounted because they were “unmarked, spoiled or ambiguous.”⁹ The General Accounting Office estimates that fifty-seven percent of jurisdictions in the nation faced significant problems in administering the 2000 election.¹⁰ Poorly maintained punchcard machines that left “hanging,” “dangling” or “dimpled” chads; “butterfly” and otherwise confusing ballots; overwhelmed polling places; poll workers who dispensed erroneous instructions; deficient overseas and military ballots; inaccurate voter registration lists; poll sites relocated with inadequate notice; and facilities and voting technology inaccessible to the disabled all combined to generate an unprecedented crisis in confidence in our electoral system.¹¹

In the days immediately following the balloting in 2000, members of Congress began introducing bills aimed at reforming some or all of the problems uncovered in the election. After more than a year of hearings, negotiation, compromise and revision, Congress passed the Help America Vote Act of 2002 (“the Act”), which President Bush signed into law on

7. *E.g.*, TASK FORCE ON THE FED. ELECTION SYSTEM, NAT'L COMM'N ON FED. ELECTION REFORM, *To Assure Pride and Confidence in the Electoral Process* (Aug. 2001) (researching the extent of Americans' lack of confidence in the electoral process after the 2000 elections), at http://www.reformelections.org/data/reports/99_full_report.pdf [hereinafter NAT'L COMM'N REPORT]; see also THE CONSTITUTION PROJECT'S FORUM ON ELECTION REFORM, *BUILDING CONSENSUS ON ELECTION REFORM* app. C at 39–40 (Aug. 2001) (indexing various state and national reports regarding deficiencies in the 2000 Election), available at <http://www.constitutionproject.org/publications.html>.

8. CALTECH-MIT, VOTING TECHNOLOGY PROJECT, *VOTING: WHAT IS, WHAT COULD BE* 8–9 (July 2001), available at http://www.vote.caltech.edu/Reports/july01/July01_VTP_%20Voting_Report_Entire.pdf.

9. *Id.* Overall, two million voters failed to have votes for the President recorded, but the CalTech-MIT study estimates that 500,000 of these voters did not intend to cast a vote for the President. *Id.* See also *Bush v. Gore*, 531 U.S. at 103 (citing 2% spoliation figure); NAT'L COMM'N REPORT, *supra* note 7, at 50.

10. GEN. ACCOUNTING OFFICE, *ELECTIONS: A FRAMEWORK FOR EVALUATING REFORM PROPOSALS*, GAO-02-90, 18 (Oct. 2001) (citing a survey of election workers).

11. See NAT'L COMM'N REPORT, *supra* note 7, at 17 (discussing survey results illustrating a decrease in public confidence in the fairness of the election system). For a description of the specific problems that plagued the election, see *id.* at 26–54.

October 29, 2002.¹² With the exception of the Voting Rights Act, the Help America Vote Act is Congress' most sweeping effort in modern times to reform the way state and local authorities administer federal elections. Earlier, narrower laws addressed discrete aspects of federal elections, such as certain elements of voter registration and the processes used by disabled, overseas, and military voters,¹³ but none attempted such comprehensive reform of nearly all aspects of the voting process—from pre-election voter registration and education, through the machinery and procedures used on election day, to post-election tabulation.

The Act mandates a variety of changes in the way states conduct elections for all federal offices, though some states already use some or all of the new, required equipment or procedures.¹⁴ Under the Act, voting systems must allow voters the opportunity to review and change their votes before the votes are cast; if states retain paper or punch card balloting, they must "establish[] a voter education program" informing voters that they can change their votes and how before casting the ballot.¹⁵ Voting systems must also have certain audit capabilities and cannot exceed specified error rates.¹⁶ In an effort to avoid both the indeterminacy in state laws governing what constitutes a legal vote, as existed in Florida in 2000, and the *ad hoc*, county-by-county rule-making that characterized the attempted recount there, the Act requires states to adopt uniform standards "that define what constitutes a vote and what will be counted as a vote for each category of voting system used."¹⁷ The Act requires states to employ "provisional voting," which enables voters, who claim to be registered but whose registration status cannot be verified at the polls, to vote and have registration confirmed before the ballot is counted.¹⁸ States must also post sample ballots, voting instructions, information about voting rights and other information at poll sites.¹⁹

12. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 §§ 101–906 (codified at 42 U.S.C. §§ 15301–15455).

13. See Voting Accessibility for Elderly and Handicapped Act, 42 U.S.C. §§ 1973ee to 1973ee-6 (2000) (improving the ability of the elderly and disabled to use polling and registration facilities); Uniformed and Overseas Citizens Absentee Voting Act 42 U.S.C. §§ 1973ff to 1973ff-6 (2000) (prescribing absentee ballot procedures); National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg to 1973gg-9 (2000) (establishing procedures to increase voter registration numbers).

14. Brian Kim, Recent Developments, *Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 587–88 (2003).

15. Help America Vote Act § 301(a)(1).

16. *Id.* § 301(a)(2), (5).

17. *Id.* § 301(a)(2), (6).

18. *Id.* § 302(a).

19. *Id.* § 302(b)(1), (2).

With regard to voter registration, each state is required to maintain and operate a single, computerized, state-wide list of registered voters in specified ways.²⁰ To curb election fraud, the Act also prohibits states from accepting or processing voter registration applications without certain identification, and requires first-time voters who registered by mail to present this identification before voting.²¹ All of the requirements of the Act are enforceable against states by the Department of Justice.²² The Act also authorizes the appropriation of federal funds to help states achieve compliance with its mandates.²³

This Article examines Congress' power, under Article II, Section 1 of the United States Constitution, to enact the Help America Vote Act. This section provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."²⁴ It also sets forth the procedure whereby the electors choose the President (later altered by the Twelfth Amendment), and leaves it to Congress to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."²⁵ Since the 2000 election, commentators have noted the uncertainty surrounding whether this section empowers Congress to regulate presidential elections.²⁶ This Article does not examine other possible constitutional bases for some or all of the provisions of the Act, such as the Fourteenth Amendment's Equal Protection Clause.²⁷ Nor,

20. *Id.* § 303(a).

21. *Id.* § 303(b).

22. *Id.* § 401.

23. Congress authorized the appropriation of 3.86 billion dollars to assist states in implementing the reforms mandated by the Act. *Id.* §§ 104(a), 257, 264, 273. As of February 20, 2003, approximately \$1.5 billion had been appropriated. See Miscellaneous Appropriations Act of 2003, Pub. L. No. 108-7, 117 Stat. 11, 537-38.

24. U.S. CONST. art. II, § 1, cl. 2.

25. U.S. CONST. art. II, § 1, cl. 4.

26. *E.g.*, Pamela S. Karlan & Daniel R. Ortiz, *Congressional Authority to Regulate Elections*, in NAT'L COMM'N ON FED. ELECTION REFORM, THE FEDERAL REGULATION OF ELECTIONS: BACKGROUND REPORT OF THE TASK FORCE ON LEGAL AND CONSTITUTIONAL ISSUES 14, 14 (June 29, 2001), available at http://www.millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/ortiz_chap10_fedreg.pdf. "The exact scope of Congress's power under Article II, § 1 to regulate presidential elections, for example, is somewhat unclear." *Id.* at 16; GEN. ACCOUNTING OFFICE, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION, GAO-01-470, at 2 (Mar. 2001) (GAO Report to Congress) ("[T]he precise parameters of Congress' authority to pass legislation relating to presidential elections have not been clearly established.")

27. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. at 104-05; *accord* *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Harper v. Va. Board of Elections*, 383 U.S. 663,

as a matter of policy, does it question the glaring need for the remedial measures set forth in the Help America Vote Act. If implemented, these changes can only improve accuracy and the experience of individual voters in future elections. Rather, this Article focuses on the understandings of the Framers and early Congresses as to Congress' role in presidential elections, as well as subsequent judicial interpretations of Article II, Section 1. The Article concludes by briefly setting forth the arguments for and against the constitutionality of the Help America Vote Act under Article II, Section 1 as it applies to presidential election.

I. EARLY UNDERSTANDINGS OF CONGRESSIONAL POWER OVER PRESIDENTIAL ELECTIONS

A. *The Constitutional Convention*

Few issues proved as intractable for the Constitutional Convention as the manner of selecting the President. James Wilson of Pennsylvania called

665 (1966). Whether some or all of the provisions of the Help America Vote Act would be upheld as to presidential elections under the Equal Protection Clause is unknown. While the Supreme Court's decision in *Bush v. Gore* rested on the Equal Protection Clause, the Court explicitly disclaimed that decision's precedential value: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Bush v. Gore*, 531 U.S. at 109. Even the four dissenters who joined Justice Souter's opinion noted that "the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on." *Id.* at 134 (Souter, J., dissenting). On the other hand, perhaps, as one commentator writes, "[i]t is . . . simply not in the power of the Court to determine that its decision has no precedential value. All decisions of the Court have such value." Renata Adler, *Irreparable Harm*, NEW REPUBLIC, July 30, 2001, at 31. In *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003) *rev'd en banc* 344 F.3d 914 (9th Cir. 2003), a panel of the Ninth Circuit reversed the district court's denial of a preliminary injunction enjoining California's 2003 gubernatorial recall and initiative election on the basis of the claimed equal protection violation inherent in some counties' use of error-prone punch card balloting. The court held that the plaintiffs' claim mirrors the one recently analyzed by the Supreme Court in *Bush v. Gore* and concluded that requiring some voters to use voting technology less accurate than that used by other voters violated the Equal Protection Clause. *Id.* at 894. Nevertheless, the court, sitting en banc, reversed. It found that the district court had not abused its discretion in finding that the plaintiffs were unlikely to succeed on the merits, and quoted the passage from *Bush v. Gore* noting that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 344 F.3d at 918 (quoting *Bush v. Gore*, 531 U.S. at 109). For a discussion of whether the Equal Protection Clause supports election reform legislation, see Kenneth A. Gross, *Constitutional Restrictions on Federal and State Regulations of the Election Process*, in NAT'L COMM'N ON FED. ELECTION REFORM, THE FEDERAL REGULATION OF ELECTIONS: BACKGROUND REPORT OF THE TASK FORCE ON LEGAL AND CONSTITUTIONAL ISSUES 3, 3-8 (June 29, 2001), available at http://www.millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/ortiz_chap10_fedreg.pdf.

it “the most difficult of all on which we have had to decide,”²⁸ while Madison recalled over three decades later that “[t]he difficulty of finding an unexceptionable process for appointing the Executive . . . was deeply felt by the Convention.”²⁹ By contrast, the Convention’s straightforward decision to give Congress power over the “Times, Places and Manner” of congressional elections, eventually embodied in Article I, Section 4, was relatively easy.³⁰

The three options that received the greatest consideration were congressional appointment, popular election, and some intermediate system making use of state officials and electors. The plan submitted at the outset of the Convention by Edmund Randolph of Virginia provided for congressional selection,³¹ as did the New Jersey Plan submitted by William

28. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 501 (Max Farrand ed., 1966) [hereinafter Farrand].

29. 3 *id.* 458 (Letter from James Madison to George Hay, August 23, 1823).

30. “The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1. The Convention gave Congress ultimate control over the rules of congressional elections because the delegates thought it essential to safeguard the federal government’s independence from the states. As Wilson asked at the Pennsylvania Ratifying Convention:

If the Congress had it not in their power to make regulations, what might be the consequences? Some states might make no regulations at all on the subject. And shall the existence of the House of Representatives, the immediate representation of the people in Congress, depend upon the will and the pleasure of the state governments?

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 440–41 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott 2nd ed. 1907) [hereinafter Elliot]. Madison argued that the rules of congressional elections could determine their outcome, that “[w]henver the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed,” and that it was “impossible to foresee all the abuses that might be made of the discretionary power” over elections given to the states if Congress could not override state rules when necessary. 2 Farrand, *supra* note 28, at 240–41. “[T]he intention of the Convention,” Judge Francis Dana explained during the Massachusetts Ratifying Convention, “was to set Congress on a different ground; that a part [of the government] should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislatures ought not to control the elections.” 2 Elliot, *supra*, at 49. The Supreme Court has held that:

[T]hese comprehensive words [in Article I, § 4] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932). For a summary of the origins of Article I, Section 4, see Michael Davidson, *Notes on History of Article I. Section 4, Clause 1*, (Apr. 3, 2001), at <http://www.constitutionproject.org/eri/Article1.pdf>.

31. 1 Farrand, *supra* note 28, at 20–21.

Patterson on June 15.³² Supporters of this method, like Charles Pinckney of South Carolina, argued that Congress, "being most immediately interested in the laws made by themselves, will be most attentive to the choice of a fit man to carry them properly into execution."³³ Roger Sherman of Connecticut reminded delegates that "the Executive magistracy [was] nothing more than an institution for carrying the will of the Legislature into effect," and that as "the depository of the supreme will of the Society" Congress should choose the President and then hold him accountable.³⁴

But as debate over the question unfolded in June and July 1787, congressional selection came under determined attack. Elbridge Gerry of Massachusetts warned that there "would be a constant intrigue kept up for the appointment. The Legislature & the candidates [would] bargain & play into one another's hands. [V]otes would be given by the former under promises or expectations from the latter . . ."³⁵ Wilson argued that the President "would be too dependent [on Congress] to stand the mediator between the intrigues & sinister views of the Representatives and the general liberties & interests of the people."³⁶ Wilson's fellow Pennsylvanian, Gouverneur Morris, invoked historical examples of legislative oppression:

If the Executive be chosen by the Nat'l. Legislature, he will not be independent on it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence. This was the case in England in the last Century. It has been the case in Holland, where their Senates have engrossed all power. It has been the case every where.³⁷

Others agreed. Pierce Butler of South Carolina maintained "[t]he two great evils to be avoided are cabal at home, & influence from abroad," and added that it would "be difficult to avoid either if the Election be made by the Nat'l Legislature."³⁸ Hamilton believed that "if appointed by the Legislature, [the President] would be tempted to make use of corrupt influence to be continued in office."³⁹ Madison may have marshaled the arguments most thoroughly:

32. *Id.* at 242, 244.

33. 2 *id.* at 30.

34. 1 *id.* at 65.

35. *Id.* at 80.

36. 2 *id.* at 30.

37. *Id.* at 30-31.

38. *Id.* at 112.

39. *Id.* at 524.

If it be a fundamental principle of free govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they should be *independently* exercised. There is the same & perhaps greater reason why the Executive shd be independent of the Legislature, than why the Judiciary should: A coalition of the two former powers would be more immediately & certainly dangerous to public liberty. It is essential then that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the Legislature. This could not be if he was to be appointable from time to time by the Legislature. It was not clear that an appointment in the 1st instance [even] with an ineligibility afterwards would not establish an improper connection between the two departments. Certain it was that the appointment would be attended with intrigues and contentions that ought not to be unnecessarily admitted. He was disposed for these reasons to refer the appointment to some other Source.⁴⁰

In lieu of congressional appointment, Madison, Morris, Wilson, and others favored popular election. Wilson argued that popular election would ensure the President's independence from state legislatures.⁴¹ Morris told the delegates that New Yorkers, who elected their governor, had not been led astray by "designing men," and that the voters would not lack for information regarding those "great & illustrious characters" worthy of the presidency.⁴² "An election by the people at large throughout so great an extent of country," Morris explained, "could not be influenced, by those little combinations and those momentary lies which often decide popular elections within a narrow sphere."⁴³ Madison concurred, arguing:

The people at large was in his opinion the fittest in itself. It would be as likely as any that could be devised to produce an Executive Magistrate of distinguished Character. The people generally could only know & vote for some Citizen whose merits had rendered him an object of general attention & esteem.⁴⁴

40. *Id.* at 56. Madison also offered other objections to congressional selection, such as the divisions that would result in Congress, and the potential for foreign influence and intrigue. *Id.* at 109.

41. 1 *id.* at 69, 80.

42. 2 *id.* at 30-31.

43. *Id.* at 54.

44. *Id.* at 56-57 (footnote omitted).

Like congressional appointment, however, popular election aroused fierce opposition on several grounds. Prominent among these was states' rights. Gerry feared that popular election would incite and empower partisan groups and political factions, leaving no role for state governments.⁴⁵ He "thought the Community [was] not yet ripe for stripping the States of their powers . . . [and] seemed to prefer the taking the suffrages of the States instead of Electors, or letting the [state] Legislatures nominate, and the electors appoint."⁴⁶ John Dickinson of Delaware, who wanted state legislatures to be able to remove the President, similarly declared that "[h]e had no idea of abolishing the State Governments as some gentlemen seemed inclined to do."⁴⁷ Roger Sherman of Connecticut argued that smaller states like his own would suffer from popular election, as citizens would "generally vote for some man in their own State, and the largest State will have the best chance for the appointment."⁴⁸ To Pinckney, "[t]he most populous States by combining in favor of the same individual will be able to carry their points" at the expense of their smaller brethren like his own South Carolina.⁴⁹

There were other objections as well. Sherman contended that the people would "never be sufficiently informed of [the candidates'] characters, and besides will never give a majority of votes to any one man."⁵⁰ Pinckney complained that voters would be misled "by a few active & designing men."⁵¹ Rufus King of Massachusetts doubted that voters could ever reach "a general concurrence . . . in favor of any one man,"⁵² while George Mason of Virginia famously called it:

[A]s unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that

45. 1 *id.* at 80; see also TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804*, at 9 (Greenwood Press 1994) (warning by Elbridge Gerry "that such a proposal would 'supercede altogether the state authorities'").

46. 1 Farrand, *supra* note 28, at 80.

47. *Id.* at 85.

48. 2 *id.* at 29.

49. *Id.* at 30; see also NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE'S PRESIDENT* 21 (Yale University Press 1981) [hereinafter *PEOPLE'S PRESIDENT*].

50. 2 Farrand, *supra* note 28, at 29.

51. *Id.* at 30; see also *PEOPLE'S PRESIDENT*, *supra* note 49, at 21. Gerry also warned that "[t]he people . . . would be misled by a few designing men" if the people were allowed to elect the president. *Id.*

52. 2 Farrand, *supra* note 28, at 55-56.

the people can have the requisite capacity to judge of the respective pretensions of the Candidates.⁵³

Mason and Gerry—who thought the people “too little informed of personal characters in large districts, and liable to deceptions,” to take part in picking the President⁵⁴—feared that popular election would lead to rule by the Order of the Cincinnati, an association of Revolutionary War veterans.⁵⁵

The deadlock between congressional selection and popular election prompted consideration of intermediate electors, an idea raised in various forms throughout the Convention. Early on, Gerry had suggested letting state legislatures select presidential candidates from whose ranks electors would make a final choice;⁵⁶ later, he proposed that state governors name electors to choose the President.⁵⁷ Hamilton wanted the people, voting in districts, to name electors who would pick the President.⁵⁸ King and Patterson also favored the use of electors chosen by the people,⁵⁹ while Wilson proposed selection by electors drawn by lot from Congress.⁶⁰ Madison favored direct election but believed it politically unpalatable to the Southern states. Thus, he too came to support the use of electors:

53. *Id.* at 31. Madison also highlighted this objection when debating Mason in the Virginia Ratifying Convention:

The choice of the people ought to be attended to. I have found no better way of selecting the man in whom they place the highest confidence, than that delineated in the plan of the Convention; nor has the gentleman [Mason] told us. Perhaps it will be found impracticable to elect him by the immediate suffrages of the people. Difficulties would arise from the extent and population of the states. Instead of this, the people choose the electors.

3 Elliot, *supra* note 30, at 494. “In a country without nationwide media, where traveling 20 miles was an arduous undertaking, this concern made ample sense.” Frederick D. Schwarz, *The Electoral College*, AM. HERITAGE, March 2001, at 43, 45.

54. 1 Farrand, *supra* note 28, at 80.

55. 2 *id.* at 114. As Gerry put it:

A popular election in this case is radically vicious. The ignorance of the people would put it in the power of some one set of men dispersed through the Union & acting in Concert to delude them into any appointment. He observed that such a Society of men existed in the Order of the Cincinnati. They were respectable, United, and influential. They will in fact elect the chief Magistrate in every instance, if the election be referred to the people.

Id.

56. 1 *id.* at 80.

57. 2 *id.* at 57.

58. 1 *id.* at 292.

59. 2 *id.* at 55–56.

60. *Id.* at 105.

There was one difficulty however of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections.⁶¹

If electors were used, Madison saw little chance for "cabal, or corruption," as electors would be "chosen for the occasion, would meet at once, & proceed immediately to an appointment."⁶²

Unlike Gerry, who sought a prominent role for the states in the naming of electors, Madison believed the states should play no role in presidential selection:

The Legislatures of the States had betrayed a strong propensity to a variety of pernicious measures. One object of the Natl. Legislre. was to controul this propensity. One object of the Natl. Executive, so far as it would have a negative on the laws, was to controul the Natl. Legislature, so far as it might be infected with a similar propensity. Refer the appointmt. of the Natl. Executive to the State Legislatures, and this controuling purpose may be defeated.⁶³

But Madison's view was not unanimous. As Butler remarked, "the Govt. should not be made so complex & unwieldy as to disgust the States. This would be the case, if the election shd. be referred to the people. He liked best an election by Electors chosen by the Legislatures of the States."⁶⁴

Repeated balloting throughout the summer failed to produce consensus. The delegates twice approved congressional appointment⁶⁵ and rejected direct election and the use of electors chosen by state legislatures.⁶⁶ Then the delegates switched and approved selection by electors (while voting to appoint electors by state legislatures),⁶⁷ only to later vote to reconsider the

61. *Id.* at 57 (footnote omitted).

62. *Id.* at 110-11.

63. *Id.* at 110 (footnote omitted).

64. *Id.* at 112.

65. 1 *id.* at 80-81 (vote on June 2, 1787, "ayes—8; noes—2"); 2 *id.* at 32 (vote on July 17, 1787, passed unanimously).

66. 2 *id.* at 32 (vote on July 17, 1787, "ayes—1; noes—9" and "ayes—2; noes—8" respectively).

67. *Id.* at 58-59 (vote July 19, 1787, "ayes—6; noes—3; divided—1").

matter and revert to congressional appointment.⁶⁸ As Gerry put it, the Convention was "entirely at a loss on this head,"⁶⁹ and additional votes proved inconclusive. On August 31, delegates voted to commit this and other unresolved questions to a committee composed of one member from each state.⁷⁰

This "Committee of Eleven" returned on September 4 with the now-familiar scheme set forth in Article II, Section 1 featuring electors appointed in the manner dictated by state legislatures.⁷¹ The compromise offered something for everyone:

The big states got an element of population-based apportionment in choosing the electors; the small states got equal voting rights in the contingent election plan when a majority of the electors failed to agree; the feelings of states'-rights advocates were acknowledged by giving the state legislatures the right to decide how the electors should be chosen; and those who wanted to entrust the choice of the President to the people could see at least the potential for popular vote.⁷²

Following additional votes rejecting a return to congressional appointment, the matter was settled and the Convention closed.⁷³

The mechanism for presidential selection chosen at the end of the Convention represented a compromise that had itself been the subject of little debate. As Madison rather sheepishly acknowledged in a letter decades later, "as the final arrangement . . . took place in the latter stage of the Session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience."⁷⁴ Still, the Convention's

68. *Id.* at 95 (vote on July 23, 1787 to reconsider, ayes—7; noes—3); *id.* at 101 (vote on July 24, 1787 to revert to congressional appointment, ayes—7; noes—4); see also PEOPLE'S PRESIDENT, *supra* note 49, at 20 (describing votes).

69. 2 Farrand, *supra* note 28, at 103.

70. *Id.* at 481. The committee was chaired by David Brearley of New Jersey and included Madison, Morris, Sherman, Butler, Dickinson, King, Nicholas Gilman of New Hampshire, Daniel Carroll of Maryland, Hugh Williamson of North Carolina and Abraham Baldwin of Georgia. KURODA, *supra* note 45, at 14.

71. 2 Farrand, *supra* note 28, at 497.

72. PEOPLE'S PRESIDENT, *supra* note 49, at 23.

73. 2 Farrand, *supra* note 28, at 511, 525. The Convention also settled on the House voting in state blocs, rather than the Senate, as the means for resolving elections where no candidate received an electoral majority. *Id.* at 513, 527.

74. 3 *id.* at 458 (letter dated August 23, 1823 to George Hay). One explanation for the hastily contrived settlement can be found in the delegates' knowledge that Washington would be the new nation's first President; hence, delegates may have been less concerned about the operation of their scheme for presidential selection than might otherwise have been the case. See, e.g., PEOPLE'S

deliberations make abundantly clear what the delegates rejected: congressional involvement in the appointment of the President, and popular election. The Convention spurned the former—except in those instances where no candidate received a majority of electoral votes—because a sufficient number of delegates feared that Congress would come to dominate the executive branch. While the Framers were of different minds as to how often candidates would fail to achieve an electoral majority and the House would therefore play a role in deciding the presidency,⁷⁵ they unambiguously banished congressional involvement to the stage following balloting by the electors, if such proved necessary. Likewise, the Convention rejected direct popular election of the President as a threat to states' rights (small and Southern states in particular). Delegates also believed popular election to be impractical and unwise because candidates would be unknown to voters in other states and, once known, would try to achieve office through unscrupulous and dishonorable means.

B. The Ratification Debates

The arrangement for selecting the President hastily devised at the end of the Convention proved immediately useful in cutting one of the Gordian knots bedeviling the delegates. During the Ratification Debates, however, that arrangement assumed a more profound role. Those who argued most forcefully for adoption of the Constitution, and who ultimately carried the day, viewed state power over presidential selection as an important bulwark of states' rights. Fundamental to the battle over ratification was the proposition that the Constitution properly balanced state and federal powers and interests. State control over presidential electors emerged as an important element in that balance.

On October 6, 1787, James Wilson became the first member of the Constitutional Convention to speak publicly in support of the Convention's

PRESIDENT, *supra* note 49, at 29; Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2528 n.11 (2001).

75. Baldwin, Morris, Madison and others maintained that presidential elections would rarely devolve to Congress. See 2 FARRAND, *supra* note 28, at 501, 512 (recording the opinions of Baldwin and Morris respectively); THE FEDERALIST NO. 45, at 296 (James Madison) (Robert Scigliano ed., 2000) (stating that state legislatures "will, perhaps, in most cases, of themselves determine" the presidency); 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 317 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter 8 DOCUMENTARY HISTORY] (quoting a statement attributable to "Valerius," originally printed in the *Virginia Independent Chronicle*, January 23, 1788, that "[t]he case can occur, but rarely"). On the other hand, Pinckney, John Rutledge of South Carolina, Mason, Wilson and Hamilton expressed the view that Congressional resolution would become the norm. 2 FARRAND, *supra* note 28, at 511, 512, 522, 524–25 (recording the views of Pinckney, Rutledge, Wilson, and Hamilton respectively).

work.⁷⁶ As noted by the editor of the *Pennsylvania Herald*, which published the speech, Wilson's address, delivered to "a very great concourse of people" in the Pennsylvania State House Yard, was "the first authoritative explanation of the principles of the NEW FEDERAL CONSTITUTION" and answered "objections . . . raised to that system."⁷⁷ In his address, Wilson responded to the anti-federalist claim that the new, more powerful federal government would eventually absorb the separate state governments by stressing the importance of state control over presidential appointment:

But upon what pretence can it be alledged that it was designed to annihilate the state governments? For, I will undertake to prove that upon their existence, depends the existence of the foederal plan. For this purpose, permit me to call your attention to the manner in which the president, senate, and house of representatives, are proposed to be appointed. The president is to be chosen by electors, nominated in such manner as the legislature of each state may direct; so that if there is no legislature, there can be no electors, and consequently the office of president cannot be supplied. The senate is to be composed of two senators from each state, chosen by the legislature; and therefore if there is no legislature, there can be no senate. The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,— unless therefore, there is a state legislature, that qualification cannot be ascertained, and the popular branch of the foederal constitution must likewise be extinct. From this view, then it is evidently absurd to suppose, that the annihilation of the separate governments will result from their union; or, that having that intention, the authors of the new system would have bound their connection with such indissoluble ties.⁷⁸

76. See 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 337 (John P. Kaminski & Gaspare J. Saladino, eds., 1981) [hereinafter 13 DOCUMENTARY HISTORY] (citing a newspaper article reporting that, "[a]fter the Constitutional Convention adjourned, Wilson was the first Convention delegate to defend the Constitution publicly").

77. *Id.* at 337. "Wilson's speech answered some of the major criticisms made against the Constitution." *Id.* at 338.

78. *Id.* at 342. The role of states in determining the qualifications of voters in elections for the House of Representatives is set forth in Article I, Section 2, Clause 1: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. Until superseded in 1913 by the Seventeenth

Wilson and others reiterated the argument at the Pennsylvania Ratifying Convention, where, as one federalist observed, the anti-federalist arguments boiled down to an objection to the absence of a bill of rights and the contention "that the effect of the proposed government will be a consolidation, and not a confederation of the states."⁷⁹ On the latter point, Wilson again expounded at length on the importance of the states in appointing federal officers, including the President:

The President of the United States is to be chosen by electors appointed in the different states, in such manner as the legislature shall direct. Unless there be legislatures to appoint electors, the President cannot be chosen: the idea, therefore, of the existing government of the states, is presupposed in the very mode of constituting the legislative and executive departments of the general government. . . . Is not the evidence indisputable, that the state governments will be preserved, or that the general government must tumble amidst their ruins?⁸⁰

Other federalists at the Pennsylvania Ratifying Convention echoed Wilson; as Jasper Yeates argued: "[state] legislatures likewise are to prescribe the manner for the appointment of Electors who are to elect the President. Thus, sir, is the connection between the states in their separate and aggregate capacity preserved, and the existence of the federal government made necessarily dependent" on the states.⁸¹

Anti-federalists replied that Wilson's view left the states as little more than electors for the federal government and failed to ensure their independence. "[W]ho is so dull as to not comprehend," one wrote in accusing Wilson of "flimsey sophistry," that "the *semblance* and *forms* of an ancient establishment, may remain, after the *reality* is gone."⁸² "Did you think, Sir, that you was [sic] speaking to men or to children, when you

Amendment, which provides for the direct election of senators, the Constitution provided: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote." U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1.

79. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 436 (Merrill Jensen ed., 1976) [hereinafter 2 DOCUMENTARY HISTORY] (comment of Jasper Yeates during the Pennsylvania Convention November 30, 1787).

80. 2 Elliot, *supra* note 30, at 439.

81. 2 DOCUMENTARY HISTORY, *supra* note 79, at 436-37.

82. 13 DOCUMENTARY HISTORY, *supra* note 76, at 459 (quoting letter from Centinel II published in the *Philadelphia Freeman's Journal*, October 24, 1787).

hazarded such futile observations[?]"⁸³ To anti-federalists, Wilson's argument "displayed much ingenuity," but:

It is a solecism in politics for two co-ordinate sovereignties to exist together, you must separate the sphere of their jurisdiction, or after running the race of dominion for some time, one would necessarily triumph over the other.

... [H]ow will [it] ... prevent the state legislatures being divested of every important, every efficient power? ... [W]ill not they dwindle into mere boards of appointment?⁸⁴

Nevertheless, when Pennsylvania ratified the Constitution on December 12, 1787, Wilson's arguments prevailed.⁸⁵

Like Wilson, Madison also emphasized the importance of state power over presidential selection to federalism. In a letter written to Jefferson in October 1787, describing the work of the Convention Jefferson missed while serving in Paris, Madison explained that one of the Convention's goals had been "to draw a line of demarkation which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them."⁸⁶ Assessing the Convention's success, Madison described the vital role of state authority over presidential appointment:

In the American Constitution The general authority will be derived entirely from the subordinate authorities. The Senate will represent the States in their political capacity; the other House will represent the people of the States in their individual capacity. The former will be accountable to their constituents at moderate, the latter at short periods. The President also derives his appointment from the States, and is periodically accountable to them. This dependence of the General, on the local authorities,

83. 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 307 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter 14 DOCUMENTARY HISTORY] (quoting Cincinnatus V published in *New York Journal*, November 29, 1787).

84. *Id.* at 346-47 (quoting Centinel V published in the *Philadelphia Independent Gazetteer*, December 4, 1787).

85. See 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 8 (John P. Kaminski & Gaspare J. Saladino, eds., 1984) [hereinafter 15 DOCUMENTARY HISTORY].

86. 1 THE DEBATE ON THE CONSTITUTION 193-94 (Bernard Bailyn ed., 1993) [hereinafter Bailyn].

seems effectually to guard the latter against any dangerous encroachments of the former⁸⁷

Madison repeated this view in *The Federalist No. 45*. Again addressing the relative strengths of the state and national governments, he wrote:

The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. . . . Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.⁸⁸

Finally, during the debates in the Virginia Ratifying Convention, Madison asked, "Are not the States integral parts of the General Government? Is not the President chosen under the influence of the State Legislatures? May we not suppose that he will be complaisant to those from whom he has his appointment, and from whom he must have his re-appointment?"⁸⁹ Henry Lee made the same point to the Virginia Convention six days earlier.⁹⁰

87. *Id.* at 197. Indeed, Madison believed that the real danger of encroachment came from the states against the national government, not vice-versa, and that Congress therefore should have insisted on a veto over state laws. *Id.* at 195–202.

88. THE FEDERALIST NO. 45, *supra* note 75, at 296.

89. 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1150 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter 9 DOCUMENTARY HISTORY]. Not all Federalists shared Madison's view that the President, owing his appointment to the States, would be "complaisant" to them; Timothy Pickering, a federalist member of the Pennsylvania Ratifying Convention, wrote that, since the President would be "chosen mediately by the people," i.e. appointed by Electors who Pickering assumed would be popularly elected, he "will have no dependence on the state governments, and therefore will feel no inducements to submit himself to their representatives." 14 DOCUMENTARY HISTORY, *supra* note 83, at 83. Pickering assumed that electors would be popularly elected, rather than appointed by state legislatures, but

Federalists were not always consistent in explaining how much discretionary authority a state legislature had in deciding how to choose electors. Thus Edmund Randolph insisted that they must allow for popular election on a general slate, while Noah Webster indicated that they should appoint electors. In the North Carolina convention . . . Samuel Johnston observed that some believed the people

Federalists and their opponents repeated Wilson's and Madison's arguments throughout the country. Journals from Maine to Georgia reprinted Wilson's October 6, 1787 address in Philadelphia, which in turn sparked anti-federalist replies as well as defenses from supporters of the Constitution, including Washington.⁹¹ Days after Pennsylvania ratified the Constitution, anti-federalists from the Pennsylvania Convention published a dissent which was also circulated to every state and, as one federalist lamented, "occasioned more consternation among the friends of this [government] than any thing that had preceded or followed it."⁹² The dissent rejected the Pennsylvania federalists' contention that power over appointment of the President and Congress safeguarded the states by asserting that the states would inevitably become "boards of appointment, merely, after they are divested of every other function"—a "solemn mockery of a government without power and usefulness."⁹³ Tench Coxe of Pennsylvania, "A Freeman," responded in a trio of essays that, with the help of Madison and other federalists, were also widely reprinted.⁹⁴ Reiterating Wilson's and Madison's point, Coxe emphasized: "The elections of the President, Vice President, Senators and Representatives, are exclusively in the hands of the states, even as to filling vacancies. *The smallest interference of Congress is not permitted*, either in prescribing the qualifications of electors, or in determining what persons may or may not be elected."⁹⁵

should choose electors, while others thought that the legislatures should do so. James Iredell replied that it could not be done properly by the legislatures, for their discretionary authority extended only to how the people chose. Archibald Maclaine disputed the Judge's reading, and William R. Davie, who had been a delegate in Philadelphia, replied that "it was left to the wisdom of the legislatures to direct their election in whatever manner they thought proper."

KURODA, *supra* note 45, at 22.

90. 9 DOCUMENTARY HISTORY, *supra* note 89, at 948.

91. 13 DOCUMENTARY HISTORY, *supra* note 76, at 338-39.

92. 15 DOCUMENTARY HISTORY, *supra* note 85, at 9-13.

93. *Id.* at 23.

94. *See id.* at 453-54.

95. *Id.* at 509 (emphasis added). Coxe's assertion that Congress is barred from interfering in elections for representatives (and, following the Seventeenth Amendment, senators) is puzzling in light of Article I, Section 4, which gives Congress power to alter state rules or make its own regarding the times, and manner of congressional elections. U.S. CONST. art. I, § 4, cl. 1. Presumably, Coxe meant the specific portion of his statement to control the general, i.e., that Congress is only barred from setting the qualifications of electors for Congress (prescribed in Article I, Section 2 as those with "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature") and lacks power to determine who can run for Congress. *Id.* § 2, cl. 1.

In Georgia, the federalist Demosthenes Minor responded to the charge that the Constitution “threaten[ed] to annihilate all state jurisdictions” in the same way:

But upon what pretense can it be alleged? For upon the very existence of a state legislature depends the existence of the federal government; for is not the President to be chosen by Electors nominated in such manner as the legislature of each state may direct; so that if there is no legislature there can be no Electors, and consequently the office of President cannot be supplied.⁹⁶

In Virginia, “An Impartial Citizen” writing in the *Petersburg Virginia Gazette* did likewise:

They urge, that by this word [consolidation] is meant the utter annihilation of the State governments, and a condensation and reduction of them all to one general Legislature. Nothing can be really more ridiculous in the estimation of every sensible federalist than this. . . . How can there be even a President, unless there be a State Legislature to direct the manner of appointing the electors who are to vote for him in each State?⁹⁷

In the New York Convention, Hamilton stressed that, in addition to appointing senators, “[t]he [state] legislatures are to provide the mode of electing the President, and must have a great influence over the electors. Indeed, they convey their influence, through a thousand channels, into the general government.”⁹⁸ Even the New York anti-federalist calling himself a “Federal Farmer,” who published a widely disseminated pamphlet of letters, admitted: “Viewing the principles and checks established in the election of the president, and especially considering the several states may guard the appointment of the electors as they shall judge best, I confess there appears to be a judicious combination of principles and precautions.”⁹⁹

96. 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 246 (Merrill Jensen ed., 1978).

97. 8 DOCUMENTARY HISTORY, *supra* note 75, at 494–95 (quoting an essay in the *Petersburg Virginia Gazette*, March 13, 1788); see also 14 DOCUMENTARY HISTORY, *supra* note 83, at 243. “The President is elected by persons nominated by the legislature of each state. Now, if there is no legislature, there can be no nomination; hence it is plain, that there can be no President.” *Id.* (letter published in the *Virginia Independent Chronicle* on November 28, 1787).

98. 2 Bailyn, *supra* note 86, at 811.

99. 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 327 (John P. Kaminski & Gaspare J. Saladino eds., 1995). For a description of the pamphlet, see *id.* at 265.

Similarly, Ezra Stiles of Connecticut recorded his conversation with Baldwin on the subject of the new Constitution and wrote of the President that the Convention "meant to give [him] considerable Weight as supreme Executive, but fixt him dependant on the States at large, and at all times impeachable."¹⁰⁰

During the Ratification Debates, then, state control over presidential selection was seen not simply as an incidental feature of the Constitution's plan for picking the chief executive. Rather, as articulated by Wilson, Madison and others, it was a key element that helped persuade those deciding whether to ratify the Constitution that the federal government was properly limited, would not "annihilate" the states, and would be subject to some measure of control by state legislatures.

C. *Early Congresses*

The first Congresses debated a variety of bills that touched on, and amendments that proposed to alter, the method of selecting the President set forth in Article II. These debates shed light on early understandings of Congress' power to reach the manner of presidential appointment and the scope of that power vis-à-vis the states. In particular, they illuminate the ideas of some of the Framers who took part in the debates in Congress and had occasion to say more on the states' power of presidential appointment there than they had said at the Constitutional Convention. Running through these arguments was a clear fault line dividing those who sought greater uniformity—and thus a greater role for Congress—and those determined to adhere to the original, decentralized plan that left the manner of selection to the several states. In the end, despite much discussion, the early Congresses chose not to interfere with the discretion given to states over the mode of choosing electors.

Congressional debates over presidential selection were prompted by the great variety in the ways states chose electors in the first decades of the Republic.¹⁰¹ Initially, states were divided between those whose legislatures simply appointed the electors and those providing for popular election.¹⁰² In 1788, the states were evenly split.¹⁰³ Between 1792 and 1800, most state

100. 15 DOCUMENTARY HISTORY, *supra* note 85, at 57.

101. See LUCIUS WILMERDING, THE ELECTORAL COLLEGE 45 (Rutgers University Press 1958).

102. See *McPherson v. Blacker*, 146 U.S. 1, 29-35 (1892) (providing a detailed account of the various and constantly shifting methods states employed to choose electors in early presidential contests); PEOPLE'S PRESIDENT, *supra* note 49, at 31-47, app. B (charting how states chose their electors from 1788-1836); WILMERDING, *supra* note 101, at 43-67.

103. PEOPLE'S PRESIDENT, *supra* note 49, at 32-33, app. B.

legislatures appointed their states' electors.¹⁰⁴ After 1800, most states provided for popular election, (except in 1812, when states were evenly split), but no fewer than six state legislatures continued to appoint electors until 1828, when the number dwindled to two (Delaware and South Carolina).¹⁰⁵ South Carolina's legislature continued appointing electors until 1860.¹⁰⁶ Even those states that provided for popular election conducted different types of elections. Some established districts that each elected a single elector, others used the general ticket system—the winner-take-all mode used by all but Maine and Nebraska today¹⁰⁷—while still others used variations on each approach.¹⁰⁸ Senator Dickinson of New Jersey, a staunch advocate of greater uniformity, summarized the chaos: “[T]he discordant systems adopted by the different states . . . are the subject of constant fluctuation and change—of frequent, hasty, and rash experiment—established, altered, abolished, re-established, according to the dictates of the interest, ambition, the whim or caprice, of party and faction.”¹⁰⁹

Given this ferment, it is not surprising that Congress found itself repeatedly embroiled in the matter. In early 1791, for example, the House debated a bill that would have established a uniform date for choosing electors, as it is Congress' clear prerogative under Article II, Section 1.¹¹⁰ Opponents of the bill pointed out that the variety of methods used by the different states would make it difficult for states to comply with any single, mandatory date, to which Representative Giles of Virginia responded that “Congress has a power to say when they shall be chosen; this imposes a necessity for one mode [of choosing], and that mode should be uniform, and be by the people; for the Legislatures, from the different circumstances of the states, must meet at different periods.”¹¹¹ When opponents of the bill replied that the Constitution left the states in charge of determining the

104. *Id.* at 34, app. B.

105. *Id.* at app. B.

106. *Id.*

107. ME. REV. STAT. ANN. tit. 21—A, § 802 (West 1964); NEB. REV. STAT. § 32-1038(1) (1998).

108. See PEOPLE'S PRESIDENT, *supra* note 49, at 44-47. As Wilmerding writes:

Sometimes the people voted in equal districts, each district choosing one Elector; but sometimes they voted in unequal and irregular districts, some large and some small, some to choose one Elector, some two, some three, and some four . . . Even the general ticket system, under which every voter voted for every Elector to which the State was entitled, was not uniform.

WILMERDING, *supra* note 101, at 46-47. Legislative appointment, likewise, was not carried out in the same manner in the States that practiced it. PEOPLE'S PRESIDENT, *supra* note 49, at 45.

109. *Id.* at 44 (citing 31 ANNALS OF CONG. 180 (1818)).

110. 2 ANNALS OF CONG. 1917 (1791).

111. *Id.*

manner of selecting electors, and proposed to include language to that effect in the bill, Madison agreed, noting, "a question arose here, which was, whether the power of Congress extends to determining the manner of choosing, by virtue of possessing the power of determining the time of their being chosen. He was, however, disposed to think that the best idea" was that of reiterating in the bill that the right remained with the states.¹¹² Ultimately, the bill was revised to make clear that states retained the ability to determine the time of appointing electors,¹¹³ and Congress chose not to exercise its power of setting a uniform day for the choosing of electors until 1845.¹¹⁴

Congress also repeatedly debated bills and resolutions regarding methods of resolving disputed presidential elections and counting votes cast by challenged electors. Establishing procedures for settling contested presidential elections and resolving questions about particular electors falls within Congress' power to count electoral votes under Article II, Section 1 and the Twelfth Amendment, and Congress would eventually enact a detailed scheme for resolving electoral disputes in the wake of the embattled election of 1876.¹¹⁵ But when, in 1800, the Senate first considered appointing a committee to set rules for resolving disputed elections and adjudging "the legality or illegality of the votes given . . . in the different States,"¹¹⁶ opponents argued that the bill infringed on the right of states to determine the manner of selecting their electors. Recalling his service in the Convention, Pinckney

112. *Id.*

113. *Id.* at 1918.

114. As one historian writes:

The fixing of a day [for picking presidential electors] would have tended to force a popular election in those states whose legislatures were not in session on the day fixed. So, at least, it was thought. In 1845 Congress overcame its scruples and fixed the Tuesday after the first Monday in November as the day for choosing Electors; this was nearly three weeks earlier than the day appointed by the constitution of South Carolina for the assembling of its legislature. To preserve the legislative mode of election, the Governor of this state, in every fourth year, called the legislature into extraordinary session in advance of the regular period.

WILMERDING, *supra* note 101, at 45 n.6 (citing 2 ANNALS OF CONG. 1868 (1791)).

115. The Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (codified as amended at 3 U.S.C. §§ 5-7, 15-18 (2000)). For a brief discussion of the Electoral Count Act of 1887, see *Bush v. Gore*, 531 U.S. 98, 153-154 (2000) (Breyer, J., dissenting). As the sponsor of the Electoral Count Act stated: "The power to judge the legality of the votes is a necessary consequent of the power to count." See *id.* (quoting 18 CONG. REC. 30 (1886)).

116. 10 ANNALS OF CONG. 29 (1800); see also *id.* at 119-20 (showing a draft of the proposed bill).

remembered very well that in the Federal Convention great care was used to provide for the election of the President of the United States, independently of Congress; to take the business as far as possible out of their hands. The votes are to be given by Electors appointed for that express purpose, the Electors are to be *appointed* by each State, and the whole direction as to the manner of their appointment is given to the State Legislatures. Nothing was more clear to him than that Congress had no right to meddle with it at all; as the whole was entrusted to the State Legislatures, they must make provision for all questions arising on the occasion.¹¹⁷

Another former delegate to the Constitutional Convention, Baldwin, agreed with Pinckney, arguing that the proposed change, if it was to be accomplished at all, required an amendment, not simple legislation.¹¹⁸

Months later, when the Senate resumed debate on the measure, Pinckney continued his objection and gave a comprehensive statement of the sources of federal authority and states' rights:

I suppose it will hardly yet be denied, that the people are the common fountain of authority to both the Federal and State Governments; that the Constitution reposes exclusively in the State Legislatures for the formation of a part of the Federal Government, and in the people for another part; and that in the appointment or formation of their part, the rights of the State Legislatures and people are exclusive: that the State Governments are the pillars upon which the Federal Government must rest, and that without a cordial and active performance of their duty, the latter could not proceed or exist. That, in the formation of the Federal Government, the people found that their safety consisted in giving certain exclusive rights to the State Legislatures, in the election of Senators and of their President—the first to ensure the State Governments their existence as such, and their equality in the second branch [of Congress], and the other to make their Executive completely independent of the National Legislature.¹¹⁹

Pointing out that Article I, Section 4 gave Congress paramount power over the "Times, Places and Manner" of congressional elections, Pinckney noted the contrast with presidential appointment:

117. *Id.* at 29.

118. *Id.* at 30, 32.

119. *Id.* at 128.

Let us for a moment compare this with the directions of the Constitution respecting the Electors of a President, and then permit me to call your attention to the remarkable difference there is between them, and the reasons for this difference.

By the Constitution, Electors of a President are to be chosen in the manner directed by the State Legislatures—this is all that is said. In case the State Legislatures refuse to make these directions there is no power to compel them; there is not a single word in the Constitution which can, by the most tortured construction, be extended to give Congress, or any branch or part of our Federal Government, a right to make or alter the State Legislatures' directions on this subject. The right to make these directions is complete and conclusive, subject to no control or revision, and placed entirely with them, for the best and most unanswerable reasons. It was intended to give your President the command of your forces, the disposal of all the honors and offices of your Government, the management of your foreign concerns, and the revision of your laws. Invested with these important powers, it was easily to be seen that the honor and interest of your Government required he should execute them with firmness and impartiality; that, to do this, he must be independent of the Legislature; that they must have no control over his election; that the only mode to prevent this was to give the exclusive direction to the State Legislatures in the mode of choosing Electors, who should be obliged to vote secretly; and that the vote should be taken in such manner, and on the same day, as to make it impossible for the different States to know who the Electors are for, or for improper domestic, or, what is of much more consequence, foreign influence and gold to interfere; that by doing this the President would really hold his office independent of the Legislature; that instead of being the creature, he would be the man of the people; that he would have to look to them, and to the confidence which he felt his own meritorious actions would inspire, for applause or subsequent appointments.¹²⁰

Pinckney's address in 1800 is one of the fullest expositions of the rationale supporting Article II, Section 1 and bears extra weight in light of his participation at the Constitutional Convention. Nonetheless, the senators ultimately disagreed with his view that merely establishing a way to resolve disputed elections treaded on the states' authority to determine

120. *Id.* at 128-29.

the manner of choosing electors. The bill passed the Senate 16-12,¹²¹ though it was never enacted due to differences with the companion bill in the House.¹²²

Pinckney's views were revived in 1809 when the House proposed a joint committee to study how Massachusetts had conducted the 1808 election.¹²³ Representative John Randolph of Virginia attacked the resolution as an "enlarge[ment of] the sphere of action of the General Government, at the expense of the dearest rights of the States."¹²⁴ Recalling "the extreme sensation which was produced in this House and throughout the Union" by the bill Pinckney had opposed in 1800, Randolph insisted that electors were to be

appointed in such manner as the Legislatures shall prescribe; and if we attempt to put our hands on this power, we might as well, in my apprehension, arrogate to ourselves the appointment of President and Vice President. If we do away [with] the decision of the Electoral body, which is as independent of us as we are of them, the Constitution is in my opinion verging to its dissolution.¹²⁵

As another member put it:

The House was called upon to say that the Legislature of the State of Massachusetts had improperly directed the manner of election. Was Congress to form for the States a model of the manner in which they should direct their elections to be held? Congress had no power to act on the subject. Why, then, send the memorials to the Senate?¹²⁶

Upon assurances from the resolution's sponsor that it would result in no action and that transmitting it to the Senate was "but decorous to the petitioners" who had troubled to bring it forward, the resolution passed.¹²⁷

121. *Id.* at 146.

122. *Id.* at 713.

123. 19 ANNALS OF CONG. 1302 (1809). The Massachusetts Legislature had appointed electors in a resolution that failed to win the Governor's signature, as was required for effective legislative acts. 31 ANNALS OF CONG. 182 (1818). Wilmerding points out that, "[o]f all the states Massachusetts was the most inconstant; not until 1828 did it appoint its Electors by the same mode twice in succession." WILMERDING, *supra* note 101, at 48.

124. 19 ANNALS OF CONG. 1302 (1809).

125. *Id.* at 1303.

126. *Id.* at 1376.

127. *Id.* at 1377.

A similar debate erupted after the 1820 Election when Henry Clay proposed that Congress sidestep questions about the legitimacy of balloting in Missouri, which could not change the outcome of the election in any case, by adopting a conditional resolution giving electoral vote totals with and without Missouri's share instead of the usual definitive count.¹²⁸ Randolph again led the opposition, arguing that Congress lacked the "power to decide on the votes of any State" and that "the Electoral College was as independent of Congress as Congress of them."¹²⁹ "Suppose a case," said Randolph,

in which some gentleman of one House or the other should choose to turn up his nose at the vote of some State, and say that if it be so and so, such a person is elected; and if so and so, what-you-call-em is elected—did not everybody see the absurdity of such a proposition?¹³⁰

To Representative Trimble of Kentucky, "[i]f anything was due to State rights, this resolution ought not to be adopted,"¹³¹ while another protested the proposed "assumption of authority" by Congress and claimed that Congress had "been going on for several years . . . accumulating power until scarcely any is left but in Congress."¹³² When Clay defended his motion, however, arguing that Congress was "called on to enumerate the votes" and thus had to "decide what *are* votes"—and pled for the easy way out of simply "waiving the question" by means of his conditional resolution, "knowing that it could not affect the result of the election"—members assented and the resolution passed.¹³³

The primary consideration given by early Congresses to the method of presidential selection consisted of debating amendments to replace the original plan with a uniform system of popularly electing presidential electors in districts.¹³⁴ The drive for amendment, as proponents acknowledged, represented a recognition that imposing uniform presidential

128. 37 ANNALS OF CONG. 1147 (1821).

129. *Id.* at 1148.

130. *Id.*

131. *Id.*

132. *Id.* at 1149.

133. *Id.* at 1149 (emphasis added). The resolution passed 90-67. *Id.* at 1152.

134. See WILMERDING, *supra* note 101, at 56-58 (discussing the three other plans advanced in amendments and occasionally debated in Congress besides the district voting proposal: a national plebiscite, mandatory appointment of electors by the state legislatures, and general ticket voting; but "most of the reformers" favored the district voting plan, including Hamilton, Jefferson, Madison, Gallatin, Bayard, King, Macon, J.Q. Adams, Jackson, Van Buren, Hayne, Webster and others).

selection procedures through legislation was beyond Congress' power.¹³⁵ But reformers were moved by the "political farce" whereby states changed their procedures quadrennially to suit the party in power,¹³⁶ and saw change as a national imperative. "[T]he question of who shall be elected President, is not a State, but a National question," argued Representative Hammond of New York in 1816.¹³⁷ "The President is an officer who exists for the benefit of the people of the United States, and not for any one State or any part of the States. He ought not, therefore, to be created by the States, but by the people."¹³⁸

Opponents of amendment argued exactly the opposite—that the Constitution had been a compact among states and that the Framers had rightly considered power over the selection of presidential electors to be a key attribute of state sovereignty in a federal system. Senator James Barbour of Virginia called the idea a "revolution in the Government" and observed that the "great American family" had come "together to form a confederation for general welfare and security," at which "a compromise of particular interests had taken place, which such a rule as was now proposed would violate and overthrow."¹³⁹ As Representative Grosvenor argued during an 1816 House debate:

[I]f any provisions of our Constitution should be held more sacred from innovation than others, it was surely that class which divided and distributed the sovereign powers of the country between the States and the General Government. Prominent in this class, is the provision now proposed to be abolished; it provided for the election of a Chief Magistrate, the most interesting as well as important object provided for by the Constitution.

135. See, e.g., 29 ANNALS OF CONG. 215–16 (1816). According to Senator Rufus King of New York, it was "unnecessary to alter the Constitution by imposing a rule, when, according to the Constitution, a competent power can now make the same regulation by law. Not so with that part of the amendment" changing the system of presidential election.

136. 30 ANNALS OF CONG. 301–03 (1816).

137. *Id.* at 306, 309.

138. *Id.* As Senator Elegius Fromentin of Louisiana also put it in 1816, "[t]he officer to be elected was the officer of the whole community, as much of Massachusetts as of Georgia, of Connecticut as of Kentucky. Why then, should a different mode of election prevail in different States?" *Id.* at 224. Ten years later, Representative Worthington made the same argument: "The character of [the President] is essentially different from that of the United States' Senators. They represent, immediately, the States, in their corporate and federal capacity, and ought to be, and properly are, elected by the State Legislatures. But not so with the President: he is not the representative of the States, in their sovereign capacities, and the manner of his election ought not, therefore, to be a matter of State designation." 2 REG. DEB. 1840, 1843 (1826).

139. 29 ANNALS OF CONG. 226 (1816).

Thus, is this right vested in every State, to be exercised according to its sovereign will, without the slightest control of any earthly power. It is a great and distinguished attribute of sovereignty; a substantial, sovereign, independent right to designate the man who shall preside over the Union. Destroy this attribute of sovereignty—erase this prominent federative feature from the Constitution; advance one step further—take from the State Legislatures the right to elect Senators, and you may then search in vain . . . for any recognition of the State sovereignty for any valuable or substantial purpose.

... I cannot but view with reprehension those constant efforts to strip of all power, and dignity, and strength, the States of the Union; to reduce to insignificance and feebleness those very powers, intended by the Framers of the Constitution to check all abuse of power in the General Government, and finally to constitute barriers impassable to any despot.¹⁴⁰

Amendments were introduced in virtually every early Congress and debated nearly every year, but the election of 1824—when the House threw the election to John Quincy Adams instead of the leading vote-getter Andrew Jackson—intensified the argument and led to what one historian has called a “flood of schemes” to reform Article II, Section 1.¹⁴¹ During debate in the Nineteenth Congress, supporters argued more vociferously than ever that states’ rights had no rightful place in presidential appointment. “[I]t cannot be disguised,” Representative McDuffie of South Carolina asserted, “that this idea of infringing the rights of the States, by fixing a uniform system of popular suffrage, is founded upon the latent delusion that the *Legislatures* of the States have rights, paramount to those of the *People* of the States. And this I pronounce an arrant heresy.”¹⁴² “[P]reserving the Federative principle in the Executive Department of this Government, is absurd,” he continued; “[t]he President is essentially a national officer, elect him as you may; and all his powers operate nationally.”¹⁴³

Opponents were equally adamant. Representative Miner of Pennsylvania reminded colleagues “that it was the federative, and not the

140. 31 ANNALS OF CONG. 348 (1816).

141. Schwarz, *supra* note 53, at 47.

142. 2 Reg. Deb. 1943 (1826).

143. *Id.* at 1944.

consolidating power, that was to operate in the election of a President."¹⁴⁴ He bristled at what he saw as federal invasion:

Again—Look at the proposition: What is it? That the General Government should go into the heart of each Republic and regulate their elections—that is, prescribe that elections shall be made by districts.

I pray you, sir, forbear. Come not into Pennsylvania to regulate our elections. It is a most delicate subject, vitally connected with our freedom. The People of Pennsylvania are fully competent to manage their own concerns. If they wish the State districted, they will order it to be done. We are alarmed at any proposition which gives to an exterior power the right to intermeddle in matters of so delicate a nature.¹⁴⁵

In the Senate, Edward Everett of Massachusetts stressed that:

[T]he choice of the President is, to a certain extent, a Federative feature of the Government [and that there was no] right now to alter that, which, at the time, was fixed by compromise, between parties then equally sovereign, and who agreed to give up certain portions of their equal sovereignty, and no more; and to establish a Government to a certain degree National, and to a certain degree Federative.¹⁴⁶

Martin Van Buren of New York joined the others in urging retention of the Constitution's original compromise:

The party in the Convention in favor of a more energetic government, being unable to carry, or, if able, unwilling to hazard the success of the plan with the states, a middle course was agreed upon. That was, that the government should be neither federal nor national, but a mixture of both; that of the legislative department, one branch—the power of representation—should be wholly national, and the other—the Senate—wholly federal; that, in the choice of the executive, both interests should be regarded, and that the judicial should be organized by the other two. But, to quiet effectually the apprehensions of the advocates for the rights and interest of the states, it was provided that the general government should be made entirely dependent, for its

144. *Id.* at 1851.

145. *Id.* at 1854–55.

146. *Id.* at 1959–60.

continuance, on the will and pleasure of the state governments. Hence it was decided that the House of Representatives should be apportioned among the states, with reference to their population, and chosen by the people; and power was given to Congress to regulate and secure their choice, independent of and beyond the control of the state governments. That the Senate should be chosen exclusively by the state legislatures; and that the choice of the electors of President and Vice-President, although the principle of their apportionment was established by the Constitution, should, in all respects, except the time of their appointment and of their meeting, be under the exclusive control of the legislatures of the several states.

... [The amendment] would, if adopted, break an important link in the chain of dependency of the general upon the state governments. It would surrender to the general government all control over the election of President and Vice-President, by placing the choice of electors on the same footing with that of representatives. . . . If it is fit to take from the states their control over the choice of electors of President and Vice-President, and give it to the federal government, it would be equally proper, under the popular idea of giving their election to the people, to divide the States into districts for the choice of senators, as was proposed in the Convention, and give to Congress the control over their election also. If the system be once broken in upon in this respect, the other measure will naturally follow, and we shall then have what was so much dreaded by those who have gone before us, and what he feared would be so much regretted by those who come after,—a completely consolidated government, a government in which the state governments would be no otherwise known or felt than as it became necessary to control them.¹⁴⁷

In the end, both Houses of Congress approved the amendment on more than one occasion, but it never achieved a constitutional majority.¹⁴⁸ The attempt at reform “would fail,” two historians write, “because it was in the interest of the ruling political circles in some states to adopt the general ticket system, and once some states had taken the step, the others were eventually obliged to follow.”¹⁴⁹ By 1836, all but South Carolina used the general ticket system in operation today,¹⁵⁰ and with uniformity finally

147. 4 Elliot, *supra* note 30, at 489–90.

148. 2 REG. DEB. 1939 (1826); WILMERDING, *supra* note 101, at 58.

149. PEOPLE'S PRESIDENT, *supra* note 49, at 47.

150. *Id.* at 46.

achieved, albeit by the states acting independently, the issue of presidential appointment receded. Article II, Section 1 had survived, if barely, because, as during the Ratification Debates, it was successfully defended as pivotal to the balance of federalism.

II. JUDICIAL CONSTRUCTION OF CONGRESS' POWER OVER PRESIDENTIAL ELECTIONS

A. Reconstruction and After: Conflicting Signals

The extent of federal power over presidential elections would not be tested in court until after the Civil War. In a series of cases interpreting Reconstruction-era statutes designed to protect the newly freed slaves' right to vote, the Supreme Court spoke decisively and broadly in favor of congressional authority to safeguard the integrity of federal, including presidential, elections. At the same time, however, the Court cared little for consistency and reaffirmed that states were to set the rules governing presidential contests.

The first case to foreshadow the Court's endorsement of a strong federal role in federal elections was *Ex parte Siebold*, decided during the 1879 Term.¹⁵¹ The case came to the Court when election supervisors in Baltimore, convicted of stuffing ballot boxes and other offenses during the Congressional Elections of 1878, sought writs of habeas corpus.¹⁵² They had been found guilty of violating provisions of the Enforcement Act, passed in 1870 during waves of violent intimidation and blatant disenfranchisement of African-Americans.¹⁵³ The provisions of the Act at issue concerned congressional elections.¹⁵⁴ The Act authorized federal judges to appoint election supervisors and gave marshals the power to squelch election fraud and make immediate arrests.¹⁵⁵ State and local election workers who committed obstruction or fraud, as well as ordinary citizens who interfered with federal supervisors or marshals, risked "instant

151. See *Ex parte Siebold*, 100 U.S. 371 (1879) (upholding federal regulation of elections).

152. *Id.* at 377-79.

153. *Id.* at 379-82.

154. *Id.* at 379, 382. For a brief description of the persistent and often violent efforts undertaken to deprive African-Americans of their right to vote and other civil rights by revanchist whites in the Southern States following the Civil War, as well as the Enforcement Act, see ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 183-97, 234-36 (1990).

155. See *Ex parte Siebold*, 100 U.S. at 379-82 (quoting relevant sections of the Enforcement Act).

arrest without process" and two years imprisonment.¹⁵⁶ As the Court remarked, the Act was "an assertion, on the part of Congress, of a power to pass laws for regulating and superintending [congressional] elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation."¹⁵⁷ The Court rejected petitioners' argument that Article I, Section 4 only gave Congress power to displace all state rules or none, using sweeping language relevant to later cases involving presidential elections:

It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed.¹⁵⁸

In *Ex parte Yarbrough*, the Ku Klux Cases, the Court revisited congressional power to have enacted other sections of the Enforcement Act proscribing conspiracies to deny voting rights in congressional and presidential elections.¹⁵⁹ Petitioners had been convicted of beating and violently intimidating Berry Saunders, a former slave, in order to prevent him from voting in Georgia's 1882 Congressional Elections. Writing for a unanimous Court, Justice Miller unequivocally upheld the Act in language that, like the Act itself, was sweeping and applied equally to presidential and congressional elections:

That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration.

If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have

156. *Id.* at 380-82.

157. *Id.* at 382.

158. *Id.* at 388.

159. See *Ex parte Yarbrough*, 110 U.S. 651, 656-58 (1884).

the power to protect the elections on which its existence depends from violence and corruption.¹⁶⁰

Notably, the Court adopted the logic advanced by Wilson, Madison and others when arguing for the necessity of federal control over congressional elections: that Congress would otherwise have to depend on the kindness of the states for its existence.¹⁶¹ Petitioners, who argued that Berry Saunders was not a federal officer and thus deserved no special federal protection, missed the point. The Enforcement Act was intended to do more than protect the individual federal voter, it also existed to protect the government he (and later she) went to the polls to elect. "In both cases . . . [Congress'] duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents."¹⁶²

Ex parte Yarbrough is also notable for the source of constitutional authority invoked to support congressional power over federal elections. Rejecting the claim that the Constitution's failure to expressly provide for such authority meant that no such power had been conferred, the Court looked to the Necessary and Proper Clause:

The proposition that [Congress] has no such power [to enact the Enforcement Act] is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no *express* power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all

160. *Id.* at 657–58.

161. *See id.* at 657–58.

162. *Id.* at 662.

laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the Constitution. Article I, sec. 8, clause 18.¹⁶³

At the same time the Supreme Court upheld Congress' power to safeguard federal elections, including those for President, from violence and corruption, it reaffirmed state prerogative over the manner of choosing presidential electors. For example, when the Circuit Court for the Eastern District of Virginia granted a writ of habeas corpus freeing Charles Green, imprisoned for violating Virginia's law disqualifying convicts from voting in presidential elections, on the ground that only Congress could regulate voting in federal elections, the Supreme Court promptly restored Green's conviction.¹⁶⁴ It was federal power, not state power, which was limited when it came to setting the rules for picking electors:

The only rights and duties, expressly vested by the Constitution in the national government, with regard to the appointment or the votes of presidential electors, are by those provisions which authorize Congress to determine the time of choosing the electors and the day on which they shall give their votes, and which direct that the certificates of their votes shall be opened by the President of the Senate in the presence of the two houses of Congress, and the votes shall be then counted.

... Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress.

...
Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the now general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such

163. *Id.* at 658; accord *Swafford v. Templeton*, 185 U.S. 487 (1902) (reinstating plaintiff's suit seeking damages for defendants' deprivation of right to vote at congressional election); *Wiley v. Sinkler*, 179 U.S. 58, 62 (1900) (affirming dismissal of damages claim for wrongful deprivation of right to vote but restating constitutional basis of right); *In re Coy*, 127 U.S. 731, 760 (1888) (affirming conviction for fraud committed during election to state office held concurrently with federal election).

164. See *In re Green*, 134 U.S. 377, 379-80 (1890). For a discussion of *In re Green's* holding that electors are state, not federal, officers, see Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 692-93 (1996).

election, or to punish any fraud in voting for electors; but has left these matters to the control of the States.¹⁶⁵

In *McPherson v. Blaker*, nominees for presidential electors challenged Michigan's reversion in 1891 to the system, widespread before the 1830s, of electing presidential electors by congressional district, rather than statewide vote.¹⁶⁶ The Court firmly rebuffed the attack. State legislatures, the Court observed, had the sole and exclusive power to appoint electors as they saw fit:

In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in *In re Green*, 134 U.S. 377, 379, "no more officers or agents of the United States than are the members of the state legislatures when acting . . . as the electors of representatives in Congress." Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influences might be excluded.¹⁶⁷

McPherson also answered the expansive constitutional reasoning in *Yarbrough*, which enlisted the Necessary and Proper Clause as the basis for the Enforcement Act. Whereas in *Yarbrough*, the Court debunked the notion that congressional powers had to be express, in *McPherson*, the Court scorned "the doctrine, that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may,

165. *In re Green*, 134 U.S. at 379-80 (citations omitted) (emphasis added). While the Court was correct in observing that Congress had not punished fraud in the voting for electors, and in noting that Sections 5511 and 5514 reached only congressional elections, the Court ignored other provisions of the Enforcement Act, at issue in *Yarbrough*, proscribing the use of force or the threat of force to deprive people of voting rights in both congressional and presidential elections. *Id.* at 380; see *Ex parte Yarbrough*, 110 U.S. at 654-55 (quoting sections 5508 and 5520, which are aimed at prohibiting threats and intimidation in voting).

166. *McPherson v. Blaker*, 146 U.S. 1, 2-5, 24-25 (1892).

167. *Id.* at 35; see also *Ray v. Blair*, 343 U.S. 214, 224 (1952) ("The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen."); *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622, 626 (E.D. Va. 1968) (relying on *McPherson* to uphold Virginia's system of state-wide election of electors).

therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision."¹⁶⁸

The line demarcating acts implicitly authorized and therefore necessary and proper, and those requiring amendment, was indistinct following *Yarborough* and *McPherson*. But under the *McPherson* Court at least, states enjoy the exclusive and virtually unlimited right to select electors however they wish. In any case, Congress repealed most of the Enforcement Act in 1894.¹⁶⁹

B. The Expansion of Congressional Power

In 1934, the Court again confronted the scope of congressional power over presidential elections. At issue in *Burroughs v. United States* was the constitutionality of early campaign finance laws, enacted as the Federal Corrupt Practices Act of 1925, which required federal political committees to report contributions to the clerk of the House of Representatives.¹⁷⁰ The Act defined "political committee" to include organizations that received contributions or made expenditures in order to influence presidential elections in two or more states.¹⁷¹ Petitioners, indicted under the Act for failing to make the required disclosures to the House clerk, claimed it exceeded the bounds of Article II, Section 1.¹⁷²

The *Burroughs* Court began by noting what was not at issue:

The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors *or the manner in which their appointment shall be made*. It deals with political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. It in no sense invades any exclusive state power.¹⁷³

168. *McPherson*, 146 U.S. at 36.

169. See, e.g., *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 344 n.12 (E.D. La. 1965). For provisions of the Act prescribing criminal sanctions for deprivations of civil rights that remain, see 18 U.S.C. §§ 241, 242 (2000).

170. *Burroughs v. United States*, 290 U.S. 534, 540 n.1. (1934).

171. *Id.* at 540-41.

172. *Id.* at 542.

173. *Id.* at 544-45 (emphasis added).

What the Act attempted to do was curtail interstate corruption, and that, as *Yarbrough* dictated, was a permissible—indeed basic—congressional objective:

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. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.¹⁷⁴

If *Burroughs* represented an extension of *Yarbrough*, in that the Court validated Congress' response to electoral distortion through corrupt campaign funding and not just overt violence and intimidation, *Burroughs* itself saw extension in later cases. The Supreme Court and lower courts would, at least for a time, come to see *Burroughs* as generally authorizing "broad congressional power to legislate in connection with the elections of the President and Vice President," to quote the majority in *Buckley v. Valeo*.¹⁷⁵ This description owed much of its accuracy to the Court's decision in *Oregon v. Mitchell*, which preceded *Buckley* by six years.¹⁷⁶

In *Mitchell*, the Court considered constitutional challenges from four states to the Voting Rights Act amendments enacted in 1970. Those amendments lowered the voting age in all federal and state elections to eighteen, barred the use of literacy tests in elections for a five-year period, and proscribed states' disqualification of voters in presidential and vice presidential elections on the grounds that they failed to meet residency

174. *Id.* at 545.

175. *Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976) (citing *Burroughs*, 290 U.S. 534). Even *Buckley* dissenters echoed this sweeping view. Chief Justice Burger, in light of the Necessary and Proper Clause, did "not question the power of Congress to regulate [presidential] elections." *Id.* at 247. Just as Justice White, discussing *Burroughs* and *Yarbrough*, acknowledged that "[i]t is accepted that Congress has power under the Constitution to regulate the election of federal officers, including the President and the Vice President." *Id.* at 257.

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

requirements.¹⁷⁷ In a raft of separate opinions, the Court upheld all of these provisions except the requirement that eighteen-year-olds be allowed to vote in state, as opposed to federal, elections.¹⁷⁸

Most relevant is the opinion of Justice Black, who provided the fifth vote for the result, announced the judgment of the Court, and relied on congressional power under Article I, Section 4 and the Necessary and Proper Clause to uphold the provisions enfranchising eighteen-year-olds in federal elections and barring disqualification due to non-residency.¹⁷⁹ After discussing the Necessary and Proper Clause and Article I, Section 4—which, he believed, provided for full congressional control over the qualifications of voters in federal elections, Article I, Section 2 notwithstanding—Justice Black touched only briefly on congressional power over presidential elections:

Similarly, it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.¹⁸⁰

In a footnote, Justice Black discussed *Burroughs* and wrote broadly that, “inherent 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. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause.”¹⁸¹ Similarly, when explaining his vote to sustain the title of the Voting Rights Act amendments that abolished state residency requirements in presidential and vice presidential elections, Justice Black noted simply:

In enacting these regulations Congress was attempting to insure a fully effective voice to all citizens in national elections. . . . Acting under its broad authority to create and

177. *Id.* at 117. In 1971, the states ratified the Twenty-Sixth Amendment, which entitles eighteen-year-olds to vote and rendered the provisions in the 1970 Amendments relating to voting age superfluous. U.S. CONST. amend. XXVI, § 1.

178. *Oregon v. Mitchell*, 400 U.S. at 117-18.

179. *See id.* at 119-20. Justice Black relied on the Fifteenth Amendment to uphold the amendment temporarily barring literacy tests. *Id.* at 132.

180. *Id.* at 124.

181. *Id.* at 124 n.7.

maintain a national government, Congress unquestionably has power under the Constitution to regulate federal elections. The Framers of our Constitution were vitally concerned with setting up a national government that could survive. Essential to the survival and to the growth of our national government is its power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent.¹⁸²

Justice Black was alone in voting to sustain the challenged amendments to the Voting Rights Act under *Burroughs* and the Necessary and Proper Clause. Justices Douglas, Brennan, White, and Marshall voted to uphold all of the challenged provisions, but under the Fourteenth and Fifteenth Amendments.¹⁸³ Chief Justice Burger and Justices Stewart and Blackmun voted to uphold the five-year ban of literacy tests under the Fifteenth Amendment, and the residency requirement under the constitutional right to travel.¹⁸⁴ In addition, they would have struck down Congress' attempt to extend the franchise to eighteen-year-olds.¹⁸⁵

Finally, Justice Harlan, convinced that the Fourteenth Amendment had no application to state rules governing voting, would have struck down all but the literacy provisions.¹⁸⁶ Scoffing at Justice Black's view that the amendments were authorized by the Necessary and Proper Clause, Justice Harlan deemed it obvious from a cursory reading of Article II, Section 1 that Congress lacked any such power:

Even the power to control the "Manner" of holding elections, given with respect to congressional elections by Art. I, § 4, is absent with respect to the selection of presidential electors. And, of course, the fact that it was deemed necessary to provide separately for congressional power to regulate the time of choosing presidential electors and the President himself demonstrates that the power over "Times, Places and Manner" given by Art. I, § 4, does not refer to presidential elections, but only to the elections for Congressmen. Any shadow of a justification for congressional power with respect to

182. *Id.* at 134.

183. *Id.* at 135-52, 231. Unlike Justice Black, Justices Brennan, White and Marshall acknowledged some limiting principle and noted simply that the Court was "not faced with an assertion of congressional power to regulate any and all aspects of state and federal elections." *Id.* at 240.

184. *Id.* at 281-92.

185. *Id.* at 293-96.

186. *Id.* at 154.

congressional elections therefore disappears utterly in presidential elections.¹⁸⁷

Despite the cacophony of opinions in *Mitchell*,¹⁸⁸ Justice Black's opinion enunciated a reading of *Burroughs* that lower courts would come to echo. When Congress enacted the National Voter Registration Act of 1993,¹⁸⁹ popularly known as the "motor voter" law because one of its provisions sought to enable more voters to register for federal elections while obtaining driver's licenses, states challenged the Act under the Tenth Amendment. Beyond requiring that state driver's license applications also serve as voter registration forms, the Act also requires states to create forms permitting people to register by mail without notarization, designate certain state offices as places where people can register in federal elections, and adhere to certain rules regarding the purging of people from voter registration lists.¹⁹⁰ As Judge Posner of the Seventh Circuit observed, "the Act intrudes deeply into the operation of state government."¹⁹¹

In adjudicating state claims under the Tenth Amendment, three circuit courts focused almost exclusively on Congress' sweeping power over congressional elections embodied in Article I, Section 4.¹⁹² The textual and historical differences between Congress' authority over congressional elections and its authority over presidential contests went without comment. Rather, each court dispensed with the issue in a manner similar to Justice Black's treatment in *Mitchell*—by allocating a single sentence to the subject and citing *Burroughs* for the proposition that Congress' power over the two types of federal elections is coextensive.¹⁹³ The Ninth Circuit's sole observation in *Wilson*—"The broad power given to Congress over congressional elections has been extended to presidential elections," citing *Burroughs*—is typical.¹⁹⁴ Whatever its particular context and despite its

187. *Id.* at 211–12.

188. As one commentator has written, "a majority of the Court recognized some congressional power to regulate the presidential election system; however, the extent of this power is uncertain." Ronald D. Rotunda & John E. Nowak, 2 *Treatise on Constitutional Law: Substance & Procedure* § 9.12, at 55–56 (3d ed. 1999).

189. 42 U.S.C. §§ 1973gg to gg-10 (2000).

190. *Id.* § 1973gg-2.

191. *Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 792–93 (7th Cir. 1995).

192. *See Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836–37 (6th Cir. 1997) ("Article 1, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections."); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413–15 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996); *Edgar*, 56 F.3d at 793–94.

193. *See Miller*, 129 F.3d at 836 n.1.; *Wilson*, 60 F.3d at 1414; *Edgar*, 56 F.3d at 793.

194. *See, e.g., Wilson*, 60 F.3d at 1414 (citing *Burroughs*, 290 U.S. at 545). Ironically, the author of the Seventh Circuit's opinion, Judge Posner, expressed the opposite view in his analysis of the 2000 Presidential Election when discussing the possibility of a congressionally-imposed national ballot:

admonition that laws “interfere[ing] with the power of a state to appoint electors or the manner in which their appointment shall be made” would be suspect,¹⁹⁵ *Burroughs*, by the time of the motor voter cases, had come to stand for the simple proposition that Congress has full power over presidential elections, as it does over congressional elections.¹⁹⁶

C. *The Recent Reemphasis of State Prerogative*

Even as Justice Black’s opinion in *Mitchell* and the “motor voter” cases seemed to establish Congress’ unlimited power over presidential elections, the pendulum was inevitably beginning to swing back toward state prerogative. Signs of this shift appeared first in minority opinions authored by Chief Justice Rehnquist in two 5-4 decisions. The first of these, *Cousins v. Wigoda*, involved a clash between Illinois law and the rules of the Democratic Party over the seating of delegates at the 1972 Democratic National Convention.¹⁹⁷ Striking down Illinois law as an infringement on the First Amendment’s freedom of association, the majority rejected Illinois’ claim that its interests trumped that of the party: “Delegates perform a task of supreme importance to every citizen of the Nation regardless of their State of residence. . . . The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates.”¹⁹⁸ In the concurrence, then-Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, chided the majority for writing in “unnecessarily broad” terms and overlooking Article II, Section 1’s dictate that, in fact, states are charged with choosing the manner of selection of presidential electors.¹⁹⁹

Similarly, in *Anderson v. Celebrezze*, John Anderson, running as an independent, attacked Ohio’s rule requiring non-party candidates to present the requisite petitions for inclusion on the general election ballot by March

“But there is no provision authorizing Congress to regulate the manner of Presidential elections. . . . [I]t is the state legislatures that have been given that power by Article II.” RICHARD A. POSNER, *BREAKING THE DEADLOCK, THE 2000 ELECTION, THE CONSTITUTION AND THE COURTS* 247–48 (2001).

195. *Burroughs*, 290 U.S. at 544.

196. See KENNETH R. THOMAS, CONG. RESEARCH SERV., *CONGRESSIONAL AUTHORITY TO STANDARDIZE NATIONAL ELECTION PROCEDURES* 5 (Mar. 29, 2001) (referring to the result in the motor voter cases as “surprising” in light of the disclaimer in *Burroughs* that state election procedures were not at issue in that case), available at <http://www.ncseonline.org/nle/crsreports/government/gov-38.cfm?&CFID=10852798&CF>.

197. *Cousins v. Wigoda*, 419 U.S. 477, 483 (1975).

198. *Id.* at 489–90.

199. *Id.* at 495.

20 of the election year.²⁰⁰ In invalidating the early deadline, the majority relied in part on the national importance of presidential elections:

[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. . . . The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.²⁰¹

Justice Rehnquist, dissenting with Justices White, Powell and O'Connor, began his attack on the deadline's invalidation by quoting Article II, Section 1 and *McPherson v. Blacker*, italicizing that decision's holding that the Constitution "leaves it to the [State] legislature exclusively to define the method of effecting the object" of selecting electors.²⁰² The majority, he observed, mischaracterized the election by describing it as simply a national contest; rather, what Ohioans were really choosing was that state's own representatives to the electoral college, a fact "[t]he Court throughout its opinion fails to come to grips with."²⁰³ "[S]o long as the Ohio ballot access laws are rational and allow nonparty candidates reasonable access to the general election ballot," then-Justice Rehnquist wrote for the dissenters, "this Court should not interfere with Ohio's exercise of its Art. II, § 1, cl. 2, power."²⁰⁴

The most recent indication of the emphasis on state authority in the management of presidential elections is, ironically, the *Bush v. Gore* decisions arising out of the disputed 2000 Election.²⁰⁵ On the one hand,

200. *Anderson v. Celebrezze*, 460 U.S. 780, 782-83 (1983).

201. *Id.* at 794-95 (footnotes omitted).

202. *Id.* at 807 (quoting *McPherson v. Blacker*, 146 U.S. at 27).

203. *Id.* at 815.

204. *Id.* at 808. Interestingly, Justice Rehnquist twice cited *Burroughs* as confirming the national importance of presidential elections, while ignoring the decision's expansion of congressional power over those elections. See *id.* at 815-16, 819.

205. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("[T]he state legislature's power to select the manner for appointing electors is plenary."); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70

these decisions stand as examples of federal primacy—the supremacy of the United States Supreme Court over a state supreme court viewed by its critics as recalcitrant, and the superiority of federal constitutional principles to state election law as interpreted by state courts. Yet the decisions also honor the plenary power of state legislatures over the manner of presidential selection. Relying heavily on *McPherson*, the decisions suggest that the state legislative power over presidential elections is absolute as long as citizens, once involved by the legislature in the process, are treated equally.²⁰⁶

In the first decision arising from the 2000 Election, then-Governor Bush asked the Court to review the Florida Supreme Court's decision to resolve apparent conflicts in that state's election code in favor of requiring certain recounts.²⁰⁷ Language in the Florida Supreme Court's decision suggested it had relied in part on the state's constitution, rather than simply the statutory dictates of the state legislature.²⁰⁸ That, the Supreme Court held, was problematic, in light of the express language in Article II, Section 1 giving state legislatures, and no other organ of state government, exclusive power over the manner of choosing electors.²⁰⁹ The Court remanded for clarification of the Florida Supreme Court's decision because the Supreme Court was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2."²¹⁰

When the dispute returned to the Supreme Court, the five Justices who formed the majority began with the constitutional text and *McPherson v. Blacker*:

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. U.S. Const., Art. II, § 1. This is the source for the statement in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892), that the state

(2000) (holding that while state legislators operate under a direct constitutional grant of authority in presidential elections, that in itself does not limit state power).

206. See *Bush v. Gore*, 531 U.S. at 104 ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 76.

207. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 73–77.

208. See *id.* at 77.

209. See *id.* at 76–77 (quoting Article II, Section 1 and its interpretation in *McPherson v. Blacker*, 146 U.S. at 25).

210. *Id.* at 78.

legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for many years after the framing of our Constitution. *Id.* at 28-33. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote *as the legislature has prescribed* is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.* at 35. ("[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated") (quoting S. Rep. No. 395, 43d Cong., 1st Sess., 9 (1874)).²¹¹

The remainder of the *per curiam* decision focuses on the Court's view of how the Florida recount procedures violated Equal Protection and why that violation required the cessation of the recount.²¹²

In their concurrence, Chief Justice Rehnquist, Justice Scalia and Justice Thomas placed even greater weight on the power of state legislatures under Article II, Section 1. Where the *per curiam* opinion rested solely on the Equal Protection Clause, the concurrence accepted Governor Bush's argument that the Florida Supreme Court's decision violated Article II, Section 1 by usurping the prerogative of the state legislature and endangering the legislature's goal of steering Florida within the "safe harbor" of 3 U.S.C. § 5, so that Florida's electoral votes would be counted without challenge in Congress.²¹³ The concurrence begins by quoting *Burroughs* and *Anderson* for the proposition that presidential elections are uniquely national and important.²¹⁴ Those decisions, usually marshaled in service of uniformity or congressional regulation, instead set the stage in the concurrence for the importance of deferring to state legislatures. For under Article II, Section 1, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance. . . . A significant departure from the legislative scheme for appointing presidential electors presents a federal constitutional

211. *Bush v. Gore*, 531 U.S. at 104 (emphasis added).

212. *Id.* at 104-09.

213. *Id.* at 111-22 (Rehnquist, C.J., concurring).

214. *Id.* at 112-13.

question.”²¹⁵ “[W]ith respect to a Presidential election,” the concurrence continues, “the court must be . . . mindful of the legislature’s role under Article II in choosing the manner of appointing electors.”²¹⁶ In various ways, the concurrence concluded, the Florida Supreme Court’s decision impermissibly altered the statutory scheme established by the state legislature under Article II, Section 1 for choosing electors.²¹⁷

The dissenters in *Bush v. Gore* focused on the Equal Protection claim, the arguments advanced in the concurrence, and the Court’s decision terminating further recounts.²¹⁸ The underlying principle of exclusive state authority came in for little dispute; indeed, Justice Stevens began his dissent by noting that “[t]he Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors.”²¹⁹ He then argued, contrary to the concurrence, that state legislatures, acting under Article II, Section 1, remain bound by their state constitutions,²²⁰ a position echoed by Justice Breyer.²²¹

III. ANALYZING THE CONSTITUTIONALITY OF THE HELP AMERICA VOTE ACT UNDER ARTICLE II, SECTION 1

The Help America Vote Act seems unlikely to provoke constitutional challenge. Repairing the obvious defects revealed in the 2000 Election is widely popular, as witnessed by the overwhelming congressional majorities in support of the Act. The changes Congress adopted are relatively modest and give states a certain degree of flexibility in achieving compliance. Moreover, a reviewing court or, following any adverse judicial decision, Congress could limit application of the Act to congressional elections. There is no doubt that Congress can impose whatever changes it chooses on the manner in which states conduct elections to the House and Senate using its power under Article I, Section 4.²²² And states will presumably continue to conduct presidential elections in the same way, at the same time, with the same personnel, at the same places, and using the same equipment and procedures as they administer elections for Congress. Thus, changing the rules for congressional elections does so for presidential ones as well, and the power Congress possesses over the former operates as a *de facto* power

215. *Id.* at 113.

216. *Id.* at 114.

217. *Id.* at 122.

218. *Id.* at 123–58 (Stevens, J., dissenting).

219. *Id.* at 123.

220. *Id.*

221. *Id.* at 147–48 (Breyer, J., dissenting).

222. *See supra* note 26 and accompanying text.

over the latter. In that sense, debates over the constitutionality of the Act's application to presidential elections are academic.

Still, any challenges to the Act's applicability to presidential elections that do occur would do well to focus on the original understandings of presidential selection. The Framers strove to avoid congressional control of the Executive and believed that removing Congress from the process of presidential selection was the best guarantee of independence from the legislature. What the Framers feared was an enfeebled President personally compromised by and dependent on the intrigues of powerful senators and representatives, who by controlling the presidential appointment would control the conduct of the Office. That evil is not threatened by the Act, but it is not difficult to see how a different bill produced by a different Congress in different political circumstances could pose a pale, but still worrisome, version of what the Framers feared.

The Act is the product of sustained deliberation and real political compromise. It is politically neutral, and does not obviously favor the electoral fortunes of one political party over the other. Changes thought to be beneficial to one party are balanced by provisions backed by, and assumed to aid, the other. This symmetry is the only way the Act could have emerged from such a closely divided Congress with near unanimous support.

Were Congress more effectively controlled by one party, however, this sort of compromise would have been politically unnecessary. Under such circumstances, it is not hard to imagine a bill governing the manner of presidential election that, by clearly favoring one party's interests, could affect the outcome of the race. Indeed, in arguing that Congress had to have power over *its own* elections, Madison understood that the rules of an election can dictate its outcome, and so opposed giving states final say.²²³ States might "take care to so to mould their regulations as to favor the [congressional] candidates they wished to succeed;" thus, Congress had to be the ultimate arbiter.²²⁴ The same is potentially true for Congress' control over the manner of presidential election. The Framers' wisdom in avoiding this problem by decentralizing and dividing the power of devising rules for presidential election among the states is discounted when Congress assumes the power to legislate as it has in the Act.

It is also clear from the deliberations of 1787 and the resulting constitutional text that the Framers did not intend to treat congressional and presidential elections identically. Textually, the contrast between the

223. See *supra* notes 30 & 63 and accompanying text.

224. See 2 Farrand, *supra*, note 28, at 240-41.

language in Article I, Section 4 and Article II, Section 1 could hardly be more plain: the former gives Congress final power over the “manner” of congressional elections, while the latter gives state legislatures power over the “manner” of appointment of electors. The states were denied ultimate power over congressional elections, lest they control the federal government, but were given power over the appointment of electors, lest they be “annihilated” by that government. To those who successfully prevented constitutional amendment in the early nineteenth century, the House was intended to reflect the “national” character of the union while the presidency marked its “federative” nature. This was the compromise of 1787, as Martin Van Buren argued in 1826: “[I]f adopted,” the amendment would “break an important link in the chain of dependency of the general upon the state governments. It would surrender to the general government all control over the election of President and Vice-President, by placing the choice of electors on the same footing with that of representatives.”²²⁵ The *McPherson* Court also noted the constitutional similarity between presidential electors and the pre-1913 election of senators by state legislatures—both of which embody the “federative” character of the United States government, as distinct from the “national” character of the House of Representatives.²²⁶ The Act, of course, draws no distinction between Congress’ power over the manner of congressional elections and presidential elections, but treats all “federal” elections exactly alike, which is to say, subject to congressional mandate.

Challengers of the Act will also point to the ratification debates. Madison, Wilson and other federalists assured doubters that, because the federal government arose from the state governments, it could never subsume them. State appointment of electors, in whatever manner state legislatures saw fit, was held up as an important component of that delicate federal balance. As Tench Coxe wrote during the struggle for ratification in his widely circulated essay, “the smallest interference of Congress is not permitted.”²²⁷ By simply assuming authority over the manner of presidential election and setting new rules, the Act ignores the arguments made at ratification and alters that balance, at least as foreseen by the ratifiers.

Finally, skeptics will undoubtedly cite the drive for amendment in the nineteenth century as an acknowledgement by the early Congresses that national uniformity in, and congressional authority over, presidential selection can not be accomplished by simple legislation, but instead

225. 4 Elliot, *supra* note 30, at 489.

226. *McPherson*, 146 U.S. at 28–29.

227. 15 DOCUMENTARY HISTORY, *supra* note 85, at 509.

requires constitutional amendment.²²⁸ Indeed, there are echoes of the arguments made by supporters of amendment in the early 1800s to be found in the language of the Act's supporters. Commenting on the several modes of selection in the nineteenth century, for example, Justice Story observed that in order to eliminate the district system and "for the sake of uniformity, it has been thought desirable by many statesmen to have the constitution amended so, as to provide for an uniform mode of choice by the people."²²⁹ So too, in beginning the Senate's debate preceding passage of that chamber's version of the Act, the bill's chief sponsor noted that the new law would "ensure that our voting procedures are uniform and nondiscriminatory, and that Americans can have faith in the integrity of our election results."²³⁰

Where opponents of the Act would do well to stress constitutional history, its defenders will rely on more recent constitutional interpretation—namely, the line of decisions beginning during Reconstruction and continuing through *Burroughs*, Justice Black's opinion in *Mitchell*, and the Motor Voter Cases. *Ex parte Yarbrough* stands for the fundamental proposition that the federal government is empowered by the Necessary and Proper Clause to safeguard the popular choice of its officers, including the President, from violence, intimidation and corruption. Given the wave of terror in certain states that gave rise to *Ex parte Yarbrough* and similar Reconstruction-era decisions, it is difficult to imagine any other result. *Burroughs* involved Congress' attempt to cope with a less dramatic but comparable threat: the corruption of presidential elections through certain interstate candidate financing schemes. The *Burroughs* Court saw the case as controlled by *Ex parte Yarbrough*'s simple rule that Congress possesses full power to preserve the government from "impairment or destruction, whether threatened by force or by corruption."²³¹ By the time of *Buckley*, *Mitchell* (at least Justice Black's decision), and the Motor Voter cases, Congress' power to legislate the rules of presidential elections in tandem with those for Congress appeared to be an afterthought. States may have the power to choose elections or something else as the "manner" of selecting presidential electors, but, to quote one civil rights-era decision, "Congress has the implied power to protect the *integrity* of the processes of

228. As the Supreme Court has repeatedly observed, the views of the early Congresses on constitutional topics are accorded special weight, since these Congresses contained members of the founding generation and participants in the Constitution's formation. See, e.g., *Printz v. United States*, 521 U.S. 898, 905 (1997) (and authorities cited therein).

229. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 538 (Carolina Academic Press 1987) (1823).

230. 148 CONG. REC. S710 (daily ed. Feb. 13, 2002) (statement of Sen. Dodd).

231. *Burroughs v. United States*, 290 U.S. 534, 545 (1934).

popular election of presidential electors once that mode of selection has been chosen by the state.²³² If a state reverts to legislative appointment of electors, Congress could move against fraud and error in those selections as well.

Any argument based on the integrity preservation principle of *Ex parte Yarbrough* and *Burroughs* will depend, of course, on likening the threat posed to democracy by the problems in certain states' processes of election administration to the violence and corruption Congress moved against in 1870 and 1925. The similarities and differences are obvious. On the one hand, the administrative difficulties and resulting disenfranchisement that, after much investigation and study by Congress and private bodies, are agreed to have occurred in various states during the 2000 Election are unquestionably of the greatest seriousness for the health of our democracy. Voters unable to participate due to faulty voting machines, overwhelmed polling places, inadequately maintained voter rolls and physically inaccessible facilities may not face violence or intimidation as during Reconstruction and the century afterwards, but the distortion in the expression of the popular will is comparable. In both cases, mass numbers of voters whose choices should have been registered were not, and the electoral outcomes were therefore less reflective of popular preference than they should have been. In both cases, those whose participation was discounted could only have understood their citizenship to have been devalued, and ended up less likely to try to participate in the future. And Congress correctly concluded that the problem is not restricted to Florida, but is national in scope.

On the other hand, there are clear differences. Violence and corruption are the products of deliberate human choice made by people out to subvert democracy, and by their extreme nature arguably pose a more direct and conscious threat to representative government than creaky equipment or outmoded procedures. The latter are simply reminders that government never works perfectly. If presidential elections with a 4-6% error rate threaten the nation such that it is necessary and proper for Congress to assume a power it ordinarily lacks, then Congress has unknowingly had that power all along, since there has never been a presidential election without significant technological and administrative error. That error was only magnified in 2000 because of the closeness of the contest. Opponents of the Act will argue that neither the Founders nor succeeding Congresses or Supreme Courts believed that, in awarding states power over the manner of

232. *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 354 (E.D. La. 1965) (emphasis added, citation omitted in original).

selecting electors, the Constitution did so only to the degree that states exercised the power without error, with optimal funding, and using processes devised by the latest and best experts—permitting Congress to step in otherwise. Rather, that better describes how the Constitution allots power over congressional elections: states have initial authority, but Congress serves as a backstop, able to change existing state rules whenever it deems necessary. As Representative Rowan asked rhetorically during the debate over whether to accept presidential electors from Massachusetts in 1809: “Was Congress to form for the States a model of the manner in which they should direct their [presidential] elections to be held? Congress had no power to act on the subject.”²³³

Moreover, unlike in *Burroughs*, opponents will claim that the administrative shortcomings addressed by the Act are not “beyond the power of the state to deal with.”²³⁴ Nor do political circumstances in the states appear to be so distorted that, as during Reconstruction, reform at the state level is impossible. Instead, most states have, over time, simply chosen to steer the necessary resources and attention to other problems.

Yet courts that more or less follow *Yarbrough* and *Burroughs* will be hard put to reject the constitutionality of the Act. *Bush v. Gore*, and that decision’s reliance on *McPherson*, may signal the current Supreme Court’s unwillingness to reprise the virtually unthinking acceptance of congressional power over presidential elections displayed in *Burroughs*. But the national electoral meltdown that gave rise to the Act and the significant flexibility it accords states in achieving compliance may ensure its survival. Like violence during the Reconstruction and the corruption of the early twentieth century, the 2000 election may prove to be a catalyst of reform that courts find difficult to resist endorsing.

CONCLUSION

The enactment of the Help America Vote Act presents fascinating questions first grappled with during the Constitutional Convention. Moreover, the solution hastily devised at the convention may not present easy answers. Like many constitutional questions, this one will likely pit history and original intent against more recent interpretation informed by Congress’ longstanding tendency to accumulate power over matters deemed important and national in scope.

233. See 2 Farrand, *supra* note 28, at 112.

234. *Burroughs*, 290 U.S. at 544.