

To Assure Pride and Confidence *in the Electoral Process*

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Task Force Reports

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the National Commission on Election Reform*

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The Federal Regulation of Elections

Background Report of the Task Force
on Legal and Constitutional Issues

National Commission on
Federal Election Reform

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INTRODUCTION

The American electoral system falls at the intersection of many different regulatory regimes—some federal, some state; some constitutional, some statutory; some general, some specific; and some mandatory and some prohibitory. The Fourteenth Amendment’s Equal Protection Clause, for example, represents a general federal constitutional prohibition against certain discriminatory electoral practices. It does not affirmatively mandate any particular practices itself. On the other hand, the federal statute setting the date of congressional elections on “[t]he Tuesday next after the first Monday in November in every even numbered year”¹ does represent a specific federal statutory mandate. Members of Congress *must* regularly be elected on that day. If election law represented only a patchwork of these different kinds of legal requirements, understanding it would be difficult enough. Unfortunately, the situation is worse still. These regulatory regimes can contradict and compete with one another. State statutory requirements, for example, may conflict not only with the state constitution but with federal statutes and the federal constitution as well.

Luckily, there is a well-recognized hierarchy of authority. In the event of a conflict, federal constitutional law trumps federal statutory law, which trumps state constitutional law, which in turn trumps state statutory law, not to mention state administrative regulation.² In order to understand best what the law requires and prohibits, then, it is best to move from the top down. This background report thus begins with a discussion of what the United States Constitution requires. Surprisingly, neither of its two prohibitory provisions most relevant to election practices—the Fourteenth Amendment’s Equal Protection Clause and the First Amendment’s protection of free speech and association—even mentions elections. The courts have, however, applied both to the political process in far-reaching ways.

Next the report discusses the scope of Congress’s power to enact statutes regulating elections. The Constitution grants it broad power to directly regulate congressional elections, less power to directly regulate the selection of presidential electors (through election or otherwise), and less power still to directly regulate state and local elections. Still, as a practical matter, Congress has great power to regulate these other elections through other means—either collaterally through its power to directly regulate the “time, place, and manner” of congressional elections, through its power to determine how federal moneys made available to the states should be spent, or through its power to enforce certain constitutional safeguards, like the Equal Protection Clause of the Fourteenth Amendment.

The report next takes up how Congress has actually used its power to regulate elections. In addition to regulating campaign financing—an important area not considered in the report because it falls outside the Commission’s agenda—Congress has enacted three different kinds of laws of particular importance: voting rights laws (the Voting Rights Act); registration and absentee voting laws (the National Voter Registration Act and the Uniformed and Overseas Citizen Absentee Voting Act); and laws protecting individuals with disabilities in many areas, including voting (the Americans with Disabilities Act, the Rehabilitation Act, and the Voting Accessibility for the Elderly and Handicapped Act). Because any reform instituted by a state would have to satisfy all these laws, their contours guide the possibilities of reform on the state level.

This background report concludes with some applications demonstrating how all these different regulatory regimes interact in practice. The task force has chosen its particular hypotheticals—a federal statute enfranchising felons who have served their time, state laws

requiring voters to produce certain forms of identification at the polls, a federal statute requiring uniform voting technology within a state or across all states, and state laws regulating media election forecasting and exit polling—not because it believes the Commission should adopt or even consider them but because as a group they will show how many of the different pieces of the puzzle fit together.

One important piece is missing, of course: state constitutional and statutory requirements. Because these vary so much from state to state, it was impossible to include them. But they will certainly affect how any reforms proposed by the Commission are adopted. Any Commission proposal requiring the amendment of a state constitution, for example, may be harder for a state to adopt than one requiring only an amendment to its code.

Finally, one caution. The task force report is intended only to provide the Commission with a general background understanding of the laws that control in this area and how they interact. There are many specific questions it does not directly address. This is unavoidable. Unless the task force were to prepare a comprehensive treatise on election law, which time does not permit, many legal questions must remain unanswered here. That is not to say, however, that the task force is less than eager to help the Commission understand them, but only to realize that this particular document has a very specific purpose—to help inform the Commission so that its members may themselves see what the legal issues are and how to begin to analyze them. Needless to say, nothing in this document necessarily represents the view of the Commission itself. Indeed, its various authors do not necessarily agree in every detail of each other's arguments.

CONSTITUTIONAL RESTRICTIONS ON FEDERAL AND STATE REGULATION OF THE ELECTION PROCESS

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Federal and state authority to regulate elections, though considerable, is not absolute. Numerous federal constitutional provisions constrain it. Two constitutional provisions in particular have great reach in this area: the Equal Protection Clause of the Fourteenth Amendment and the First Amendment. In addition, a number of other constitutional provisions have a narrower but still significant impact on the election process.

The Equal Protection Clause

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

The equal protection clause is typically implicated in one of two situations: (1) when a statute employs an inherently suspect or invidious classification, such as race or national origin; or (2) when a statute implicates a fundamental right. Both situations can arise in elections. In fact, elections nearly always potentially implicate the fundamental rights strand. The Supreme Court has long held the right to vote to be fundamental. As early as 1886, it declared in *Yick Wo v. Hopkins*:

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a *fundamental political right*, because preservative of all rights.³

Whenever an election law employs a suspect classification or infringes the fundamental right to vote, the courts subject it to so-called “strict scrutiny.” Under this test, the law will be declared

unconstitutional unless it can be shown to bear a necessary relationship or be narrowly tailored to a compelling state interest⁴--a very demanding requirement.

Suspect Classifications. At one time some statutes straight-forwardly burdened disfavored groups' right to vote. These laws would simply employ suspect classifications on their face. Although the Fifteenth Amendment, for example, barred states from restricting the franchise to whites, some states banned African-American citizens outright from voting in political primaries on the theory that primaries, unlike general elections, represented a private activity rather than an act of the state. A court today would quickly strike down any statute like this which discriminated on its face against African-Americans and even a state inclined to discriminate would not be foolish enough to enact one.⁵ Nowadays voters typically challenge a different kind of statute, one that although facially neutral has the effect of burdening a protected group's vote. In reviewing this kind of statute, courts employ strict scrutiny whenever voters in a protected group can show both a discriminatory impact on their vote and an intent to burden them because of their group identity.

The courts employ so-called "reduced scrutiny," on the other hand, when the voters cannot show such a discriminatory intent or when, if they can, the state can nonetheless prove it would have passed the same law even without it.⁶ Thus, a law disproportionately burdening African-Americans but passed for nonracial reasons or which *would* have been passed for nonracial reasons is subject to only reduced scrutiny. Under reduced scrutiny, a statute will survive so long as it bears a rational relationship to a legitimate government interest⁷--a fairly lax requirement. The courts, in fact, have never employed reduced scrutiny to strike down an election law affecting a particular group. Realistically speaking, a showing of intent is necessary to make a suspect classification challenge stick.

*Hunter v. Underwood*⁸ well illustrates how the suspect classification strand of equal protection operates in this area. The Alabama Constitution of 1901 provided for the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, including "any . . . crime involving moral turpitude." Two citizens who had been disenfranchised because they had been convicted of the misdemeanor of presenting a worthless check challenged the provision under the Equal Protection Clause. From looking at the historical record, the Supreme Court found that the state constitutional convention included this provision because it believed it would disproportionately disenfranchise blacks. In the absence of any showing that the convention would have passed the provision for other, legitimate reasons, the Court applied strict scrutiny and struck the provision down. Strict scrutiny is so demanding, in fact, that the court did not even bother to inquire whether a compelling interest might support the provision. The finding of intent alone effectively decided the case. Thus, although the Equal Protection Clause does not generally bar states from disenfranchising those convicted of crimes,⁹ it does bar them from disenfranchising selectively on the basis of race or any intended racial proxy.

Fundamental Rights. The fundamental rights strand of equal protection falls into several largely discrete parts even within just the field of election law. Two parts in particular--"one person, one vote" and durational residency requirements--have long received attention from courts and commentators and represent much of the doctrinal backdrop to *Bush v. Gore*. *Bush v. Gore* itself suggests that the Supreme Court may--or may not--be interested in expanding this strand of equal protection to encompass much about how votes are cast, counted, and recounted. And some lower courts have already applied this strand to invalidate certain registration requirements. In particular, one federal court of appeals has held that a state cannot require

registration applicants to disclose their social security numbers unless the state protects that information from further disclosure.

One person, one vote. Equal protection was the basis for the "one person, one vote" line of cases addressing malapportioned election districts. As early as *Reynolds v. Sims*,¹⁰ the Supreme Court made clear that both state legislative districts and federal congressional districts had to be apportioned on a near equal population basis. The courts have allowed some deviation from absolute equality, however, especially in state legislative districts, in order to serve specific governmental interests. Indeed, in *Reynolds v. Sims* itself, Chief Justice Warren's opinion observed that "some distinctions may well be made between congressional and state legislative representation . . . [since] it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts."¹¹ Thus, in practice, congressional districting plans must generally strive for absolute equality in population (*i.e.*, zero deviation) and drafters must justify nearly all deviations,¹² while state and local districting plans are allowed more leeway.¹³

Durational residency requirements. Equal protection analysis has also been used to test state durational residency requirements for voting. Such requirements are prohibited for elections for President and Vice President,¹⁴ but are permissible for congressional elections so long as the requirements are the same as those for the more numerous branch of the state's own legislature. Nevertheless, several such durational requirements have been successfully challenged as unconstitutional burdens on the right to vote. In *Dunn v. Blumstein*, the Supreme Court invalidated a Tennessee statute imposing a one-year state and three-month county residence requirement as a prerequisite to voting. It reasoned that such long periods completely denied some residents the fundamental right to vote and it rejected them under strict scrutiny because it found they were not necessary to promote a compelling state interest.¹⁵ Not all durational residency requirements, however, are invalid. Courts have accepted ensuring the "purity" of the electorate, avoiding fraud, and providing time for a jurisdiction to close its registration books in advance of an election as compelling interests that can support reasonable residency requirements.¹⁶

Bush v. Gore. Of course, the Supreme Court's most recent application of equal protection to elections is *Bush v. Gore*.¹⁷ In *Bush*, the Supreme Court found that the Florida Supreme Court's decision to order manual recounts in an effort to resolve the contest of the state's 2000 presidential election violated the Equal Protection Clause. Although the *per curiam* opinion was silent on the specific standard of review the Court used in evaluating the equal protection claim, it cites two cases – *Harper v. Virginia Board of Elections* and *Reynolds v. Sims* – that apply strict scrutiny to state statutes challenged on equal protection grounds, and the opinion later discusses the "fundamental right" of voters in a statewide recount, suggesting strict scrutiny as well.¹⁸ Yet in actually reviewing Florida's recount procedures, the Court used language that looks more like reduced scrutiny's rational basis review. Specifically, the *Bush* court held that

[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by arbitrary and disparate treatment, value one person's vote over that of another.¹⁹

This threshold ambiguity as to the applicable standard of review makes any prediction of how future courts will apply *Bush v. Gore* difficult. But the Supreme Court's analysis does identify

several particular deficiencies in the Florida recount process to which future courts will presumably remain attentive:

- Varying standards of what counts as a vote. Because Florida used a general “intent of the voter” standard in determining for whom a ballot should count and left the application of this general standard up to individual county canvassing boards, a ballot counted for a candidate in one county might not be counted at all in another. In fact, as the Court noted, “[t]he standards for accepting or rejecting contested ballots might vary not only from county to county but within a single county from one recount team to another.”²⁰ While one team in a particular county might count a dimpled chad, for example, as a vote for a particular candidate, another team might not. The Court thought such disuniformity in recount standards across and within jurisdictions represented unconstitutional “uneven treatment.”²¹ If *Bush v. Gore* stands for nothing else, it stands for this: standards for what counts as a vote have to be reasonably uniform in application, not just in theory, across the whole jurisdiction for a particular race. For statewide races, this effectively points to a single, specific statewide standard for each type of voting machinery used.
- Overvotes vs. undervotes. The Florida recounts were focused exclusively on undervotes (ballots that failed to register any choice in the presidential race) and did not focus on overvotes (ballots that registered more than one choice in the contest, rendering them invalid). The Court noted that under the Florida Supreme Court's order, “the citizen who failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by a machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent.”²² The Court’s concern suggests that any recounting procedure should include both types of votes.
- Inclusion of partial counts. The Florida Supreme Court, in ordering the recounts, appeared willing to accept partial counts as of the time of final certification. The *Bush* court disagreed, reasoning that “[t]he press of time does not diminish the constitutional concern” and observing that “[a] desire for speed is not a general excuse for ignoring equal protection guarantees.”²³
- Use of voting machinery. Noting the requirement that any recount conducted under the Florida Supreme Court's order would involve the use of voting machines in an unapproved manner (*e.g.*, screening out undervotes and overvotes), the *Bush* Court observed that such use of machines would possibly require the state to design new software, which under state law would need to be evaluated for accuracy. Without this “substantial additional work,” the *Bush* court concluded that “the recount cannot be conducted in compliance with the requirements of equal protection.”²⁴
- Education. Similarly, the *Bush* court observed that the recount would require the use of “ad hoc teams comprised of judges . . . with no previous training in handling and interpreting ballots.” In conjunction with other aspects of the recount, the *Bush* court found this process to “rais[e] further concerns.”²⁵

In addition to the ambiguity of *Bush v. Gore*’s general standard of review, another feature makes it difficult to say how expansively future courts will apply the case. Although the Court’s general reasoning would seem to sweep broadly, the Court defined the actual constitutional violation quite narrowly: “The recount process . . . is inconsistent with the minimum procedures

necessary . . . in the special instance of a statewide recount under the authority of a single state judicial officer.”²⁶ It immediately cautioned, moreover, that “[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”²⁷ And it took care to point out all that it was *not* deciding:

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.²⁸

The Court’s opinion points to three particular features of Florida’s scheme that might limit the future reach of the case. First, the case focuses only on recounts, not on other features of the election process in which differences of treatment might be justified. As two justices often supportive of equal protection claims stated in dissent:

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.²⁹

Second, the Court suggests that its standard might apply only to statewide, not local, procedures. The Court carefully distinguishes between local and statewide procedures several times in the *per curiam* opinion, twice remarks that the Florida Supreme Court’s remedy in *Bush* was statewide, and clearly indicates that it is not speaking to the issue of non-statewide races. Third, the Court expressly focuses on the situation “where a state court [has] the power to assure uniformity.” This focus leaves open the possibility that equal protection might require less from an executive actor, like a Secretary of State, particularly if the Secretary has under state law no “power to assure uniformity” through promulgating rules or issuing opinions. In short, the Court in *Bush* reasoned broadly in a way that leaves hope for those who would challenge many existing election procedures but at the same time hedged its opinion with enough cautions and special circumstances that future courts, if they want, can limit the case to its facts. It is safe to say only that *Bush*’s future is unclear.

Privacy and Social Security Numbers. One United States Court of Appeals has applied the fundamental rights strand of equal protection to protect a voter’s privacy. Before 1993, Virginia required registration applicants to provide their social security numbers to voting registrars and allowed any other qualified voter, along with candidates, incumbents, political parties, and certain nonprofits, to obtain that information. Because of Congress’s protection of social security numbers against disclosure in the Privacy Act and in the Freedom of Information Act and the “alarming and potentially financially ruinous” harm of identity theft, the court found that the two provisions together imposed a substantial, indeed “intolerable,” burden on the fundamental right to vote.³⁰ That finding, in turn, obliged it to apply strict scrutiny, which asked whether the provisions were narrowly tailored to advance a compelling state interest. Virginia

argued that the provisions prevented voter fraud and promoted participation in the electoral process. The court, however, concluded that the provisions together were not narrowly tailored to fulfill those interests. In particular, it saw no reason for the second provision, which allowed disclosure to the public. It did, however, find that the first provision by itself would “unquestionably” have passed constitutional muster.³¹ It thus gave Virginia two choices. The state could either stop demanding that registration applicants provide their social security numbers as a condition of voting or it could continue to require that information and use it internally but not allow members of the public to see it. The state now prohibits disclosure of social security numbers to anyone other than election officials and courts.

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

Although the election process is fraught with First Amendment issues (most notably in the context of campaign finance regulation and political speech), the First Amendment is most relevant to the Commission’s work in two general areas: (1) political parties’ freedom of association and (2) the media’s freedom of the press, especially with respect to the collection of exit poll data and the use of such data to forecast the outcome of elections. Each of these is discussed below.

Political Parties’ Freedom of Association. In *NAACP v. Alabama*,³² the Supreme Court first recognized a right to freedom of association emanating from the First Amendment. In the elections context, freedom of association has been applied to evaluate statutes that directly or indirectly affect political parties, particularly their conduct of primary elections. A state can, for example, require that parties use primaries to nominate candidates, but there are some types of primaries they cannot impose against a party’s wishes. Conversely, when party activities come to comprise an integral part of the overall election process, they become subject to constitutional requirements and statutory limitations to enforce them.³³

The first case applying freedom of association to party primaries was *Tashjian v. Republican Party of Connecticut*.³⁴ In *Tashjian*, the Court invalidated a state law barring parties from allowing independents from voting in their parties. In invalidating the statute, the Court concluded that “the Party’s determination of the boundaries of its own association . . . is protected by the Constitution.”³⁵ The Court made clear, however, that strict scrutiny does not always apply in cases where a state law infringes the autonomy of political parties. “No litmus-paper test . . . separates those restrictions that are valid from those that are invidious The rule is not self-executing and is no substitute for the hard judgments that must be made.”³⁶ As the Court made clear in a more recent case, the applicable test balances the party’s associational interests against the state’s interests in a complicated way:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.³⁷

In short, the Court applies strict scrutiny whenever a state severely burdens a party's rights of association and something like reduced scrutiny when a state does not. The Commission must thus carefully think through any proposals that affect the autonomy of political parties. So far, the Court has struck down, among other things, state attempts (1) to limit the voters a party may allow to participate in its primary;³⁸ (2) to impose restrictions on the selection of party officials, as opposed to candidates;³⁹ and (3) to structure the primary system in a way that forces members to associate with voters with whom they not only disagree but who have actively declined to associate formally with the party.⁴⁰

Media Restrictions on Exit Polling and Forecasting Election Results. The other relevant application of the First Amendment to elections concerns the always-controversial media practice of conducting exit polls and then forecasting election results before the polls have closed in all areas of the country. Because the First Amendment strongly protects the media's activities, it is inevitable that any attempt to regulate the media's collection and use of exit poll data will draw a first amendment challenge.

Restricting forecasts. Efforts to restrict broadcast of election forecasts would likely be subject to scrutiny under the First Amendment's highly protective approach to political speech. In *Mills v. Alabama*, the most relevant Supreme Court precedent, the Court struck down an Alabama statute that barred the media from publishing on election day itself editorials urging voters to vote in certain ways.⁴¹ The Court found no need to make the controlling First Amendment standard clear because "no test of reasonableness" could save the statute.⁴² Nowadays rules barring the media from disseminating information, like forecasts, that some voters would view as relevant to their decision whether or how to vote would invoke strict scrutiny, which would require the state to show that the rules were narrowly tailored to serve a compelling government interest—a difficult test indeed.

Restrictions on the Collection of Exit Poll Data. Another possible means to stem the forecasting of election results is to ban or restrict exit polling. If the media lacks information on how people voted, it cannot make reliable predictions. A number of states have attempted to do this and have been largely unsuccessful. In *Daily Herald v. Munro*, for example, the Ninth Circuit upheld a trial court's decision to overturn a Washington statute banning exit polling within 300 feet of a polling place.⁴³ The court found the 300-foot zone to be a public forum because of its traditional openness for press interviews and public discourse and found the restriction to be content-based because it turned on the kind of information discussed. Thus, strict scrutiny

applied: "[a] content-based statute that regulates speech in a public forum is constitutional only if it is narrowly tailored to accomplish a compelling government interest."⁴⁴

The state argued that the statute satisfied this demanding test. The law was designed, the state claimed, to preserve order at polling places. The court recognized, however, that the unspoken goal of the statute was to restrict exit polling and election forecasts;⁴⁵ noted that the state already had a statute prohibiting "disruption" at polling places; and found that less-restrictive ways were available to address the state's asserted interest, such as a smaller zone, media identification requirements, and separate entrances and exits to the polls.⁴⁶ District courts elsewhere have followed the reasoning of *Daily Herald* to invalidate similar restrictions in other states.⁴⁷ In Georgia, however, a district court did uphold a 25-foot zone, reasoning that the state's interest in polling place decorum outweighed the media's interest in this small area and that the 25-foot figure was a fair balance between the interests of pollsters and voters.⁴⁸

Restricting the Release of Official Polling Results to the Press. Although the First Amendment generally bars the government from restricting the press's collection and publication of publicly available data or predicting election results, it places no duty on the government to make information available to the media that it does not make available to the general public.⁴⁹ Thus, the government could, if it wanted, embargo the public release of official polling data until a certain time on election day or after. It could not, however, release such information to some members of the public while not releasing it to the press. In particular, a state could not allow some members of the public to witness the official counting and then prevent the media from asking those witnesses about the results.

Other Constitutional Provisions Affecting Elections

Twelfth Amendment (presidential elections)

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves. . . .

U.S. Const. Amend. XII.

The Twelfth Amendment, together with Article II, establishes the presidential selection process known popularly as the Electoral College and specifies the procedures by which electors' votes are cast and counted (*i.e.*, opening and counting in the Senate, and procedures for resolving the election in the two Houses of Congress if no candidate receives a majority). Any proposal to abolish the Electoral College would require a constitutional amendment. The Constitution, however, does leave the states and Congress some flexibility. A state legislature can, for example, forego a popular election and pick presidential electors itself subject to due process constraints. It can also change the traditional winner-take-all formula for allocating electors, as both Nebraska and Maine have done, by awarding electors by congressional district (with a bonus for winning the statewide popular vote) and it can bind electors to vote for their party's nominee. Likewise, although the Twelfth Amendment says that the electors' votes shall be counted in a joint session of Congress, it does not specify the method of counting, presumably leaving that to Congress itself.

Fifteenth Amendment (race)

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

U.S. Const. Amend. XI, § 1.

Nineteenth Amendment (sex)

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

U.S. Const. Amend. XIX, § 1.

Twenty-Sixth Amendment (age)

The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

U.S. Const. Amend. XXVI, § 1.

These three amendments ban states and localities from discriminating against racial minorities, women, and youths aged 18 or older in the grant of the franchise. None grants the right to vote itself to anyone. Rather they all prohibit states, if they grant the right to vote to others, from denying it to individuals in these groups. These amendments, together with the Fourteenth, would be the basis for any constitutional claim of discrimination in voting against a state or locality.

Seventeenth Amendment (election of senators)

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

U.S. Const. Amend XVII, § 1.

This amendment provides for the popular election of United States senators. Prior to its adoption in 1913, senators were chosen in whatever way the legislature of each state directed.⁵⁰

Twentieth Amendment (presidential and congressional transition)

The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

U.S. Const. Amend. XX, § 1.

This amendment specifies that the executive transition should occur on January 20th following each presidential election and the congressional transition on January 3rd following each congressional election. This deadline creates the ultimate pressure for speedy resolution of presidential election contests.

Twenty-Second Amendment (presidential term limits)

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

U.S. Const. Amend. XXII, § 1.

This amendment imposes a limit of two terms on the office of President of the United States and prohibits an individual who ascends to the office of President and serves as President for more than two years from seeking re-election more than once. The Twenty-Second Amendment effectively bars certain candidates (*i.e.*, two-term incumbents) from gaining access to the presidential ballot in the states.

Twenty-Third Amendment (selection of presidential electors for the District of Columbia)

The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state

U.S. Const. Amend. XXIII, § 1.

This amendment allows residents of the District of Columbia some voice in choosing the President. Prior to its adoption in 1961, the District had no representation in the Electoral College. Other territories of the United States currently have none.

Twenty-Fourth Amendment (poll taxes)

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

U.S. Const. Amend XXIV.

This amendment prohibits states from requiring people to pay money in order to exercise their right to vote in federal elections. Although the amendment does not prohibit the use of such taxes in state or local elections, such practices will generally be unconstitutional under the Fourteenth Amendment's Equal Protection Clause.⁵¹

CONGRESSIONAL AUTHORITY TO REGULATE ELECTIONS

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Since the federal government is one of delegated power, any act of Congress must rest on some affirmative grant by the Constitution. Four major constitutional provisions give Congress power to regulate how states and localities conduct elections: the Elections Clause of Article I, section 4, which governs congressional elections, and its presidential counterpart in Article II, section 1; the enforcement power conferred by section 5 of the Fourteenth Amendment; the Spending Clause of Article I, section 8, clause 1; and the Commerce Clause of Article I, section 8, clause 3.

The Elections Clause and Article II, Section 1

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.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes, which Day shall be the same throughout the United States.

U.S. Const. art II, § 1, cl. 4.

The Elections Clause has traditionally been interpreted to give Congress virtually plenary power over a wide range of aspects relating to congressional elections. In its most recent decision discussing this clause, *Cook v. Gralike*,⁵² the Supreme Court stated that “in our commonsense view [the] term [‘Manner of holding Elections’] encompasses matters like ‘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.’”⁵³ The list of practices that the Supreme Court and the lower federal courts have actually found within the scope of Congress’s Election Clause power is broad indeed—ranging from registration of voters at the beginning of the federal election process to the certification of results at the end.⁵⁴ The courts, in fact, have interpreted the clause as granting Congress authority both to regulate conduct at any state or local election that coincides with a federal contest and to punish state election officers for violating state duties connected with federal elections.⁵⁵ The clause does not, however, grant Congress power to decide who may vote in congressional elections. That power belongs to the states. Under the Qualifications Clauses of the Constitution, the voters for House and Senate elections “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”⁵⁶ In other words, the Constitution restricts the

congressional franchise to those whom the state allows to vote for members of the lower house of its own legislature. The power to set the qualifications of voters, however, does not mean that states can set them discriminatorily on certain prohibited grounds, like race and gender. The fundamental rights strand of equal protection, moreover, limits the state's ability to restrict the franchise in other ways as well.

The Elections Clause assumes, in the first instance, that states will enact election regulations themselves. But as the Court has explained:

The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices. Thus it is well settled that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the States. The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.⁵⁷

As the Court went on to say, the clause gives Congress “‘comprehensive’ authority to regulate the details of elections, including the power to impose ‘the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.’”⁵⁸

This power has a long pedigree, stretching back into the 1880's. In one of the earliest cases, the Court construed the “make or alter” language of the Elections Clause:

[If Congress] chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.⁵⁹

Several aspects of Congress's Elections Clause power bear discussion. The first is that the states' default power to regulate congressional elections comes from the Elections Clause, rather than from their residual, Tenth Amendment-protected sovereignty. As the Supreme Court reaffirmed recently in *Cook*:

The federal offices at stake aris[e] from the Constitution itself. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the

States.... No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.⁶⁰

Thus, federalism concerns and state sovereignty cannot trump any exercise of Congress's Elections Clause power. In fact, the lower federal courts have uniformly rejected state arguments that Congress's wide-ranging regulation of state voter registration practices under the Motor Voter law violate the Tenth Amendment by commandeering state personnel and resources.⁶¹

Second, a long series of cases, mostly involving statutes that criminalize various forms of election-related misconduct, holds that Congress's power under the Elections Clause extends to many, if not all, aspects of an election conducted even in part to select members of Congress. In the most recent reported case, the federal Court of Appeals upheld the convictions of two men charged with vote buying in primary elections for county commissioner and sheriff that appeared on the same ballot as uncontested primaries for the United States Senate and House of Representatives. In language fairly typical of these cases, the Court of Appeals firmly rejected the defendants' claim that there was no federal jurisdiction:

[T]he federal election fraud statutes were implemented to protect two aspects of a federal election: the actual results of the election and the integrity of the process of electing federal officials. In the present case, we agree with the government that [the defendants'] fraudulent conduct corrupted the election process, if not the election results.

Moreover, the government maintains, and we agree, that the Constitution's Necessary and Proper Clause, (Art. I, § 8, cl.18), along with Art. I, § 4, empowers Congress to regulate mixed elections even if the federal candidate is unopposed.⁶²

This ability to regulate "mixed" elections effectively gives Congress some extra power to protect voting rights in state and local elections. Thus, for example, the federal anti-intimidation statute protects voters even if the real aim of intimidation concerns a state or local contest.⁶³

The practical reach of Congress's power is wider still. Although as a formal matter the Elections Clause gives Congress power only to regulate elections for the House and Senate, states may find it easier and cheaper simply to standardize to the federally mandated congressional model for all the elections—presidential, state, or local—they conduct. The exact scope of Congress's power under Article II, § 1 to regulate presidential elections, for example, is somewhat unclear. The Elections Clause grants Congress the authority to regulate "the time, place, and manner" of congressional elections while its presidential counterpart grants Congress authority to regulate only the "Time of chusing Elector[s] and the Day on which they shall give their Votes." Art. II, § 1, cl. 2 also expressly gives states, not Congress, the power to "appoint in such Manner as the legislature thereof may direct, a Number of electors." Those textual differences would seem to give Congress much less power over presidential elections and the states more. The courts, however, have not been so clear. In *Burroughs v. United States*, for example, the Supreme Court held that Congress could regulate the *manner* of financing

presidential campaigns.⁶⁴ Its reasoning sweeps broadly:

While presidential electors are not officers or agents of the federal government...they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. 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.⁶⁵

Bush v. Gore's recent affirmation of the state legislature's expansive power to control the manner of selecting presidential electors, however, casts some doubt on the scope of Congress's authority. Simply put, the states' and Congress's power cannot both be expansive. One must come at the expense of the other. As a practical matter, however, there never is a presidential election that does not simultaneously select members of Congress.⁶⁶ Thus, even if Congress's power to regulate presidential elections directly is somewhat limited, any limitations may make little practical difference. Many standards and requirements that apply to congressional elections will, practically speaking, govern the presidential elections held at the same time.

The same holds true for state and local elections. Although Congress has no authority under the Elections Clause to regulate these races, states may conform them to federal standards to ease their administration. Experience under the Motor Voter law bears this out. Although in that law Congress mandated voter registration practices only for federal elections, all but a handful of states shifted to a single voter registration scheme that complied with federal law rather than maintain a dual registration system in which voters who wished to participate in state and local elections had to register differently.

In short, the broad judicial understanding of the phrase "Manner of holding Elections" and the plenary power afforded Congress to "at any time by Law make or alter" state regulations regarding the way in which elections for Senators and Representatives are held effectively make the Elections Clause an expansive source of federal power over all elections.

The Fourteenth Amendment

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article.

U.S. Const. Amend. XIV, § 5.

The Fourteenth Amendment Due Process and Equal Protection Clauses are the primary constitutional provisions protecting the right to vote. Although the Supreme Court has consistently held that the Constitution recognizes no right to vote, it has just as consistently held that voting, when allowed by a state, is a “fundamental” interest and thus that restrictions on the franchise trigger strict scrutiny.⁶⁷ In a set of cases construing critical provisions of the Voting Rights Act of 1965, the Supreme Court upheld the Act as an appropriate use of Congress’s power under section 5 of the Fourteenth Amendment, the “enforcement clause.”⁶⁸

There are two sorts of practices Congress might regulate using its Enforcement Clause powers, and they raise different questions. First, Congress might provide special remedies for violations of the self-executing prohibitions of section 1 of the Fourteenth Amendment. For example, Congress has provided for the award of attorney’s fees in cases where plaintiffs establish a violation of their constitutional right to vote.⁶⁹ Such provisions, which modify the traditional “American rule” that each party bears its own litigation costs, clearly make it easier for plaintiffs to vindicate their rights. Similarly, Congress could provide other expedited or plaintiff-friendly procedures. With respect to this first category, however, Congress does not itself prohibit any practices that are not already prohibited by the equal protection or due process clauses. It leaves up to the judiciary the decision whether a particular practice in a particular jurisdiction violates the Constitution.

Second, Congress might seek to deter constitutional violations by outlawing conduct that a court has not already declared violates the self-executing prohibitions of the equal protection or due process clauses. The question then becomes how far beyond simply outlawing practices that courts would find to violate the Fourteenth Amendment itself can Congress go? The central Supreme Court decision discussing this use of section 5’s enforcement power is *City of Boerne v. Flores*.⁷⁰ In *Boerne*, the Court struck down a provision of the Religious Freedom Restoration Act of 1993 (RFRA) that prohibited state and local governments from “substantially burdening” a person’s exercise of religion even if the burden resulted from a rule of general applicability that was not intended to burden religious free exercise unless the government could demonstrate that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest.”⁷¹

The Federal Government defended RFRA as an appropriate use of Congress’s enforcement power under § 5 of the Fourteenth Amendment. It argued that Congress’s “decision to dispense with proof of deliberate or overt discrimination and instead concentrate on a law’s effects accords with the settled understanding that § 5 includes the power to enact legislation designed to prevent as well as remedy constitutional violations.”⁷² The Supreme Court disagreed. While acknowledging that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States,” it declared that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁷³ With respect to RFRA, the Court found no such congruity: the record before Congress did not indicate a pervasive practice of intentional discrimination against religious free exercise that would justify the prophylactic step of prohibiting conduct with a discriminatory impact absent a finding of purposeful discrimination. Given that failure, the Court saw Congress’ action

as an attempt to redefine the substantive scope of First and Fourteenth Amendment protections, rather than as an appropriate remedial response. The Court has followed *Boerne*'s analysis in several later cases construing Congress's authority under section 5 to abrogate states' sovereign immunity under the Eleventh Amendment⁷⁴ and in striking down a provision of the Violence Against Women Act that allowed private parties to sue other individuals who engaged in gender-motivated violence against them.⁷⁵

The "congruence and proportionality" requirement of *Boerne* thus requires asking, first, what practices violate section 1 of the Fourteenth Amendment, and, second, whether a congressional enactment that goes beyond banning simply those practices is nonetheless an acceptable response to the overall situation because such "over-inclusive" legislation is appropriate to deter or remedy constitutional violations. The Court's recent opinion in *Board of Trustees v. Garrett*⁷⁶ illustrates the bite of both parts of *Boerne*'s requirement. There, the Court struck down Congress's use of the Enforcement Clause to render states liable for money damages for discriminating against individuals with disabilities in employment. The Court's analysis seems to rest on the following syllogism: individuals with disabilities do not form a suspect or quasi-suspect class; therefore discrimination against them is unconstitutional only if arbitrary or capricious; the congressional findings that undergirded the Americans With Disabilities Act (ADA) may show that states have treated people with disabilities differently but not necessarily arbitrarily; thus without a basis for seeing a serious risk of unconstitutionally arbitrary differential treatment, Congress exceeded its powers because there was no section 1 violation to which the section 5 enforcement mechanism could be proportional and congruent.

Garrett poses two questions—one general and one specific—whose answers are unclear. First, how far may Congress legislate to "enforce" the equal protection principle announced in *Bush v. Gore*? Since both the reach and the basis of that holding are somewhat unclear, so too will be the constitutionality of many efforts to enforce it. Whether Congress may under section 5 require that states use uniform voting technologies statewide, for example, depends upon whether *Bush v. Gore* extends to these technologies—something the five justices joining in the Court's opinion insisted they were not deciding while two dissenting justices explicitly stated the case would not.⁷⁷

Second, *Garrett*'s holding unsettles an important antidiscrimination provision not at issue in *Garrett* itself. *Garrett* decided only that Title I of the ADA did not represent a valid exercise of Congress's section 5 power. Since Title I, which concerns discrimination in employment, also represents an exercise of Congress's power over interstate commerce, its substantive prohibitions remain in place. Only individuals' damage remedies against a state, which cannot for technical reasons be authorized by the interstate commerce power, were effectively invalidated. (Damage remedies against state officials in their official capacity and injunctive remedies against all types of parties were unaffected.) Unlike Title I, however, Title II, which prohibits discrimination on the basis of disability in the provision of public services, including voting, might not represent a valid exercise of Congress's commerce power. If it does not, some or all of its substantive prohibitions, not only some of its remedies, could prove ineffective.

In any event, one thing seems clear about the Enforcement Clause power. The Supreme Court has been looking quite closely at the evidentiary record before Congress when Congress makes its decision about how to regulate the states. So if Congress intends to use its enforcement clause powers, it must anticipate building a record designed to show substantial and pervasive constitutional violations and tie the remedy to them.

Overall, the fact that the Supreme Court has evinced a growing suspicion of congressional use of section 5 of the Fourteenth Amendment to ban conduct that a court would not itself hold unconstitutional suggests that Congress's power to use the Fourteenth Amendment may be less robust than its Elections Clause power.

The Spending Clause

**The Congress shall have Power To ... provide for the...
general Welfare of the United States**

U.S. Const. art. I, § 8, cl. 1.

Under the so-called "Spending Clause," Congress may attach conditions to the receipt of federal funds. And it has frequently used this power to induce states to undertake or forego actions that it would otherwise lack the power to regulate. As the Supreme Court has explained, "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."⁷⁸ Thus, even issues not within Article I's "enumerated legislative fields" may be addressed by conditionally granting or withholding federal funds.⁷⁹

At least so far, the Spending Clause remains a robust source of congressional power.⁸⁰ In *South Dakota v. Dole*, the Court upheld a statute that conditioned states' receipt of certain federal highway funds on their raising the drinking age to 21.⁸¹ The Court identified three key limitations on the scope of the spending power. First, the exercise of the spending power must be in pursuit of "the general welfare." Second, the congressional regulation must be unambiguous so that states understand the choice they are making in agreeing to receive the funds. Third, the conditions on the federal funds must be related to the purposes of the federal spending.⁸²

Could the Spending Clause be used to induce states to adopt appropriate electoral practices? Certainly. But Congress would have to carefully specify the conditions imposed. The first two prongs of the *Dole* requirement would be easy to satisfy. Clearly, such congressionally imposed conditions and the underlying funding would be in pursuit of the general welfare. Similarly, making the conditional nature of the grant unambiguous is a simple matter of legislative drafting. The real question concerns the third prong. So long as the conditional spending sufficiently relates to Congress's aims, there will be no problem. Congress could, for example, simply make new funds available for state and local governments to spend on elections and impose appropriate election conditions. It could not, however, condition receipt of federal highway or social security funds upon those same conditions. In short, Congress has great power to regulate elections under the Spending Clause provided it properly lays out its conditions and ties them to election funding. The states, however, always retain the right to refuse the funds and so can escape any federal obligations.

The Commerce Clause

**The Congress shall have Power ... [t]o regulate Commerce ...
among the Several States**

U.S. Const., art. I, § 8, cl. 3.

The Commerce Clause has traditionally been the source of much federal regulation, including much regulation of state and local governments that can best be described as about social policy rather than commerce in its traditional sense. The paradigmatic examples of social regulation are the cases upholding provisions of the Civil Rights Act of 1964.⁸³ While Congress cannot abrogate states' immunity to suit by private citizens using its commerce clause power,⁸⁴ it can regulate states directly and authorize the United States itself to sue the states as well as allow private lawsuits seeking injunctions against state officials.⁸⁵

The real question here will be whether Congress is actually regulating "interstate commerce." Some election laws would clearly satisfy any conceivable definition. Congressional prohibition of the use of particular kinds of voting technology that had traveled across state lines would clearly be permissible. But recent Supreme Court cases suggest there are at least some limits as to what counts as regulable interstate commerce.⁸⁶ The Court has sometimes struck down congressional action when the Court perceives Congress to be using the commerce clause to reach intrastate activity that is not itself sufficiently "economic" to substantially affect interstate commerce. So if Congress wants to use its commerce clause powers to regulate elections more generally, it must make specific findings about both the amount of commerce involved and its interstate nexus.

MAJOR FEDERAL STATUTES DIRECTLY REGULATING ELECTIONS

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Congress has exercised its power over both federal and state elections in a variety of statutes. Some statutes, like those laying out the presidential counting rules or congressional apportionment formulas, are quite focused and regulate only one stage of a single type of election. Others, most notably the Voting Rights Act of 1965, are quite broad and regulate many stages of many different elections—from filing to run for President to recounting the votes for local school boards. Together these different federal statutes create a complex framework which states must take into account when they exercise their own power over elections.

Time, Place, and Manner Regulations

Pursuant to its authority under the Elections Clause to regulate the “time, place, and manner” of congressional elections, Congress has laid down rules governing the apportionment of Representatives among the states, districting principles within each state, and the date of the election.

The Fourteenth Amendment requires congressional seats to be apportioned among the states according to their respective populations.⁸⁷ The amendment is silent, however, as to exactly what formula should be used. Through statute Congress employs the so-called “method of equal proportions,” which assigns Representatives among the States according to a particular mathematical formula.⁸⁸ Although other formulas are available to apportion according to population, the Supreme Court has treated congressionally-selected apportionment measures with a fair degree of deference.⁸⁹ For instance, when Montana claimed that the method of equal proportions unfairly left it with a single Representative for 803,655 persons, as compared to a nationwide average district size of 572,466, the Court responded that Congress had “a measure of discretion” to make a “good-faith choice of a method of apportionment of Representatives among the several States.”⁹⁰ Once seats have been apportioned among the states, Congress requires each state with more than one Representative to establish an individual district for each one.⁹¹

Beyond apportionment by equal proportions and single-member districts for the House of Representatives, Congress has imposed few time, place, and manner requirements on federal elections. It has, of course, set the date for congressional elections—“[t]he Tuesday next after the first Monday in November in every even numbered year.”⁹² Congress has also set that same day for the quadrennial appointment of presidential electors.⁹³ No federal statute, however, addresses the times polling places should remain open on election day. Congress also allows states to decide for themselves when an election may be held when a vacancy occurs or when, for some reason, a state fails to select a Representative on election day.⁹⁴ Similarly, if a state fails to choose presidential electors on election day, Congress provides for them to be appointed “as the legislature of the State may direct.”⁹⁵

Presidential Counting Rules

Under Article II, Section 1 and the Twelfth Amendment to the Constitution, the President and the Vice President are to be elected by the electors from the states. Each state receives one elector for each Senator and one elector for each Representative to which that state is entitled.⁹⁶ Under the Twenty-third Amendment, the District of Columbia is entitled to the number of electors it would receive were it a state up to the number that the least populous state receives. Congress has then by statute laid down how it will receive the electors' votes and how it will handle disputes.

The Constitution gives state legislatures the authority to determine the manner of appointing the electors in the states.⁹⁷ Unlike with Representatives, there is no general provision under which Congress can override state rules for appointing electors—states enjoy nearly plenary authority over the manner of appointment.⁹⁸ Congress has by statute, however, provided a safe harbor provision that applies in the event of a “controversy or contest” concerning the appointment of a state’s electors.⁹⁹ If a state has provided, prior to election day, for a method for the resolution of such a controversy, and if that method results in the naming of electors at least six days before the day electors are supposed to meet in each state to elect the President and Vice President, then the naming of those electors will be “conclusive” in the event of further controversy.¹⁰⁰

The Twelfth Amendment establishes in detail the procedures for each state’s electors to cast their votes.¹⁰¹ The electors are to meet in their respective states and cast separate ballots for President and for Vice President. They are then to make lists of those receiving votes for President and Vice President, and of the number of votes those persons received. The electors must then sign and certify the lists and transmit them to the President of the Senate, who must open the certificates in the joint presence of the Senate and the House of Representatives where the votes will be counted.

It takes a majority vote of the electors to select the President.¹⁰² If there is no majority, then the House of Representatives is entitled to select from among the three candidates who received the greatest number of votes. In casting their votes, each state delegation in the House is entitled to a single vote on behalf of their state. A majority of these votes is required to select the President.

It likewise takes a majority of the electors to select the Vice President.¹⁰³ If there is no majority, then the Senate is entitled to select from among the two candidates who received the greatest number of votes. A majority vote of the Senate is required to select the Vice President.

The Voting Rights Act

The Voting Rights Act of 1965 (VRA), as amended, is the primary federal statute addressed to discriminatory election practices.¹⁰⁴ The VRA’s initial aim was to use federal legislation to end decades of official state discrimination and disenfranchisement. In “covered jurisdictions” (largely the southern states), the VRA established procedures to register minority voters, including the appointment of federal election examiners and hearing officers to ensure the availability of voter registration. The VRA suspended in covered jurisdictions (and later eliminated nationwide) the use of any “tests or devices” impeding the right to vote, such as literacy tests or “good character” requirements.¹⁰⁵ These provisions had dramatic effects in opening the franchise and combating rank discrimination, and are not a major subject of controversy today.

The Supreme Court upheld the constitutionality of the VRA in *South Carolina v. Katzenbach*.¹⁰⁶ In *Katzenbach*, the Court held that the passage of the VRA was within Congress' enforcement power under the 15th Amendment. The Court later upheld the constitutionality of the VRA's provisions relating to voting by persons who attend non-English speaking schools as a valid exercise of Congress' enforcement power under section 5 of the 14th Amendment.¹⁰⁷ Notwithstanding the Supreme Court's recent limitations on the scope of congressional enforcement power in *City of Boerne*,¹⁰⁸ the Court has continued to reaffirm the constitutional validity of the VRA in its most recent cases.¹⁰⁹

Three provisions of the VRA dwarf the others in terms of their current importance. First, section 5 of the VRA imposes a "preclearance" requirement for any changes affecting voting within certain covered jurisdictions.¹¹⁰ Section 5 applies primarily to the southern states, as well as selected areas of other states, and requires approval by the Attorney General or the United States District Court for the District of Columbia prior to new measures related to voting taking effect. The second provision of particular significance is section 2 of the VRA, which applies nationwide.¹¹¹ This section creates an affirmative cause of action by which citizens can challenge allegedly discriminatory districting or other voting practices. Section 2 was the impetus for the creation of "majority-minority" legislative districts beginning in the 1980's. The creation of those districts in turn has become the focus of constitutional litigation under the equal protection clause over the legitimacy of the use by states of race in the drawing of legislative districts.¹¹² Third, section 4(f) protects certain language minorities. It grants them the right to registration and voting materials in their language and triggers treatment under sections 2 and 5.

Section 5

Whenever [a covered jurisdiction] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from [before], such [covered jurisdiction] may institute an action . . . for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees [protecting certain language minorities,] and unless and until . . . such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure.

42 U.S.C. § 1973c.

Almost any proposal by the Commission that relates to voting in covered jurisdictions will be subject to the requirements of section 5 unless the federal government mandates it or provides an exemption. The VRA's original coverage provisions set out a formula by which any state or political subdivision that maintained a "test or device" that limited access to voting and where fewer than 50 percent of voting age persons were registered became a covered jurisdiction and thus subject to the preclearance requirements of the statute.¹¹³ In theory, section 4 of the VRA provided a "bailout" procedure by which a jurisdiction that had not used prohibited tests or devices for ten years and could show that their effects had been eliminated could remove itself from coverage under section 5.¹¹⁴ Debates over the extension and amendment of the VRA in 1970, 1975, and 1982 all included efforts to modify the bailout provisions to make relief under them more attainable. Nonetheless, no state and only a handful of political subdivisions have successfully made use of the bailout procedures. The list of covered jurisdictions thus has remained essentially unchanged over the last quarter century.¹¹⁵

Section 5 requires a covered jurisdiction seeking to implement a change in any "voting qualification or prerequisite, or any standard, practice, or procedure with respect to voting" to obtain "preclearance" before doing so.¹¹⁶ A covered jurisdiction may meet this obligation in two ways. The most common means of compliance with section 5 is to submit a proposed change to the United States Attorney General, who has 60 days in which to object and thereby block the change from taking effect.¹¹⁷ The Civil Rights Division of the Department of Justice is responsible for reviewing proposed changes. Alternatively, a state or political subdivision may institute a declaratory judgment action in the United States District Court for the District of Columbia. In either case, the jurisdiction bears the burden of demonstrating that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote.¹¹⁸ As a practical matter, thousands of proposed voting changes are submitted to the Department of Justice each year, and the overwhelming majority of them are precleared in the administrative review process.¹¹⁹

In addition, private individuals may bring suit in a local United States District Court to enjoin the implementation of any new state measure affecting voting that has not been precleared.¹²⁰ Local district courts in such private suits are limited to making a determination

whether the change at issue is covered by section 5, in which case the local district court may enjoin the implementation of the change until it has been properly precleared by the Attorney General or the U.S. District Court for the District of Columbia.¹²¹ In these “coverage” suits, local district courts cannot rule on the substantive validity of any changes.

It is important to recognize that the coverage provisions of section 5 are extremely broad. Almost any change related to voting practices or procedures, no matter how small, is subject to the section 5 preclearance requirement in covered jurisdictions.¹²² From the earliest interpretations of the VRA, it has been well settled that changes in polling places, changes in voting mechanisms or procedures, changes in registration requirements, residence requirements or any other prerequisite to voting, and any similar provision are subject to the preclearance requirement.¹²³ While any federal statute that results from the Commission’s recommendations would not itself be subject to section 5 preclearance, any state or local provisions enacted by a covered jurisdiction to implement Commission proposals would be subject to preclearance. In fact, any provisions enacted by a covered jurisdiction to implement congressional requirements would also be subject to preclearance so long as the congressional act left the covered jurisdiction some residual discretion and did not expressly exempt the state choice from section 5 review.

The substantive standard governing preclearance requires that a change not have the purpose or effect of denying or abridging the right to vote of racial, ethnic, and certain language minorities. Unlike section 2, which creates a cause of action to challenge existing voting procedures as discriminatory, section 5’s substantive standard is comparative—a standard of “nonretrogression.”¹²⁴ In other words, section 5 forbids only changes that: (1) are intended to reduce minority participation in the electoral process below that prevailing under the existing regime, or (2) have that effect.¹²⁵ Under the nonretrogression principle, for example, a legislative districting plan will pass muster so long as it provides for no less minority representation than the existing plan does. A plan that reduces minority representation will not. In simple terms, any change to voting practices that can be demonstrated to “improve” or maintain the existing ability of racial or language minorities effectively to cast the vote they intend and to have that vote counted should be approved pursuant to section 5.

Section 2

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees [protecting language minorities.]

42 U.S.C. § 1973.

The primary battleground with respect to section 2 of the VRA has been in the context of at-large voting systems and legislative districtings. As originally enacted, section 2 of the VRA merely restated the guarantees of the 15th Amendment.¹²⁶ During the 1970's, claims of vote "dilution" — the manipulation of racial voting strength by either packing minority voters together in a disproportionately minority district or dispersing them in a way that makes their vote less effective — were litigated under the 15th Amendment and the 14th Amendment's equal protection guarantee.¹²⁷ After a plurality of the Supreme Court concluded that constitutional vote dilution cases required a showing of discriminatory purpose or "intent,"¹²⁸ Congress amended section 2 in 1982.¹²⁹

The 1982 amendments adopted a "results" test that eliminated the requirement that plaintiffs show discriminatory intent in order to demonstrate that a districting scheme or other practice was racially dilutive in violation of the VRA. The operative language of amended section 2 provides a "totality of the circumstances" test under which plaintiffs may challenge a districting plan or other voting mechanism on grounds that the political processes in the jurisdiction are not equally open to participation by members of a racial, ethnic, or language group in that its members have less opportunity than others to participate in the political process and to elect candidates of their choice.¹³⁰ The statute provides that the extent to which members of a protected group have been elected to office in the relevant jurisdiction is relevant.¹³¹ The so-called "Dole Proviso" also provides, however, that nothing in amended section 2 is meant to give rise to a right of proportional representation.¹³²

Under the "totality of the circumstances" test, the following factors are typically relevant:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.¹³³

Two further factors can be relevant in some cases:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[, and]

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.¹³⁴

Litigation under amended section 2 led to the creation of significant numbers of majority-minority districts in the 1980s. The Justice Department also used section 5 preclearance review to demand that some districting plans include significant numbers of majority-minority districts in covered jurisdictions.¹³⁵ Facing the prospect of litigation under section 2, state legislators in many cases also proposed districting plans that included majority-minority districts. In 1993, however, the Supreme Court held that the Equal Protection Clause subjects the use of race in redistricting to strict scrutiny.¹³⁶ Although this issue remains intensely controversial, the Supreme Court's current guiding principle appears to be that race may be considered in drawing districts so long as it does not "predominate" over other factors such as seeking geographical compactness, respecting the territorial integrity of political subdivisions, and politics.¹³⁷

While the Commission's work is unlikely to involve districting issues, section 2 is not limited to the arena of legislative apportionment. Section 2 also has been used to challenge other types of election mechanisms, including balloting and counting procedures,¹³⁸ appointment of registrars,¹³⁹ convicted felon disenfranchisement laws,¹⁴⁰ all manner of registration requirements, and other elements of the voting process that potentially could be employed to deny or abridge the right to vote. And it is currently being used in many of the post *Bush v. Gore* lawsuits challenging state and local voting procedures and machinery. The courts evaluate these other mechanisms under the same general totality of the circumstances test they apply to districting claims. The courts have not, however, developed more specific standards, as they have in the districting cases, to judge these other mechanisms.

Minority Language Protections

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

42 U.S.C. § 1973b(f)(2).

In 1975, Congress amended the VRA to protect members of language minority groups. It extended three different protections. First, it brought language minority groups under section 2.¹⁴¹ Thus, any voting practice which “results in a denial or abridgement of the right of any citizen ... to vote” on account of that person’s language status is prohibited. As with any section 2 claim, the court will look at “the totality of the circumstances” and not construe the right as one to proportional representation.¹⁴² Second, Congress subjected any jurisdiction that in 1972 provided voting and registration information and materials only in English and that had more than 5 percent of its citizens of voting age in a single language minority group to section 5’s preclearance requirement¹⁴³ and specified that section 5’s “purpose or effects” test would apply to such groups.¹⁴⁴ In practice, this has both brought more jurisdictions within the ambit of section 5 generally and meant that changes in voting practices in covered jurisdictions could not retrogress the effectiveness of the vote of any covered language group.¹⁴⁵ Third, Congress required that voting and registration materials and information in these jurisdictions and others in which a single language group later came to constitute more than 5 percent of or more than 10,000 of the citizens of voting age be provided in the covered group’s own language unless that language was unwritten, in which case the jurisdiction had to furnish only oral instructions and assistance.¹⁴⁶ In measuring compliance with this requirement, the U.S. Department of Justice looks at the extent to which “materials and assistance [have been] provided in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activitie[s] and [the extent to which the] affected jurisdiction [has] taken all reasonable steps to achieve that goal.”¹⁴⁷

REGISTRATION AND OVERSEAS AND MILITARY VOTING

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The National Voter Registration Act

The National Voter Registration Act of 1993 (NVRA) codifies the federal government's broad authority over voter registration for federal elections. Motor Voter, as the Act was nicknamed, was written to “create procedures to increase the number of eligible citizens who register to vote, to protect the integrity of the voting process and to ensure accurate and current voter registration records” for presidential and congressional elections.¹⁴⁸

Congressional power over voter registration was affirmed by the 1932 Supreme Court case of *Smiley v. Holm*.¹⁴⁹ In *Smiley*, the court interpreted the Election Clause as allowing Congress to

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.¹⁵⁰

And in 1941, the Supreme Court further held that Congress could regulate not only general but also primary elections.¹⁵¹

Based on these constitutional interpretations of its powers over federal elections and voting registration, Congress enacted the Motor Voter law to regulate the election process, provide greater access to voter registration and secure safer registration records. Motor Voter defines both state and federal responsibilities for voter registration in federal elections. NVRA imposes three different sets of obligations on any state that requires registration before election day: registration requirements, list maintenance requirements, and so-called “fail safe” voting requirements. It imposes no obligations on states that permit same-day registration or require no registration at all.

First, NVRA requires that these states allow individuals to register for federal elections in three particular ways.

Driver’s License Applications. States must allow driver’s license applications to serve also as voting registration applications unless an applicant fails to sign the voter registration application section.¹⁵² The voting registration portion of the joint application, moreover, (i) cannot duplicate any part of the driver’s license portion; (ii) may require only the minimum amount of additional information necessary to prevent duplicate voter registrations and to allow state officials to assess an applicant’s eligibility under state law; and (iii) shall include a statement that sets forth each eligibility requirement, including citizenship, shall require the applicant to

attest that he meets each requirement, and shall require the applicant's signature under penalty of perjury.¹⁵³

By Mail. States must also allow voters to register and change their address by mail using forms prescribed by the Federal Election Commission. If a state wishes, it may also use its own mail registration forms provided that they meet certain congressionally specified minimal requirements. Mail registration must have the same effects as registration in person, except that a state may require a voter who registered by mail to vote in person for the first time if that person has not previously voted in person within the jurisdiction.

Other State Services. States must also allow individuals to register in person at certain state-designated voter registration agencies. The state *must* designate all offices in the state that provide public assistance and all offices that provide state-funded services to persons with disabilities and *may* designate any other state and local government offices, such as schools, libraries, and fishing and hunting license bureaus.¹⁵⁴ In addition, if a state-funded agency provides disability services in a person's home, that agency must accept voter registration applications in the home during its normal course of business.¹⁵⁵

Regardless of the mode of registration, the registrar must notify the applicant of whether the registration application is accepted.

Second, NRVA places certain list maintenance obligations on state officials. In particular, it requires that each state "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of ... death ... or a change in residence"¹⁵⁶ Any such program, however, must be uniform and nondiscriminatory, must comply with the Voting Rights Act, and must not remove anyone from the list because of that person's failure to vote.¹⁵⁷

NRVA establishes a safe-harbor purging procedure, which most jurisdictions now adhere to.¹⁵⁸ It allows the state to use change-of-address information supplied by the postal service to identify registrants whose addresses may have changed. The registrar may then send the registrant a notice by forwardable mail with a prepaid, preaddressed return form on which the registrant can state his current address. The notice must say that if the registrant has not changed address or has changed address within the registrar's jurisdiction, he should so state and return the form within the time allowed for mail registration. It must also state that, if the form is not returned, affirmation or confirmation of the registrant's address may be required before the registrant can vote in any federal elections between the date of the notice and the day after the second-next federal general election and, if the registrant does not vote in any election in that period, the state then may purge him from the rolls. A registrar may, of course, immediately purge from the rolls any voter who directly affirms that he has moved outside the registrar's jurisdiction.

Third, NVRA requires covered states to allow "fail-safe" voting in federal elections to registrants who fall within certain groups.¹⁵⁹

- Those who have not actually moved. If the registration records indicate that a registrant has moved but the registrant affirms before an election official on election day that he has not, the registrant must be permitted to vote at his usual polling place.

- Those who have moved from one address to another within the area served by the same polling place. On affirmation of their change of address, these registrants must be allowed to vote at that polling place.
- Those who have moved from an area served by one polling place to an area served by another within the same registrar's jurisdiction and congressional district. State law can specify that any registrant in this group can vote at either his old or new polling place on affirmation of his change of address. If state law does not specify either alternative, a somewhat different choice defaults to the voter. He can vote either (i) at his former polling place on affirmation of his new address, (ii) at a central location upon written affirmation of his new address, or (iii) if state law permits, at the location of the new polling place on providing verification of his new address.

Many states employ provisional voting to satisfy their fail-safe voting obligations to members of these groups, but it is not necessary to do so. NVRA allows a state to simply accept a fail-safe ballot under the appropriate conditions. It neither requires nor prohibits any subsequent verification of the voter's eligibility.

NVRA provides two different enforcement mechanisms. First, the United States Attorney General may bring a civil action in federal district court for declaratory or injunctive relief.¹⁶⁰ Second, "any person aggrieved by a violation" may bring a civil action in federal district court for declaratory or injunctive relief if he has provided notice to the chief election officer of the state and the violation is not corrected within a certain amount of time.¹⁶¹ NVRA waives this notice requirement, however, whenever the violation occurs within 30 days before the federal election. Although damages are not available under the act, NVRA does allow a prevailing plaintiff to recover reasonable attorney fees, including litigation expenses, and costs.¹⁶²

The Privacy Act

(a) (1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to—

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Section 7 of the Privacy Act (uncodified), Pub. L. No. 93-579

In 1974, Congress enacted section 7 of the Privacy Act. Section 7 forbids any government agency—federal, state, or local—from conditioning any right, benefit, or privilege, including voting, on an individual's disclosure of his social security number. It contains two exceptions. First, if an agency required disclosure prior to 1975 it may continue to do so. Second, an agency may condition enjoyment of a right, a privilege, or benefits upon disclosure if Congress requires it.

Congress has created one wide exception to section 7. A state may require the disclosure of social security numbers for identification purposes “in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law within its jurisdiction”¹⁶³ Since Congress has created no exception for voting registration programs, however, section 7 effectively forbids states from requiring disclosure as a condition of registration unless they did so prior to 1975. Any state may require disclosure of the last four digits of a registration applicant's social security number and nothing prevents the states from requesting social security numbers as a voluntary matter. Whenever they do request the full number—whether as a voluntary matter or not—they must give the registrant certain information. In particular, they

must indicate whether the disclosure is mandatory or voluntary, under what statute or other authority it is requested, and how the social security number will be used.

The Uniform and Overseas Citizens Absentee Voting Act

Each State shall –

Permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office

42 U.S.C § 1973ff-1.

In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) to ensure that eligible servicemembers and their families away from their voting district on election day and citizens overseas could vote in federal elections. According to the General Accounting Office, UOCAVA covers nearly 6.1 million citizens, including 3.4 million individuals living abroad and 2.7 million active military personnel and their families.¹⁶⁴

UOCAVA makes several recommendations to the states but imposes only three clear requirements. Its recommendations include (i) that states waive registration requirements for absent servicemembers and their families and for citizens overseas who do not have an opportunity to register; (ii) that if they do not waive registration requirements for these people, states allow them to use a federally-developed post card form to apply simultaneously for voting registration and absentee ballots; (iii) that if states do not allow use of the federally-developed simultaneous application, they send out their own registration forms along with the absentee ballot itself and allow them to be returned together; (iv) that states adopt a federally-developed design for absentee ballot mailing envelopes; and (v) that states expedite processing of balloting material requested by these voters.¹⁶⁵ In the words of UOCAVA, all these recommendations aim “[t]o afford maximum access to the polls by absent uniformed services voters and overseas voters.”¹⁶⁶

The three requirements, of course, have more bite. They require most importantly that states permit covered voters to use absentee registration procedures and to vote by absentee ballot in all federal elections.¹⁶⁷ Thus, even if a state had no absentee voting process available for state and local elections, it would have to create such a process for federal ones. Since most, if not all, states already allow absentee voting, the real impact of this provision lies in the scope of voters it covers. Although its definition of absent uniformed services voters and their families is straightforward, its definition of overseas voter is expansive. It includes not only someone who resides outside the country and is still qualified to vote in the last place he was domiciled before leaving the United States but also someone who resides outside the country and because of his absence is no longer qualified to vote in the last place he was domiciled.¹⁶⁸ Thus, while a state can bar a former voter who moved to another state from voting in its elections, it must allow a former voter who moved outside the country to vote in all its federal elections.

UOCAVA also partially overrides state voter registration deadlines. It requires states to accept any otherwise valid voter registration application for a federal election from a covered

voter that is received no less than 30 days before an election.¹⁶⁹ States can on their own, of course, accept registration applications even fewer days before an election.

Finally, UOCAVA requires states to accept from overseas voters a federally prescribed “back-up” write-in absentee ballot for federal general elections.¹⁷⁰ A state can escape this obligation either by having the federal government approve the state’s own absentee ballot and by making it available to overseas voters at least 60 days before it must be received or by making the absentee ballot available to overseas military voters at least 90 days before the general election and making it available to nonmilitary overseas voters as soon as the official list of candidates in the general election is complete.¹⁷¹ The federal write-in absentee ballot is a back-up ballot only. To use it, an overseas voter must have applied for a state absentee ballot no fewer than 30 days before the election and have been unable to submit it by the state deadline.¹⁷² A completed federal write-in absentee ballot of an overseas voter will not be counted if it is submitted from within the United States.¹⁷³

Because UOCAVA prescribes a single federal back-up ballot for federal races everywhere, the federal back-up ballot differs in one crucial respect from the state absentee ballots it replaces. The federal back-up ballot is write-in only. In other words, it does not present any list of candidates for the voter to choose from but instead allows the voter to write in the name of the candidate for a particular federal office.¹⁷⁴ If a voter wants, he may instead write in the name of a political party and his vote will be counted for the candidate of that party running for the particular office.¹⁷⁵ Any minor mistakes in indicating the candidate, moreover, will be ignored so long as “the intention of the voter can be ascertained.”¹⁷⁶

DISABILITY PROTECTIONS

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Section 208 of the Voting Rights Act of 1965

Any voter who requires assistance to vote by reason of blindness, disability or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.

42 U.S.C. § 1973aa-6.

Section 208 of the Voting Rights Act of 1965, as amended, grants both people with disabilities and the illiterate the right to be assisted in voting by certain people of their choice. Until passage of the Voting Accessibility for the Elderly and Handicapped Act and the Americans with Disabilities Act, this provision was the only federal law to directly address the rights of individuals with disabilities in voting. It extends broadly to all elections—state, local, and federal—and beyond the voting booth itself. It protects, for example, the right of a voter with disabilities to appoint a person to obtain an absentee ballot application, deliver the completed application to the election board, obtain the actual ballot, and deliver the completed ballot to a mailbox or to the board itself for a state election.¹⁷⁷ Strictly speaking, however, this part of the Voting Rights Act is not an antidiscrimination provision. Although it grants people with disabilities a right to assistance in order to make their vote more effective, it does not require the state to remove obstacles that differentially burden people with disabilities in voting. Since the assistance provision is part of the Voting Rights Act, moreover, that Act's remedial provisions, particularly its allowance of reasonable attorney's fees, are available to encourage its enforcement.

The Voting Accessibility for the Elderly and Handicapped Act

Within each State . . . each political subdivision responsible for conducting elections shall assure that all polling places for Federal elections are accessible to handicapped and elderly voters.

42 U.S.C. § 1973ee-1.

Passed in 1984, the Voting Accessibility for the Elderly and Handicapped Act (VAEH) generally requires that polling places nationwide be accessible to voters with disabilities in federal elections. If none can be made available, a political subdivision must provide individuals with disabilities a legally acceptable alternative way of voting, such as an absentee ballot. In

addition to this general requirement, VAEH imposes several specific duties, including that each state (1) make available special registration and voting aids for handicapped and elderly individuals, such as large-type instructions for the visually-impaired and information by telecommunications devices for the deaf, and (2) provide timely notice of the availability of such aids and the procedures for voting by absentee ballot. Either the United States Attorney General or a “person who is personally aggrieved by noncompliance” may bring an action for declaratory or injunctive relief in federal court, but only 45 days after the plaintiff has notified the state’s chief election officer that an election authority is not in compliance.¹⁷⁸

Several factors restrict the practical reach of this seemingly broad prohibition. First, by its very terms, it applies only to federal elections. Election administrators, of course, are likely to apply the same standards to other elections happening on the same day in order to reduce the cost of administration. But there is less practical incentive to extend these standards to state and local elections occurring at other times and the VAEH standards may, in fact, conflict with otherwise governing state law. Second, VAEH allows the states some leeway in defining what accessibility means. It states that the key term in the general prohibition, “‘accessible[.]’ means accessible to handicapped and elderly individuals for the purpose of voting and registration, *as determined under guidelines established by the chief election officer of the State involved.*”¹⁷⁹ It allows the state, in effect, to define the extent of applicable protections. Third, although any “personally aggrieved” individual may sue under the VAEH, neither damages nor attorney’s fees are available.¹⁸⁰ This effectively discourages private parties from bringing any suit. For all these reasons, very few VAEH cases have been brought and the courts have had few opportunities to interpret the reach of its provisions. Furthermore, because plaintiffs usually bring VAEH claims along with claims under other, “friendlier” disability acts, the courts have felt little need to reach even those few VAEH claims that have reached them.

The Americans with Disabilities Act

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity.

42 U.S.C. § 12132.

Title II of the Americans with Disabilities Act (ADA) prohibits public entities from discriminating on the basis of disability in the provision of public “services, programs, or activities,” which include voting. Title II requires public entities to make reasonable modifications to practices that would otherwise discriminate unless they can show that the modifications would fundamentally change the nature of the program involved or impose undue financial or administrative burdens.¹⁸¹

Few of the factors limiting the practical reach of the VAEH affects Title II of the ADA. First, Title II applies to all, not just federal, elections. Second, Title II empowers the U.S. Attorney General, not the chief election officer of each state, to issue regulations giving definition to the central prohibition of the Act.¹⁸² Third, unlike the VAEH, Title II allows aggrieved individuals generally to sue for money damages, not only injunctions and declaratory relief, and allows successful plaintiffs to recover reasonable attorney’s fees.¹⁸³ After *Board of Trustees v. Garrett*,¹⁸⁴ an individual cannot sue a state, but only state officials in their official capacity and

localities, for money damages. For these reasons, Title II has proven a more popular means of vindicating claims of discrimination in voting on the basis of disability.

Given the ADA's broad language, results under it have been surprisingly few and mixed. On the one hand, all courts have agreed that Title II covers elections and cases challenging physical access to polling places have generally been successful. In New York, for example, the state Attorney General successfully brought suit against several counties requiring them to make polling places accessible to voters with physical disabilities. Although suit was brought under the ADA, the VAEH, and state law, the court felt it need reach only the ADA claim and granted a preliminary injunction requiring the counties to physically modify polling places to bring them into compliance with the ADA and a later order requiring them to decertify any polling places not made compliant by a certain date.¹⁸⁵

Claims by the blind, on the other hand, have not met with such strong success. In Texas, a group of visually-impaired voters sued the Texas Secretary of State claiming that voting machinery that required them to use third-party assistance violated the secrecy of their vote in contravention of the ADA. The federal district court agreed, finding that

[h]andicapped voters presently take an assistant or are to be assisted by election judges, one from each party in the case of a general election. The Secretary of State concedes that no present system assures the secrecy of the ballot for visually-impaired voters other than enforcement of election laws making it a crime to disclose how someone voted, which would be the same enforcement method afforded to non-handicapped voters. Likewise, under the present system there is no means by which a visually-impaired voter may verify in his own mind that his ballot is properly marked.¹⁸⁶

The victory was short-lived, however. On appeal, the federal court of appeals reversed on the ground that the Secretary of State was the wrong party.¹⁸⁷ Although state law authorized the Secretary of State to supervise local elections in order to protect the voting rights of citizens from abuse, the court found that the Secretary had no duty to do so. Absent such a duty, it believed, the Secretary could not be held responsible under the ADA. The court of appeals later vacated the district court's opinion denying it any kind of precedential effect whatsoever. Texas did, however, subsequently pass a statute granting much of what plaintiffs had requested.¹⁸⁸

In Michigan, a group of blind voters brought a similar suit.¹⁸⁹ They claimed that the Secretary of State's failure to implement a system by which they could vote without third-party assistance denied them secrecy of the ballot, which Michigan's sighted voters enjoyed. Despite a state constitutional provision that expressly directed the state legislature to "enact laws ... to preserve the secrecy of the ballot," the federal court of appeals held that no right of secrecy was violated. Requiring third-party assistance for the blind, it found, was completely consistent with the constitutional guarantee because the legislature had passed the assistance measure and the state supreme court had never questioned it.

The Rehabilitation Act

No otherwise qualified individual with disabilities ...

shall, solely by reason of his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.

29 U.S.C. § 794.

The Rehabilitation Act prohibits discrimination on the basis of disability in any program receiving federal funds. Its standards for identifying prohibited discrimination are generally the same as those under Title II of the ADA and the same remedies are generally available. The major difference between the two acts is coverage: Title II of the ADA covers public entities providing public services and benefits; the Rehabilitation Act covers all programs receiving federal money. Whereas Title II represents an exercise of Congress's powers under § 5 of the Fourteenth Amendment and perhaps the Commerce Clause, § 504 of the Rehabilitation Act represents an exercise of its spending power.

In the elections context, claims under the Rehabilitation Act often encounter difficulty on the threshold issue of coverage. Although the states, of course, receive much federal money, the Rehabilitation Act requires that the money go to the "program or activity" being sued. Since the federal government does not generally fund elections held in the states, § 504 has little effective reach here. In Texas, for example, the federal court of appeals denied a § 504 claim brought by a group of blind voters against the Secretary of State on the grounds that the plaintiffs did not allege that the Secretary himself received any federal assistance.¹⁹⁰ If the federal government were in the future to provide funds to states and localities for elections, § 504 would then, of course, apply. The operating standards and legal issues would look like those under the ADA.

ILLUSTRATIVE APPLICATIONS

Together these various constitutional and statutory provisions create a complex legal framework, many different parts of which may apply to any particular reform proposal. In order to give a better idea of how these various provisions interact with one another and might apply to the work of the Commission, this report demonstrates their application to a group of sample reform proposals. The task force has chosen these particular proposals not because it believes the Commission should or is likely to propose them. Rather, we have chosen them because we believe that together they well illustrate how the law might bear on the different types of issues the Commission may consider.

Enfranchising Felons

Can Congress declare that felons who have served their time and otherwise qualify for the franchise may vote?

No federal law prevents states from allowing felons who otherwise qualify for the franchise from voting. Many states, however, do not permit them to do so. Could Congress declare that felons who have served their time may vote in all or just federal elections?

The answer may depend on how Congress tries to accomplish its aim. It has four possible means available to it. First, Congress might try to accomplish this result by exercising its great power under the Elections Clause to regulate the “time, places, and manner” of federal elections. Who can vote might seem to concern the “manner” of conducting elections. Another federal constitutional provision, however, clearly blocks such an interpretation. The Qualifications Clause, which states that “the Electors in each state [for the United States House of Representatives or Senate] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature,” pegs federal voting qualifications to those set for the larger chamber of the state legislature. Thus, although Congress’s Elections Clause power is broad, it does not extend to setting voter qualifications in either state or congressional elections. And, as *Bush v. Gore* makes clear, the states have even more power over the selection of presidential electors.

Second, Congress might try to enfranchise felons by exercising its power under section 5 of the Fourteenth Amendment to enforce equal protection. *Richardson v. Ramirez*,¹⁹¹ however, clouds this prospect. In *Ramirez*, the Supreme Court held that the Equal Protection Clause does not generally bar the states from disenfranchising felons. It construed section 2 of the Fourteenth Amendment, which reduces a state’s representation in the House of Representatives to the extent that the state denies the vote “to any . . . male inhabitants . . . , being twenty-one years of age, and citizens of the United States . . . *except for participation in rebellion, or other crime*”¹⁹² as expressly contemplating a state’s right to disenfranchise felons. Thus, Congress’s section 5 powers here seem narrower than with respect to other restrictions on the franchise.

To proceed under section 5, Congress would have to identify an equal protection violation to which the remedy of enfranchising felons would be congruent and proportional. The closest candidate for a suitable equal protection violation would be the disproportionate burdening of African-American citizens’ right to vote. A court would clearly hold unconstitutional any state action intentionally and disproportionately burdening the vote of this

group. The issue, then, is whether the congressionally mandated remedy of enfranchising felons would be considered congruent and proportional to this particular violation.

Here guidance is very thin. Disenfranchising felons has been found to have a discriminatory impact on African-Americans and the Court has recognized that in some circumstances section 5 permits Congress to remedy intentional discrimination prophylactically by prohibiting actions that have discriminatory effects. Significantly, however, the Court has never said that Congress can *always* act prophylactically by prohibiting actions that have discriminatory effects and it has not address this issue since it imposed requirements of congruence and proportionality on section 5 legislation.

What result? On balance, congressional success under section 5 is doubtful. Whether the action would be constitutional depends both upon how rigorously the Supreme Court will interpret the congruence and proportionality requirements and upon how much resistance *Ramirez* poses. In *Garrett* earlier this year, the Supreme Court indicated that it was taking the congruence and proportionality requirements seriously indeed. Under such an approach, Congress would likely encounter constitutional difficulty.

Third, Congress might try to enfranchise felons pursuant to its plenary authority over interstate commerce. In recent years, however, the Court has restricted this once capacious power in two different ways. It has pressed the requirement that the law must really regulate interstate commerce and it has given the states more leeway than before to operate without federal interference in areas of traditional state authority. Both these movements would pose difficulties for enfranchising felons through this means. Whether felons can vote would seem to have a fairly attenuated connection to interstate economic transactions and deciding who may vote in state elections would seem central to state governance and autonomy. For both reasons, the Commerce Clause would be an unlikely source of authority for this congressional action.

Fourth, Congress might try to enfranchise felons pursuant to its spending power. Three conditions apply: (i) the exercise of the spending power must be in pursuit of “the general welfare”; (ii) the congressional regulation must be unambiguous so that states understand the choice they are making in agreeing to receive the funds; and (iii) the conditions on the federal funds must be related to the purposes of the federal spending. Luckily for Congress, the Supreme Court has interpreted the general welfare requirement quite broadly. It would cover both federal aid to localities and states to improve elections and expanding the franchise. The second requirement could easily be satisfied. Congress would just have to draft the statute to make clear that states could receive funds only on condition that they allow felons who had served their time the right to vote. Meeting the third requirement would require only the right financial hook. Congress could not condition highway funds on such enfranchisement but it could so condition grants for purchasing or maintaining election machinery. Congress could, then, pass a provision allowing felons who had served their time to vote in both federal and state elections if it attached the provision to an appropriate funding program in the right way. Nothing, of course, would stop a state from refusing such funds and so escaping the federal requirements.

Identification Requirements for Voting

May a state require a voter to produce a driver’s license or other form of identification before voting on election day?

According to the Federal Election Commission, 13 states require voters to produce some form of identification at the polls and another 7 either require or allow local officials to do so under some circumstances.¹⁹³ Under what circumstances does federal law permit this?

Whether a state identification requirement is permissible under federal law depends largely on what forms of identification the state allows. In general, the fewer the forms of identification the state allows and the more difficult they are for voters to obtain, the less likely the identification requirement is to pass federal muster. Allowing a voter to affirm his identity under penalty of perjury as an acceptable substitute for identification, however, makes any requirement more sustainable.

Any identification requirement must first pass federal constitutional requirements. Such a requirement would pose no real first amendment issues but it could pose serious questions under the fundamental rights strand of equal protection. Requiring identification as a condition of voting clearly burdens the right to vote substantially. Without an acceptable form of identification, the voter simply cannot cast a ballot. Strict scrutiny would thus apply and a court would ask whether the identification requirement is necessary or narrowly tailored to accomplish a compelling state interest. Courts have accepted preventing voter fraud as a compelling interest. The question would be whether the particular identification requirement was necessary or narrowly tailored to achieve this goal. This would depend upon the type of identification requested and perhaps the amount and type of voter fraud committed in the state.

Requiring a passport or driver's license, for example, would likely be unconstitutional. Passports are expensive to obtain and relatively few people have reason to possess one. Driver's licenses, on the other hand, are more common but still many people have no reason to drive a car or cannot afford to drive one. Since other forms of identification could also serve to prevent fraud while effectively disenfranchising many fewer legitimate voters, requiring one of these two forms of identification would not represent narrow tailoring and a court would likely strike down any such requirement.

On the other hand, requiring any form of identification provided by any level of government or certain private substitutes, like utility bills, would likely pass constitutional muster, especially if the voter were allowed the alternative of affirming his identity under penalty of perjury. Although even this wider requirement would invoke strict scrutiny, a court would likely find that the broad variety of forms of identification permitted provided acceptably narrow tailoring. Such a regime would prevent some fraud without arbitrarily excluding many legitimate voters from the franchise.

Many possible schemes range between these two extremes, of course, and courts would analyze each on its individual merits. Constitutionally speaking, the perfect identification scheme would exclude all fraudulent voters while permitting every legitimate voter to vote. No conceivable identification scheme meets this standard in practice, of course, and the equal protection clause does not demand perfection. It does, however, demand that any identification scheme not burden legitimate voters unduly and that it actually work to prevent fraud. That is an empirical question that depends upon the circumstances.

An identification requirement is not likely to pose any problem under the suspect classification strand of equal protection unless the particular forms of acceptable identification were chosen because they would disparately burden a protected group, like a racial minority. If

the identification requirement was designed for this end, even if it did not employ any such classification on its face, it would be subject to strict scrutiny unless the state could show that it would have enacted the same requirement without such intent. Under strict scrutiny, the requirement would fall. It is impossible to imagine any constitutionally acceptable justification that such a requirement would be narrowly tailored or necessary to achieve.

Even if constitutional, an identification requirement might pose conflicts with other federal law, particularly with the Voting Right Act. If the jurisdiction is a so-called “covered” jurisdiction under the Voting Rights Act, it must preclear any identification requirement before it can employ it. In order to preclear it, the state or political subdivision must convince either the United States District Court for the District of Columbia or the United States Department of Justice that the requirement does not have the purpose or effect of abridging the right to vote of any racial or qualifying language minority. The test is one of non-retrogression, that is, whether the requirement would reduce the vote of any of these groups within the jurisdiction, and the state itself bears the burden of persuading that the requirement would not make voting more difficult.

Once again, whether the identification requirement passed muster would depend on the circumstances. If the requirement disproportionately burdened minority voters, that is, if relatively fewer of them possessed the forms of identification that satisfied the requirement, no preclearance should be granted. If they were not disproportionately burdened, preclearance should be granted.

Even if preclearance is granted (or the jurisdiction is not “covered” and so preclearance is not required), an individual voter could challenge an identification requirement under section 2 of the Voting Rights Act. In such a challenge, the voter would bear the burden of proving that the requirement resulted in abridging the vote of a racial minority or qualified language group. In evaluating such a claim, a court would look at the “totality of the circumstances,” especially the following factors:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction;
8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.¹⁹⁴

Because all these factors can play out so differently in different jurisdictions, it is dangerous to generalize about which kinds of identification requirements are permissible under section 2 and which not. It can safely be said only that the more forms of identification permitted and the more widely those forms are held across racial and language groups, the more likely the requirement is to pass muster. Again, any requirement that permits a voter to cast a ballot upon affirmation of his identity is much more likely to be acceptable under section 2.

Uniform Voting Machinery

Can Congress require the states to adopt uniform voting technologies at least in some elections?

“[T]he policy of Congress for so great a part of our constitutional life has been . . . to leave the conduct of the election of its members to state laws, administered by state officers.”¹⁹⁵ Even after the enactment of the Voting Rights Act, Congress generally has left the mechanics of the electoral process to the states. Until recently, the fact that states employ a wide variety of voting methods has largely avoided attention.¹⁹⁶

Nonetheless, Congress unquestionably has the authority to require or to induce the states to adopt uniform voting technologies for use in at least their congressional elections. First, Congress could require the states to adopt a particular technology pursuant to its authority under the Constitution’s Elections Clause.¹⁹⁷ Under that Clause, the states have the primary authority to prescribe regulations for the time, place, and manner of choosing Senators and Representatives, but Congress may override those regulations at any time.¹⁹⁸ Since regulations prescribing the type of voting technology address the “manner” of choosing Senators and Representatives,¹⁹⁹ Congress has the authority under the Elections Clause to promulgate those regulations.

Moreover, although Congress does not have the authority to override state rules for the appointment of presidential electors, Congress has exercised its authority to set the time for choosing those electors on the same day as congressional elections. Consequently, as a practical matter, the use of uniform voting technologies in congressional elections would likely result in the use of those technologies in elections for presidential electors as well.

Second, Congress could induce states to adopt uniform voting technologies by using its spending power.²⁰⁰ In other words, Congress could condition the receipt of certain federal funds

on a state's adoption of a particular type of technology. Spending Clause legislation has been subject only to relaxed judicial scrutiny.²⁰¹ So long as (i) Congress clearly states the condition to which it attaches the funds, (ii) the condition is related to the purpose for which the funds are given, and (iii) the funds serve some public purpose, Congress is within its authority to attach the condition to those funds.

Third, Congress might attempt to require uniform voting technology under section 5 of the Fourteenth Amendment to the Constitution on the ground that the use of differential voting machines violates the equal protection of the laws. Legislation under section 5 of the Fourteenth Amendment has received close scrutiny since *City of Boerne*, however, with courts examining whether a constitutional violation has in fact occurred and policing the congruence and proportionality of the remedy for any violation. It is open to debate after *Bush v. Gore* whether the use of different voting technologies from state to state or from precinct to precinct violates the Fourteenth Amendment. In short, the Elections and Spending Clauses would furnish a more solid basis for such legislation.

It should be noted that 2 U.S.C. § 9 requires voting technology used in elections for Representatives to be “duly authorized by State law.” Under this provision, the states would need to authorize whatever technology was selected. If it wanted to avoid this requirement, Congress could simply repeal or modify it contemporaneously with whatever legislation it promulgated. Or, under the Spending Clause option, Congress could make the receipt of federal funds conditional on the due authorization by the state.

It should also be noted that the adoption of new voting technologies would be subject to the preclearance requirements of section 5 of the Voting Rights Act if federal legislation leaves any discretion to the states. Preclearance should pose no significant hurdle, however, since uniform election technology would be designed to enhance all participation – including minority participation – in the elective process. It would be unlikely to make things worse, which is the standard for a section 5 violation.

Finally, it is at least possible that voting technology legislation may invite private actions charging that the adoption of a particular technology imposes a heightened burden on the exercise of the elective franchise by minority voters in violation of § 2 of the Voting Rights Act.²⁰² Again, voters could challenge only the discretionary choices among technology that Congress left to the states, not the congressional mandates themselves. Since the purpose of adopting uniform voting technology would be to ensure better counting of votes, a suit under section 2 would likely claim that some engineering, technical, or educational issue related to the technology had the effect of limiting the opportunity of minority groups to participate equally in the political process and to elect representatives of their choice. A court would apply this standard “under the totality of the circumstances” and look to much empirical evidence of the effect of the voting technology chosen by the state on different groups.

Exit Polling and Forecasting

To what extent could a state regulate or discourage exit polling and the forecasting of election results before all polls are closed?

There are no court cases ruling on the constitutionality of state laws prohibiting the forecasting of election results for good reason—no state has been foolish enough to try it. Under *Mills v. Alabama*,²⁰³ where the Supreme Court struck down a state ban on “electioneering” content in media on election day itself, a ban on media forecasting would face very high hurdles. As a restriction of speech that many voters would find relevant to their decision whether and how to vote, such a ban would have to bear a necessary relationship to a compelling state interest. The state’s usually robust interest in promoting democratic participation would not likely carry the day since in this context it means denying individual voters political information—how others have voted—that they deem relevant to their own democratic decisionmaking. Furthermore, even if this interest were found to be compelling, the prohibition might well fall on grounds that it is not narrowly tailored. Unless the law made an exception for forecasts appearing in areas where the polls had already closed, it would arguably spread too wide.

A law restricting exit polling, upon which election forecasts are partly based, would also face high hurdles. Courts have struck down laws prohibiting exit polling in the vicinity of polls except where the distance specified is so small—25 feet—that the ban would be ineffectual. The government could, however, refuse to release its own official polling data until whatever time it wished unless the count is conducted in public. Under the First Amendment, although the press enjoys great freedom from government restraint, it enjoys no special right of access to government information. The First Amendment, in other words, generally keeps the government from barring the press from using and publishing information the press has itself collected, but it does not force the government to give the press information that is not available to the public generally.

Finally, the federal government could try to minimize the perceived adverse effects of early media forecasting on election day by enacting uniform nationwide poll closings times. Congress could surely enact such a law under the Elections Clause and it would likely pose no First Amendment problems. Depending on the particular circumstances, however, it might possibly face an equal protection challenge. If a particular uniform closing time burdened voters in different time zones very differentially, a voter in a more inconvenient time zone might challenge it under the fundamental right strand of equal protection. For example, a national law that closed polls nationwide at 7 p.m. Eastern Time would arguably place a great burden on voters working on the west coast. Most of them would have no opportunity to vote after a daytime job. On the other hand, a law that closed polls at 9 p.m. Pacific Time would not pose such a great burden on any voters except perhaps those in Hawaii and Alaska. Multiple-day voting would pose even less of a burden, if any at all.

Appendix

Constitutional Provisions

The Qualifications Clause

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

The Elections Clause

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 Commerce Clause

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

U.S. Const. Art. I, § 8, cl. 3

The Necessary and Proper Clause

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. Art. I, § 8, cl. 18

The Presidential Electors Clause

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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. Const. Art. II, § 1, cl. 2

The Election Day Clause

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

U.S. Const. Art. II, § 1, cl. 3

The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I

The Twelfth Amendment

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;--the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;--the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.--The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. Const. Amend. XII

The Fourteenth Amendment

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

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

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Amend XIV

The Fifteenth Amendment

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

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. Amend XV

The Seventeenth Amendment

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

U.S. Const. Amend. XVII

The Nineteenth Amendment

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. Amend. XIX

The Twenty-Second Amendment

§ 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the

office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.

U.S. Const. Amend. XXII

The Twenty-Third Amendment

§ 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

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

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. Amend. XXIII

The Twenty-Fourth Amendment

§ 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. Amend. XXIV

The Twenty-Sixth Amendment

§ 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. Amend. XXVI

Statutory Provisions

2 U.S.C. § 2b

Number of Representatives...Each State shall be entitled...based upon the method known as the method of equal proportions, no State to receive less than one Member.

2 U.S.C. § 7

The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of

Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

The Electoral Count Act

3 U.S.C. § 1

The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President

3 U.S.C. § 2. Failure to make choice on prescribed day

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

3 U.S.C. § 3. Number of electors

The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

3 U.S.C. § 5. Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

CIVIL RIGHTS CRIMES

18 U.S.C. § 241.

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include

kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

REHABILITATION ACT

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) **Promulgation of rules and regulations.** No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is submitted to such committees.

(b) **Program or Activity defined.** For the purposes of this section, the term “program or activity” means all of the operations of-

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government.

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. §8801]), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship-

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance

(c) Significant Structural Alterations by Small Providers. Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of enactment of this subsection [enacted March 22, 1998].

(d) Standards used in determining violation of section. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et. seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794a. Remedies and attorney's fees

(a) (1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5 (f) through (k)), shall be available, with respect to any complaint under section 501 of this Act [29 USC § 791], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 USC § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 USC § 794].

(b) In any action or proceeding to enforce or charge a violation of a provision of this title [29 USCS § § 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Voting Rights Act

42 U.S.C. § 1971. Voting rights

(a) **Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions .**

(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(2) No person acting under color of law shall--

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

(C) employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to title III of the Civil Rights Act of 1960 (*42 U. S. C. 1974-74e*; 74 Stat. 88) [*42 USCS § § 1974 et seq.*]: Provided, however, That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

(3) For purposes of this subsection--

(A) the term "vote" shall have the same meaning as in subsection (e) of this section;

(B) the phrase "literacy test" includes any test of the ability to read, write, understand, or interpret any matter.

(b) **Intimidation, threats, or coercion.** No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

(c) **Preventive relief; injunction; rebuttable literacy presumption; liability of United States for costs; State as party defendant.** Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

(d) **Jurisdiction; exhaustion of other remedies.** The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

(e) **Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions.** In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to

vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote, to vote at an appropriate election shall constitute contempt of court.

An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by Revised Statutes, section 1757; (*5 U.S.C. 16*) to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard *ex parte* at such times and places as the court shall direct. His statement under oath shall be *prima facie* evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure [USCS Federal Rules of Civil Procedure, Rule 53(c)]. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: Provided, however, That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provisions for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

When used in the subsection, the word "vote" includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words "affected area" shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a); and the words "qualified under State law" shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

(f) Contempt; assignment of counsel; witnesses. Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel.

(g) Three-judge district court: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action.

In any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section the Attorney General, at the time he files the complaint, or any defendant in the proceeding, within twenty days after service upon him of the complaint, may file with the clerk of such court a request that a court of three judges be convened to hear and determine the entire case. A copy of the request for a three-judge court shall

be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceedings authorized by this subsection, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or, in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

42 U.S.C. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973b. Suspension of the use of tests or devices in determining eligibility to vote

(a) Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court.

(1) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit, or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action--

(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);

(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the rights to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgments of the right to vote;

(C) no Federal examiners under this Act have been assigned to such State or political subdivision;

(D) such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act [42 USCS §

1973c], including compliance with the requirement that no change covered by section 5 [42 USCS § 1973c] has been enforced without preclearance under section 5 [42 USCS § 1973c], and have repealed all changes covered by section 5 [42 USCS § 1973c] to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5 [42 USCS § 1973c], with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5 [42 USCS § 1973c], and no such submissions or declaratory judgment actions are pending; and

(F) such State or political subdivision and all governmental units within its territory--

(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;
(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and

(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.

(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the

media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may as of right intervene at any stage in such action.

(5) An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 USCS § 2284] and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within the State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds.

(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing in such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28 of the United States Code [28 USCS § 292(d)].

(7) The Congress shall reconsider the provisions of this section at the end of the fifteen-year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(8) The provisions of this section shall expire at the end of the twenty-five year period following the effective date of the amendments made by the Voting Rights Act Amendments of 1982.

(9) Nothing in this section shall prohibit the Attorney General from consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of section 4(a)(1)

[subsec. (a)(1) of this section]. Any aggrieved party may as of right intervene at any stage in such action.

(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register.

The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted on the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous two sentences, the provisions of a subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 [42 USCS § 1973d or 1973k] shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

42 U.S.C. § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the second sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the third sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia

for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

42 U.S.C. § 1973i. Prohibited acts

(a) **Failure or refusal to permit casting or tabulation of vote.** No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) **Intimidation, threats, or coercion.** No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any persons to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e) [42 USCS § § 1973a(a), 1973d, 1973f, 1973g, 1973h, or 1973j(e)].

(c) **False information in registering or voting; penalties.** Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$ 10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties. Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$ 10,000 or imprisoned not more than five years, or both.

(e) Voting more than once.

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$ 10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 202 of this Act [42 USCS § 1973aa-1], to the extent two ballots are not cast for an election to the same candidacy or office.

42 U.S.C. § 1973j. Civil and criminal sanctions

(a) Depriving or attempting to deprive persons of secured rights. Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 [42 USCS § 1973, 1973a, 1973b, 1973c, 1973e, or 1973h] or shall violate section 11(a) [42 USCS § 1973i(a)], shall be fined not more than \$ 5,000, or imprisoned not more than five years, or both.

(b) Destroying, defacing, mutilating, or altering ballots or official voting records. Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than \$ 5,000, or imprisoned not more than five years, or both.

(c) Conspiring to violate or interfere with secured rights. Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10, or 11(a) [42 USCS § § 1973, 1973a, 1973b, 1973c, 1973e, 1973h or 1973i(a)] shall be fined not more than \$ 5,000, or imprisoned not more than five years, or both.

(d) Civil action by Attorney General for preventive relief; injunctive and other relief. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11 [42 USCS § § 1973, 1973a, 1973b, 1973c, 1973e, 1973h, or 1973i], or subsection (b) of this section, the

Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Proceeding by Attorney General to enforce the counting of ballots of registered and eligible persons who are prevented from voting. Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) Jurisdiction of district courts; exhaustion of administrative or other remedies unnecessary. The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

42 U.S.C. § 1973l. Attorney's fees

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment [USCS Constitution, Amendments 14, 15] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973aa-1. RESIDENCE REQUIREMENTS FOR VOTING

(a) Congressional findings. The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections--

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution [USCS Constitution, Art IV, § 2, ch 1];

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment [USCS Constitution, Amendment 14]; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

(b) Congressional declaration: durational residency requirement, abolishment; absentee registration and balloting standards, establishment. Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment [USCS Constitution, Amendment 14], it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

(c) Prohibition of denial of right to vote because of durational residency requirement or absentee balloting. No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

(d) Registration: time for application; absentee balloting: time of application and return of ballots. For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

(e) Change of residence; voting in person or by absentee ballot in State of prior residence. If any citizen of the United States who is otherwise qualified to vote in any State or political

subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

(f) **Absentee registration requirement.** No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration.

(g) **State or local adoption of less restrictive voting practices.** Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

(h) **"State" defined.** The term "State" as used in this section includes each of the several States and the District of Columbia.

(i) **False registration, and other fraudulent acts and conspiracies: application of penalty for false information in registering or voting.** The provisions of section 11(c) [42 USCS § 1973i(c)] shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.

Voting Accessibility for the Elderly and Handicapped Act (VEHA)

§ 1973ee. Purpose

It is the intention of Congress in enacting this Act [42 USCS § § 1973ee et seq.] to promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections.

§ 1973ee-1. Selection of polling facilities

(a) Within each State, except as provided in subsection (b), each political subdivision responsible for conducting elections shall assure that all polling places for Federal elections are accessible to handicapped and elderly voters.

(b) Subsection (a) shall not apply to a polling place--

(1) in the case of an emergency, as determined by the chief election officer of the State;
or

(2) if the chief election officer of the State--

(A) determines that all potential polling places have been surveyed and no such accessible place is available, nor is the political subdivision able to make one temporarily accessible, in the area involved; and

(B) assures that any handicapped or elderly voter assigned to an inaccessible polling place, upon advance request of such voter (pursuant to procedures established by the chief election officer of the State)--

(i) will be assigned to an accessible polling place, or

(ii) will be provided with an alternative means for casting a ballot on the day of the election.

(c) (1) Not later than December 31 of each even-numbered year, the chief election officer of each State shall report to the Federal Election Commission, in a manner to be determined by the Commission, the number of accessible and inaccessible polling places in such State on the date of the preceding general Federal election, and the reasons for any instance of inaccessibility.

(2) Not later than April 30 of each odd-numbered year, the Federal Election Commission shall compile the information reported under paragraph (1) and shall transmit that information to the Congress.

(3) The provisions of this subsection shall only be effective for a period of 10 years beginning on the date of enactment of this Act [enacted Sept. 28, 1984].

§ 1973ee-2. Selection of registration facilities

(a) Each State or political subdivision responsible for registration for Federal elections shall provide a reasonable number of accessible permanent registration facilities.

(b) Subsection (a) does not apply to any State that has in effect a system that provides an opportunity for each potential voter to register by mail or at the residence of such voter.

§ 1973ee-3. Registration and voting aids

(a) **Printed instructions; telecommunications devices for the deaf.** Each State shall make available registration and voting aids for Federal elections for handicapped and elderly individuals, including--

(1) instructions, printed in large type, conspicuously displayed at each permanent registration facility and each polling place; and

(2) information by telecommunications devices for the deaf.

(b) **Medical certification.** No notarization or medical certification shall be required of a handicapped voter with respect to an absentee ballot or an application for such ballot, except that medical certification may be required when the certification establishes eligibility, under State law--

(1) to automatically receive an application or a ballot on a continuing basis; or

(2) to apply for an absentee ballot after the deadline has passed.

(c) **Notice of availability of aids.** The chief election officer of each State shall provide public notice, calculated to reach elderly and handicapped voters, of the availability of aids under this section, assistance under section 208 of the Voting Rights Act of 1965 (*42 U.S.C. 1973aa-6*), and the procedures for voting by absentee ballot, not later than general public notice of registration and voting is provided.

42 U.S.C. § 1973ee-4. Enforcement

(a) **Action for declaratory or injunctive relief.** If a State or political subdivision does not comply with this Act [*42 USCS § § 1973cc et seq.*], the United States Attorney General or a person who is personally aggrieved by the noncompliance may bring an action for declaratory or injunctive relief in the appropriate district court.

(b) **Prerequisite notice of noncompliance.** An action may be brought under this section only if the plaintiff notifies the chief election officer of the State of the noncompliance and a period of 45 days as elapsed since the date of notification.

(c) **Attorney fees.** Notwithstanding any other provision of law, no award of attorney fees may be made with respect to an action under this section, except in any action brought to enforce the original judgment of the court.

§ 1973ee-5. Relationship to 42 USCS § § 1973 et seq.

This Act [42 USCS § § 1973ee et seq.] shall not be construed to impair any right guaranteed by the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.)

42 U.S.C. § 1973ee-6. Definitions

As used in this Act [42 USCS § § 1973ee et seq.], the term--

- (1) "accessible" means accessible to handicapped and elderly individuals for the purpose of voting or registration, as determined under guidelines established by the chief election officer of the State involved;
- (2) "elderly" means 65 years of age or older;
- (3) "Federal election" means a general, special, primary, or runoff election for the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;
- (4) "handicapped" means having a temporary or permanent physical disability; and
- (5) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession [possession] of the United States.

Uniform and Overseas Citizens Absentee Voting Act (UOCAVA)

42 U.S.C. § 1973ff. Federal responsibilities

(a) **Presidential designee.** The President shall designate the head of an executive department to have primary responsibility for Federal functions under this title [42 USCS § § 1973ff et seq.].

(b) **Duties of presidential designee.** The Presidential designee shall--

- (1) consult State and local election officials in carrying out this title [42 USCS § § 1973ff et seq.];
- (2) prescribe an official post card form, containing both an absentee voter registration application and an absentee ballot application, for use by the States as recommended in section 104 [42 USCS § 1973ff-3];
- (3) carry out section 103 [42 USCS § 1973ff-2] with respect to the Federal write-in absentee ballot for overseas voters in general elections for Federal office;
- (4) prescribe a suggested design for absentee ballot mailing envelopes for use by the States as recommended in section 104 [42 USCS § 1973ff-3];

(5) compile and distribute (A) descriptive material on State absentee registration and voting procedures, and (B) to the extent practicable, facts relating to specific elections, including dates, offices involved, and the text of ballot questions; and

(6) not later than the end of each year after a Presidential election year, transmit to the President and the Congress a report on the effectiveness of assistance under this title [42 *USCS* § § 1973ff et seq.], including a statistical analysis of uniformed services voter participation, a general assessment of overseas nonmilitary participation, and a description of State-Federal cooperation.

(c) Duties of other Federal officials.

(1) In general. The head of each Government department, agency, or other entity shall, upon request of the Presidential designee, distribute balloting materials and otherwise cooperate in carrying out this title [42 *USCS* § § 1973ff et seq.].

(2) Administrator of General Services. As directed by the Presidential designee, the Administrator of General Services shall furnish official post card forms (prescribed under subsection (b)) and Federal write-in absentee ballots (prescribed under section 103 [42 *USCS* § § 1973ff-2]).

§ 1973ff-1. State responsibilities

Each State shall--

(1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office;

(2) accept and process, with respect to any general, special, primary, or runoff election for Federal office, any otherwise valid voter registration application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election; and

(3) permit overseas voters to use Federal write-in absentee ballots (in accordance with section 103 [42 *USCS* § 1973ff-2]) in general elections for Federal office.

42 U.S.C. § 1973ff-2. Federal write-in absentee ballot for overseas voters in general elections for Federal office

(a) **In General.** The Presidential designee shall prescribe a Federal write-in absentee ballot (including a secrecy envelope and mailing envelope for such ballot) for use in general elections for Federal office by overseas voters who make timely application for, and do not receive, States, absentee ballots.

(b) **Submission and processing.** Except as otherwise provided in this title [42 USCS § § 1973ff et seq.], a Federal write-in absentee ballot shall be submitted and processed in the manner provided by law for absentee ballots in the State involved. A Federal write-in absentee ballot of an overseas voter shall not be counted--

- (1) if the ballot is submitted from any location in the United States;
- (2) if the application of the overseas voter for a State absentee ballot is received by the appropriate State election official less than 30 days before the general election; or
- (3) if a State absentee ballot of the overseas voter is received by the appropriate State election official not later than the deadline for receipt of the State absentee ballot under State law.

(c) **Special rules.** The following rules shall apply with respect to Federal write-in absentee ballots:

- (1) In completing the ballot, the overseas voter may designate a candidate by writing in the name of the candidate or by writing in the name of a political party (in which case the ballot shall be counted for the candidate of that political party).
- (2) In the case of the offices of President and Vice President, a vote for a named candidate or a vote by writing in the name of a political party shall be counted as a vote for the electors supporting the candidate involved.
- (3) Any abbreviation, misspelling, or other minor variation in the form of the name of a candidate or a political party shall be disregarded in determining the validity of the ballot, if the intention of the voter can be ascertained.

(d) **Second ballot submission; instruction to overseas voter.** An overseas voter who submits a Federal write-in absentee ballot and later receives a State absentee ballot, may submit the State absentee ballot. The Presidential designee shall assure that the instructions for each Federal write-in absentee ballot clearly state that an overseas voter who submits a Federal write-in absentee ballot and later receives and submits a State absentee ballot should make every reasonable effort to inform the appropriate State election official that the voter has submitted more than one ballot.

(e) **Use of approved State absentee ballot in place of Federal write-in absentee ballot.** The Federal write-in absentee ballot shall not be valid for use in a general election if the State involved provides a State absentee ballot that—

(1) at the request of the State, is approved by the Presidential designee for use in place of the Federal write-in absentee ballot; and

(2) is made available to overseas voters at least 60 days before the deadline for receipt of the State ballot under State law.

(f) Certain States exempted. A State is not required to permit use of the Federal write-in absentee ballot, if, on and after the date of the enactment of this title [enacted Aug. 28, 1986], the State has in effect a law providing that--

(1) a State absentee ballot is required to be available to any voter described in section 107(5)(A) [42 USCS § 1973ff-6(5)(A)] at least 90 days before the general election involved; and

(2) a State absentee ballot is required to be available to any voter described in section 107(5)(B) or (C) [42 USCS § 1973ff-6(5)(B) or (C)], as soon as the official list of candidates in the general election is complete.

42 U.S.C. § 1973ff-3. Recommendations to the States to maximize access to the polls by absent uniformed services voters and overseas voters

To afford maximum access to the polls by absent uniformed services voters and overseas voters, it is recommended that the States--

(1) use the official post card form (prescribed under section 101 [42 USCS § 1973ff]) for simultaneous voter registration application and absentee ballot application;

(2) adopt the suggested design for absentee ballot mailing envelopes prescribed under section 101 [42 USCS § 1973ff];

(3) waive registration requirements for absent uniformed services voters and overseas voters who, by reason of service or residence, do not have an opportunity to register;

(4) if an application other than an official post card form (prescribed under section 101 [42 USCS § 1973ff]) is required for absentee registration, provide that registration forms be sent with the absentee ballot and may be returned with it;

(5) expedite processing of balloting materials with respect to absent uniformed services voters and overseas voters;

(6) permit any oath required for a document under this title [42 USCS § § 1973ff et seq.] to be administered by a commissioned officer of the Armed Forces or any official authorized to administer oaths under Federal law or the law of the State or other place where the oath is administered;

(7) assure that absentee ballots are mailed to absent uniformed services voters and overseas voters at the earliest opportunity;

(8) assist the Presidential designee in compiling statistical and other information relating to this title [42 USCS § § 1973ff et seq.]; and

(9) provide late registration procedures for persons recently separated from the Armed Forces.

§ 1973ff-4. Enforcement

The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as may be necessary to carry out this title [42 USCS § § 1973ff et seq.].

§ 1973ff-5. Effect on certain other laws

The exercise of any right under this title [42 USCS § § 1973ff et seq.] shall not affect, for purposes of any Federal, State, or local tax, the residence or domicile of a person exercising such right.

§ 1973ff-6. Definitions

As used in this title [42 USCS § § 1973ff et seq.], the term--

(1) "absent uniformed services voter" means--

(A) a member of a uniformed service on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote;

(B) a member of the merchant marine who, by reason of service in the merchant marine, is absent from the place of residence where the member is otherwise qualified to vote; and

(C) a spouse or dependent of a member referred to in subparagraph (A) or (B) who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote;

(2) "balloting materials" means official post card forms (prescribed under section 101 [42 USCS § 1973ff]), Federal write-in absentee ballots (prescribed under section 103 [42 USCS § 1973ff-2]), and any State balloting materials that, as determined by the Presidential designee, are essential to the carrying out of this title [42 USCS § § 1973ff et seq.];

(3) "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(4) "member of the merchant marine" means an individual (other than a member of a uniformed service or an individual employed, enrolled, or maintained on the Great Lakes or the inland waterways)--

(A) employed as an officer or crew member of a vessel documented under the laws of the United States, or a vessel owned by the United States, or a vessel of foreign-flag registry under charter to or control of the United States; or

(B) enrolled with the United States for employment or training for employment, or maintained by the United States for emergency relief service, as an officer or crew member of any such vessel;

(5) "overseas voter" means--

(A) an absent uniformed services voter who, by reason of active duty or service is absent from the United States on the date of the election involved;

(B) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or

(C) a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States.

(6) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa;

(7) "uniformed services" means the Army, Navy, Air Force, Marine Corps, and Coast Guard, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration; and

(8) "United States", where used in the territorial sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa.

National Voter Registration Act ("Motor Voter Act") (§§1973gg et. seq.)

§ 1973gg. Findings and purposes

(a) **Findings.** The Congress finds that--

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) **Purposes.** The purposes of this Act are--

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

§ 1973gg-1. Definitions

As used in this Act--

(1) the term "election" has the meaning stated in section 301(1) of the Federal Election Campaign Act of 1971 (*2 U.S.C. 431(1)*);

(2) the term "Federal office" has the meaning stated in section 301(3) of the Federal Election Campaign Act of 1971 (*2 U.S.C. 431(3)*);

(3) the term "motor vehicle driver's license" includes any personal identification document issued by a State motor vehicle authority;

(4) the term "State" means a State of the United States and the District of Columbia; and

(5) the term "voter registration agency" means an office designated under section 7(a)(1) [*42 USCS § 1973gg-5(a)(1)*] to perform voter registration activities.

42 U.S.C. § 1973gg-2. National procedures for voter registration for elections for Federal office

(a) **In general.** Except as provided in subsection (b), notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office--

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 5 [*42 USCS § 1973gg-3*];

(2) by mail application pursuant to section 6 [*42 USCS § 1973gg-4*]; and

(3) by application in person--

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 7 [*42 USCS § 1973gg-5*].

(b) **Nonapplicability to certain States.** This Act does not apply to a State described in either or both of the following paragraphs:

(1) A State in which, under law that is in effect continuously on and after August 1, 1994, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.

(2) A State in which under law that is in effect continuously on and after August 1, 1994, or that was enacted on or prior to August 1, 1994, and by its terms is to come into effect upon the enactment of this Act [enacted May 20, 1993], so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

42 U.S.C. § 1973gg-3. Simultaneous application for voter registration and application for motor vehicle driver's license

(a) In general.

(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

(2) An application for voter registration submitted under paragraph (1) shall be considered as updating any previous voter registration by the applicant.

(b) Limitation on use of information. No information relating to the failure of an applicant for a State motor vehicle driver's license to sign a voter registration application may be used for any purpose other than voter registration.

(c) Forms and procedures.

(1) Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.

(2) The voter registration application portion of an application for a State motor vehicle driver's license--

(A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

(B) may require only the minimum amount of information necessary to--

(i) prevent duplicate voter registrations; and

(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(C) shall include a statement that--

- (i) states each eligibility requirement (including citizenship);
- (ii) contains an attestation that the applicant meets each such requirement; and
- (iii) requires the signature of the applicant, under penalty of perjury;

(D) shall include, in print that is identical to that used in the attestation portion of the application--

- (i) the information required in section 8(a)(5)(A) and (B) [42 USCS § 1973gg-6(a)(5)(A), (B)];
- (ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and
- (iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes; and

(E) shall be made available (as submitted by the applicant, or in machine readable or other format) to the appropriate State election official as provided by State law.

(d) **Change of address.** Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

(e) **Transmittal deadline .**

(1) Subject to paragraph (2), a completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority shall be transmitted to the appropriate State election official not later than 10 days after the acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

§ 1973gg-4. Mail registration

(a) **Form.**

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 9(a)(2) [42 USCS § 1973gg-7(a)(2)] for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 9(b) [42 USCS § 1973gg-7(b)] for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms. The chief State election official of a State shall make the forms described in subsection (a) available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters.

(1) Subject to paragraph (2), a State may by law require a person to vote in person if--

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person--

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff-1 et. seq.);

(B) who is provided the right to vote otherwise than in person under section 3(b)(2)(B)(ii) of the Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee-1(b)(2)(B)(ii)); or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices. If a notice of the disposition of a mail voter registration application under section 8(a)(2) [42 USCS § 1973gg-6(a)(2)] is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 8(d) [42 USCS § 1973gg-6(d)].

42 U.S.C. § 1973gg-5. Voter registration agencies

(a) Designation.

(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies--

- (A) all offices in the State that provide public assistance; and
 - (B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.
- (3)
- (A) In addition to voter registration agencies designated under paragraph (2), each State shall designate other offices within the State as voter registration agencies.
 - (B) Voter registration agencies designated under subparagraph (A) may include--
 - (i) State or local government offices such as public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and offices not described in paragraph (2)(B) that provide services to persons with disabilities; and
 - (ii) Federal and nongovernmental offices, with the agreement of such offices.
- (4)
- (A) At each voter registration agency, the following services shall be made available:
 - (i) Distribution of mail voter registration application forms in accordance with paragraph (6).
 - (ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.
 - (iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.
 - (B) If a voter registration agency designated under paragraph (2)(B) provides services to a person with a disability at the person's home, the agency shall provide the services described in subparagraph (A) at the person's home.
- (5) A person who provides service described in paragraph (4) shall not--
- (A) seek to influence an applicant's political preference or party registration;
 - (B) display any such political preference or party allegiance;
 - (C) make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from registering to vote; or
 - (D) make any statement to an applicant or take any action the purpose or effect of which is to lead the applicant to believe that a decision to register or not to register has any bearing on the availability of services or benefits.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall--

(A) distribute with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance--

(i) the mail voter registration application form described in section 9(a)(2) [42 USCS § 1973gg-7(a)(2)], including a statement that--

(I) specifies each eligibility requirement (including citizenship);

(II) contains an attestation that the applicant meets each such requirement; and

(III) requires the signature of the applicant, under penalty of perjury; or

(ii) the office's own form if it is equivalent to the form described in section 9(a)(2) [42 USCS § 1973gg-7(a)(2)], unless the applicant, in writing, declines to register to vote;

(B) provide a form that includes--

(i) the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?";

(ii) if the agency provides public assistance, the statement, "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.";

(iii) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote (failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)), together with the statement (in close proximity to the boxes and in prominent type), "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.";

(iv) the statement, "If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private."; and

(v) the statement "If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to

register to vote, or your right to choose your own political party or other political preference, you may file a complaint with -----", the blank being filled by the name, address, and telephone number of the appropriate official to whom such a complaint should be addressed; and

(C) provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.

(7) No information relating to a declination to register to vote in connection with an application made at an office described in paragraph (6) may be used for any purpose other than voter registration.

(b) Federal Government and private sector cooperation. All departments, agencies, and other entities of the executive branch of the Federal Government shall, to the greatest extent practicable, cooperate with the States in carrying out subsection (a), and all nongovernmental entities are encouraged to do so.

(c) Armed Forces recruitment offices.

(1) Each State and the Secretary of Defense shall jointly develop and implement procedures for persons to apply to register to vote at recruitment offices of the Armed Forces of the United States.

(2) A recruitment office of the Armed Forces of the United States shall be considered to be a voter registration agency designated under subsection (a)(2) for all purposes of this Act.

(d) Transmittal deadline .

(1) Subject to paragraph (2), a completed registration application accepted at a voter registration agency shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

42 U.S.C. § 1973gg-6. Requirements with respect to administration of voter registration

(a) In general. In the administration of voter registration for elections for Federal office, each State shall--

(1) insure that any eligible applicant is registered to vote in an election--

- (A) in the case of registration with a motor vehicle application under section 5 [42 USCS § 1973gg-3], if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;
 - (B) in the case of registration by mail under section 6 [42 USCS § 1973gg-4], if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;
 - (C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and
 - (D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;
- (2) require the appropriate State election official to send notice to applicant of the disposition of the application;
- (3) provide that the name of a registrant may not be removed from the official list of eligible voters except--
- (A) at the request of the registrant;
 - (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
 - (C) as provided under paragraph (4);
- (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of--
- (A) the death of the registrant; or
 - (B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);
- (5) inform applicants under sections 5, 6, and 7 [42 USCS §§ 1973gg-3, 1973gg-4, 1973gg-5] of--
- (A) voter eligibility requirements; and
 - (B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration. Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office--

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (*42 U.S.C. 1973 et seq.*); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

(c) Voter removal programs .

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which--

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that--

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2) (A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude--

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this Act.

(d) Removal of names from voting rolls .

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B) (i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card.

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of change of address before an election official at that polling place.

(2) (A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change address prior to the date of an election, at the option of the registrant--

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii) (I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction. In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) Conviction in Federal court.

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 10 of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include--

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States may have concerning the offender and the offense of which offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) [Omitted]

(i) Public disclosure of voter registration activities.

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined. For the purposes of this section, the term "registrar's jurisdiction" means--

- (1) an incorporated city, town, borough, or other form of municipality;
- (2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or
- (3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

42 U.S.C. § 1973gg-7. Federal coordination and regulations

(a) In general. The Federal Election Commission—

- (1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);
- (2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;
- (3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this Act on the administration of elections for Federal office during the preceding 2-year period and including recommendations or improvements in Federal and State procedures, forms, and other matters affected by this Act; and
- (4) shall provide information to the States with respect to the responsibilities of the States under this Act.

(b) **Contents of mail voter registration form.** The mail voter registration form developed under subsection (a)(2)--

- (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
- (2) shall include a statement that--
 - (A) specifies each eligibility requirement (including citizenship);
 - (B) contains an attestation that the applicant meets each such requirement; and
 - (C) requires the signature of the applicant, under penalty of perjury;
- (3) may not include any requirement for notarization or other formal authentication; and
- (4) shall include, in print that is identical to that used in the attestation portion of the application--
 - (i) the information required in section 8(a)(5)(A) and (B) [*42 USCS § 1973gg-6(a)(5)(A), (B)*];
 - (ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and
 - (iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

§ 1973gg-8. Designation of chief State election official

Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this Act.

§ 1973gg-9. Civil enforcement and private right of action

(a) **Attorney General.** The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out this Act.

(b) **Private right of action.**

(1) A person who is aggrieved by a violation of this Act may provide written notice of the violation to the chief election official of the State involved.

(2) If the violation is not corrected within 90 days after receipt of a notice under paragraph (1), or within 20 days after receipt of the notice if the violation occurred within 120 days before the date of an election for Federal office, the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.

(3) If the violation occurred within 30 days before the date of an election for Federal office, the aggrieved person need not provide notice to the chief election official of the State under paragraph (1) before bringing a civil action under paragraph (2).

(c) **Attorney's fees.** In a civil action under this section the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs.

(d) **Relation to other laws.**

(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this Act shall supersede, restrict, or limit the application of the Voting Rights Act of 1965 (*42 U.S.C. 1973 et seq.*).

(2) Nothing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965 (*42 U.S.C. 1973 et seq.*).

42 U.S.C. § 1973gg-10. Criminal penalties

A person, including an election official, who in any election for Federal office--

(1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for--

(A) registering to vote, or voting, or attempting to register or vote;

(B) urging or aiding any person to register to vote, to vote, or to attempt to register or vote; or

(C) exercising any right under this Act; or

(2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by--

(A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or

(B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with title 18, United States Code (which fines shall be paid into the general fund of the Treasury, miscellaneous receipts (pursuant to section 3302 of title 31, United States Code), notwithstanding any other law), or imprisoned not more than 5 years, or both.

Civil Rights Act

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Crimes Against One's Civil Rights

42 U.S.C. § 1988. Proceedings in vindication of civil rights

(a) **Applicability of statutory and common law.** The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) **Attorney's fees.** In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS § § 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS § § 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS § § 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) **Expert fees.** In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS § § 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee.

Americans With Disabilities Act (ADA)

42 U.S.C. § 12133

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 USCS § 12132].

42 U.S.C. § 12134

(a) **In general.** Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Attorney General shall promulgate regulations in an accessible format that implement this subtitle. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244 [42 USCS § 12143, 12149, or 12164].

(b) **Relationship to other regulations.** Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) shall be consistent with this Act and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 504.

(c) **Standards.** Regulations under subsection (a) shall include standards applicable to facilities and vehicles covered by this subtitle, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504(a) of this Act [42 USCS § 12204(a)].

Section 7 of the Privacy Act of 1974 (uncodified)

Disclosure of social security number.

"(a) (1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

"(2) the provisions of paragraph (1) of this subsection shall not apply with respect to--
"(A) any disclosure which is required by Federal statute, or

"(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

"(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

P.L. 93-579, § 7, 88 Stat. 1909

Code of Federal Regulations

28 CFR 35.130

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability --

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on

the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections -

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

- (c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.
- (d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.
- (e) (1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.
- (2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.
- (f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.
- (g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

ENDNOTES

¹ 2 U.S.C. §§1, 7.

² *Bush v. Palm Beach County Canvassing Board*, 121 S. Ct. 471 (2000) (per curiam), and, *Bush v. Gore*, 121 S.Ct. 525, 533 (2000) (Rehnquist, C.J., concurring), suggest that this general rule may have one significant exception. As a matter of federal constitutional law, state law might sometimes trump state constitutional law. See *Bush v. Palm Beach County Canvassing Bd.*, 121 S.Ct. at 475 (remanding case to Florida Supreme Court because it was not clear to what extent “the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, § 1, cl. 2.”); *Bush v. Gore*, 121 S.Ct. at 534 (Rehnquist C.J., concurring) (“[T]here are a few exceptional cases in which the [federal] Constitution imposes a duty or confers a power on a particular branch of a State’s government.”).

³ 118 U.S. 356, 369-370 (1886) (emphasis added).

⁴ See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

⁵ See, e.g., *Nixon v. Herndon*, 273 U.S. 536 (1927).

⁶ See *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

⁷ See *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 667-68(1981).

⁸ 471 U.S.222 (1985).

⁹ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

¹⁰ 377 U.S. 533 (1964).

¹¹ *Id.* at 578.

¹² See *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (no deviation from population equality among congressional districts may be considered *de minimis* and all variances must be justified); *Karcher v. Daggett*, 462 U.S. 725 (1983) (where it can be demonstrated that challenged plan has higher population deviation than competing plan, deviations from equality must be shown to satisfy "some legitimate state objective"); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (congressional districts must be as equal in population as practicable).

¹³ See *Mahan v. Howell*, 410 U.S. 315 (1973) (approving 16.4% total deviation in order to preserve political subdivision); *Gaffney v. Cummings*, 412 U.S. 755 (1973) (deviations of up to 7.8% in state legislative plan acceptable as result of effort to achieve "political fairness"); *White v. Regester*, 412 U.S. 755 (1973) (state house plan valid despite 9.9% total deviation).

¹⁴ 42 U.S.C. § 1973aa-1.

¹⁵ 405 U.S. 330 (1972). See also *Burg v. Caniffe*, 315 F. Supp. 380 (D. Mass. 1970), *aff'd* 405 U.S. 1034 (1972) (Massachusetts one-year residency requirement invalid); *Andrews v. Cody*, 327 F. Supp. 793 (D. N.C. 1971) *aff'd* 405 U.S. 1034 (1972) (North Carolina one-year residency requirement invalid); *Hadnott v. Amos*, 320 F. Supp. 107 (D. Ala. 1970), *aff'd* 401 U.S. 968 (1971) and also *aff'd* 405 U.S. 1035 (1972) (Alabama one-year state, 6-month county, and 3-month precinct residency requirement invalid).

¹⁶ See, e.g., *Burg v. Caniffe*, 315 F. Supp. at 380, *aff'd* 405 U.S. at 1034 (1972) (6-month Massachusetts town residency upheld), *Smith v. Climer*, 341 F. Supp. 123 (D. Ark. 1972) (Arkansas 30-

day precinct residency requirement upheld).

17 121 S.Ct. 525.

18 *Id.* at 530.

19 *Id.* (citing *Harper*, 383 U.S. at 665 and *Reynolds*, 377 U.S. at 555).

20 *Id.* at 531.

21 *Id.*

22 *Id.*

23 *Id.* at 532.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* (italics added).

28 *Id.*

29 *Id.* at 545 (Souter, J., dissenting).

30 *Greidinger v. Davis*, 988 F.2d 1344, 1352-55 (4th Cir. 1993).

31 *Id.* at 1354 n. 11.

32 357 U.S. 449 (1958).

33 *Smith v. Allwright*, 321 U.S. 649 (1944). *See also* *Terry v. Adams*, 345 U.S. 461 (1953) (private, all-white association whose unofficial endorsement was controlling in Democratic primary was subject to constitutional limitations because association played an "integral role" in the politics of county).

34 479 U.S. 208 (1986).

35 *Id.* at 224.

36 *Storer v. Brown*, 415 U.S. 724, 730 (1974).

37 *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997).

38 *Tashjian*, 479 U.S. 208.

39 *San Francisco County Cent. Democratic Comm. v. Eu*, 826 F.2d 814 (1987).

40 *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

41 384 U.S. 214 (1966).

42 *Id.* at 220 (italics added).

43 838 F.2d 380 (9th Cir. 1988).

44 *Id.* at 385.

45 *Id.* at 387.

46 *Id.* at 385.

47 CBS Inc. v. Smith, 681 F. Supp. 794 (S.D. Fla. 1988) (150 foot no-polling zone); NBC v. Cleland, 697 F. Supp. 1204 (N.D. Ga. 1988) (250 foot zone); NBC v. Colburg, 699 F. Supp. 241 (D. Mont. 1988) (200 foot zone).

48 Cleland, 697 F. Supp. at 1215.

49 Pell v. Pecunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

50 U.S. Const. Art. I, § 3. cl. 1.

51 *See* Harper, 383 U.S. 663.

52 121 S. Ct. 1029 (2001).

53 *Id.* at 1038 (2001) (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).

54 Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972) (authority to regulate recount of elections); United States v. Gradwell, 243 U.S. 476, 483 (1917) (full authority over federal election process from registration to certification of results);

55 *In re* Coy, 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte* Clarke, 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis -a-vis Congressional elections).

56 U.S. Const. Art. I, §2, cl. 1 (House of Representatives); U.S. Const. Amend. XVII, § 1 (Senate).

57 Foster v. Love, 522 U.S. 67, 69 (1997) (internal quotation marks and citations omitted).

58 *Id.* at 72 n.2 (quoting Smiley v. Holm, 285 U.S. at 366).

59 *Ex parte* Siebold, 100 U.S. 371, 383-84 (1880).

60 121 S.Ct. at 1037-38 (internal quotations and citations omitted).

61 *See, e.g.*, ACORN v. Miller, 129 F.3d 833 (6th Cir. 1997); ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995).

62 United States v. McCranie, 169 F.3d 723, 727 (11th Cir. 1999).

63 *See* 42 U.S.C. § 1971(b).

64 290 U.S. 534 (1934).

65 *Id.* at 545 (internal citation omitted); *accord*, ACORN v. Miller, 129 F.3d at 836 n.1 (“While

Article I section 4 mentions only the election of Senators and Representatives, Congress has been granted authority to regulate presidential elections”).

⁶⁶ The one exception might be the selection of the District of Columbia’s three electors. Even here, however, current federal criminal law dealing with election fraud applies to elections conducted in part to select “any candidate for the office of ... Delegate from the District of Columbia.” 42 U.S.C. § 1973i.

⁶⁷ See, e.g., Harper, 383 U.S. 663.

⁶⁸ See Katzenbach v. Morgan, 384 U.S. 641 (1966). The Fifteenth Amendment, which targets racial discrimination in voting, contains a similar enforcement clause, to which the Supreme Court has given a similarly expansive reading. See South Carolina v. Katzenbach, 383 U.S. 301 (1966). So do the 13th, 19th, 23rd, 24th and 26th Amendments.

⁶⁹ See 42 U.S.C. § 1973l(e); 42 U.S.C. § 1988.

⁷⁰ 521 U.S. 507 (1997).

⁷¹ 42 U.S.C. § 2000bb-1.

⁷² City of Boerne, 521 U.S. at 517.

⁷³ *Id.* at 518, 520 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

⁷⁴ See, e.g., Board of Trustees v. Garrett, 121 S.Ct. 955 (2001); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627 (1999).

⁷⁵ United States v. Morrison, 529 U.S. 598 (2000).

⁷⁶ 121 S.Ct. 955 (2001).

⁷⁷ As the majority put it: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” 121 S.Ct. at 532. The two dissenting justices made clear that *Bush v. Gore* would not extend so far: “It is true 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 545 (Souter, J., dissenting).

⁷⁸ United States v. Butler, 297 U.S. 1, 66 (1936).

⁷⁹ *Id.* at 65.

⁸⁰ Its future robustness is somewhat less certain. Will a Supreme Court that has restricted Congress’s powers under the Commerce Clause and the Fourteenth Amendment leave the sweeping scope of the Spending Clause untouched? This is currently an issue of substantial discussion among constitutional lawyers and the subject of much scholarly commentary. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

⁸¹ 483 U.S. 203 (1987).

⁸² *Id.* at 207; see also *New York v. United States*, 505 U.S. 144, 166 (1992) (applying the same test and finding Congress’ use of the Spending Clause to create incentives for states to deal with low-level

radioactive wastes was appropriate).

⁸³ Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964).

⁸⁴ See Seminole Tribe v. Florida, 517 U.S. 44 (1996).

⁸⁵ See generally Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. ____ (forthcoming 2001).

⁸⁶ United States v. Morrison, 120 S.Ct. 1740 (2000); United States v. Lopez, 514 U.S. 549 (1995).

⁸⁷ U.S. Const., amend. XIV, § 2.

⁸⁸ 2 U.S.C. § 2a(a).

⁸⁹ United States Department of Commerce v. Montana, 503 U.S. 442 (1992).

⁹⁰ *Id.* at 464.

⁹¹ 2 U.S.C. § 2b.

⁹² *Id.* §§ 1,7.

⁹³ 3 U.S.C. § 1.

⁹⁴ 2 U.S.C. § 8.

⁹⁵ 3 U.S.C. § 2.

⁹⁶ U.S. Const., Art. II, § 1; *see also* 3 U.S.C. § 3.

⁹⁷ *Id.*

⁹⁸ McPherson v. Blacker, 146 U.S. 1 (1892). Congress can, of course, override state rules pursuant to its authority under the enforcement clauses of various constitutional amendments, particularly section 5 of the Fourteenth Amendment.

⁹⁹ 3 U.S.C. § 5.

¹⁰⁰ *Id.*; *see* Bush v. Palm Beach County Canvassing Bd., 121 S. Ct. 471, 474 (2000).

¹⁰¹ U.S. Const., Amend. XII.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ 42 U.S.C. § 1971 *et seq.*

¹⁰⁵ *See, e.g.,* Oregon v. Mitchell, 400 U.S. 112, 132-34 (1970).

¹⁰⁶ 383 U.S. 301, 309 (1966).

107 Morgan, 384 U.S. 641.

108 City of Boerne, 521 U.S. 507 (1997).

109 *See, e.g.*, Board of Trustees v. Garrett, 121 S. Ct. 955, 967 (2001).

110 42 U.S.C. § 1973c.

111 *Id.* § 1973.

112 *See, e.g.*, Hunt v. Cromartie, 121 S. Ct. 1452 (2001); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

113 42 U.S.C. § 1973b(b).

114 *Id.* § 1973b(a).

115 The list now comprises the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia; some counties within California, Florida, New York, North Carolina, and South Dakota; and some townships within Michigan and New Hampshire. 51 C.F.R. App. (2000).

116 42 U.S.C. § 1973c.

117 *Id.*

118 *Id.*

119 *See* text and tables available at http://www.usdoj.gov/crt/voting/sec_5/about.htm.

120 Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

121 *Id.* at 555.

122 Young v. Fordice, 520 U.S. 273, 283 (1997); Perkins v. Matthews, 400 U.S. 379, 387-88 (1971).

123 Allen, 393 U.S. 544, 566-67.

124 Beer v. United States, 425 U.S. 130 (1976).

125 Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000).

126 Bolden, 446 U.S. at 61.

127 *See, e.g.*, Davis v. Bandemer, 478 U.S. 109 (1986); Whitcomb v. Chavis, 403 U.S. 124 (1974); White v. Regester, 412 U.S. 755 (1973).

128 Abrams v. Johnson, 521 U.S. 74, 90-91 (1997); Bolden, 446 U.S. at 80.

129 Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

130 § 1973b.

131 *Id.*

132 *Id.* See S. Rep. No. 97-417, 97th Cong., 2d Sess. (May 1982).

133 Gingles, 478 U.S. at 36-37 (1986)(quoting S. Rep. No.97-417, at 28-29 (1982)).

134 *Id.* at 37 (quoting S. Rep. No. 97-417, at 29 (1982)).

135 See, e.g., Miller v. Johnson, 515 U.S. 900, 906-07 (1995); Shaw, at 635.

136 Shaw v. Reno, 509 U.S. 630 (1993).

137 Hunt v. Cromartie, 121 S.Ct. 1452 (2001).

138 See Roberts v. Wamser, 679 F. Supp. 1513 (E.D. Mo. 1987), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989); United States v. Post, 297 F. Supp. 46 (W.D. La. 1969).

139 See Hernandez v. Woodard, 714 F. Supp. 963 (N.D. Ill. 1989).

140 Compare Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (rejecting § 2 challenge to felon disenfranchisement law), with Farrakhan v. Locke, 987 F. Supp. 1304 (E.D. Wash. 1997) (denying motion to dismiss § 2 claim by disenfranchised felons), and Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (*en banc* panel evenly divided on whether disenfranchised felons could assert VRA claim).

141 42 U.S.C. §§ 1973(a), 1973b(f)(2).

142 *Id.* § 1973(b).

143 *Id.* § 1973b(f)(3).

144 *Id.* §§ 1973aa-1a, 1973b(f)(4).

145 The current jurisdictions covered under the minority language provisions are counties in Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Wisconsin. 55 C.F.R. App. (2000).

146 42 U.S.C. § 1973b(f)(4).

147 28 C.F.R. § 55.2(b) (2000).

148 Pub. L. 103-31, Sec. 2, 107, Stat. 77.

149 285 U.S. 355 (1932).

150 *Id.* at 366.

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

152 42 U.S.C. § 1973gg-3(a)(1).

153 *Id.* § 1973gg-3(c).

154 *Id.* § 1973gg-5(a)(2)-(3).

155 *Id.* § 1973gg-5(a)(4)(B).

156 *Id.* § 1973gg-6(a)(4).

157 *Id.* § 1973gg-6(b).

158 *Id.* § 1973gg-6(c)-(d).

159 *Id.* § 1973gg-6(e). Although the title of this subsection limits the fail-safe voting requirements to those registrants who have failed to return the form the registrar has sent to confirm their addresses and the senate and house reports suggest a similar limitation, the words below the title do not include this limitation and the Federal Election Commission since 1994 has interpreted these provisions as applying to all registrants. FEDERAL ELECTION COMMISSION, IMPLEMENTING THE NATIONAL VOTER REGISTRATION ACT OF 1993: REQUIREMENTS, ISSUES, APPROACHES, AND EXAMPLES 6-1,-2 (1994). No reported court cases address this ambiguity and state and localities appear to have followed the FEC's interpretation.

160 *Id.* §1973gg-9(a).

161 *Id.* §1973gg-9(b).

162 *Id.* §1973gg-9(c).

163 *Id.* §405(c)(2)(C)(i).

164 “Elections: Issues Affecting Military and Overseas Absentee Voters,” Statement of David M. Walker, Comptroller General of the United States for the Subcommittee on Military Personnel, Committee on Armed Forces, House of Representatives, May 9, 2001, p.1.

165 42 U.S.C. § 1973ff-3.

166 *Id.*

167 *Id.* § 1973ff-1(1).

168 *Id.* § 1973ff-6(5)(B)-(C).

169 *Id.* § 1973ff-1(2).

170 *Id.* § 1973ff-1(3).

171 *Id.* § 1973ff-2(e)-(f).

172 *Id.* § 1973ff-2(b)(2)-(3).

173 *Id.* § 1973ff-2(b)(1).

174 *Id.* § 1973ff-2(c)(1)-(2).

175 *Id.*

176 *Id.* § 1973ff-2(c)(3).

177 *Dipietrae v. City of Philadelphia*, 666 A.2d 1132 (1995), *aff'd* 673 A.2d 905, 543 Pa. 591 (1996).

178 42 U.S.C. § 1973ee-4(a)(italics added).

179 *Id.* § 1973ee-6(1).

180 *Id.* § 1973ee-4(a) & (c). Although 42 U.S.C. § 1983 normally allows suits for both damages and injunctive relief against government officials and local (but not state) governments that deprive a citizen of any right secured by either the Constitution or federal law, there is one important limitation to the availability of § 1983 in cases based on the violation of federal statutes (as opposed to deprivations of constitutional rights). Congress can foreclose a remedy under § 1983 "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). In *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981), for example, the Court held that the "unusually elaborate enforcement provisions" of two environmental statutes—which required prior notice to federal and state authorities and authorized only prospective relief—foreclosed damages suits under § 1983. Applying *Sea Clammers*, the Fourth Circuit held that the Americans with Disabilities Act likewise provided a comprehensive remedial scheme and thus did not permit use of § 1983. *Zombro v. Baltimore City Police Dep't*, 868 F.2d 1364 (4th Cir. 1989). It is not entirely clear whether the detailed exhaustion requirement and remedial scheme of the VAEH would also be held to preclude § 1983 actions, which permit damages and attorneys' fees.

181 28 C.F.R. § 35.130.

182 42 U.S.C. § 12134(a).

183 *Id.* § 12133 (providing remedies available under 29 U.S.C. § 794a (The Rehabilitation Act), which include private actions for damages and attorneys fees).

184 121 S.Ct. 955 (2001).

185 *New York v. County of Delaware*, 82 F. Supp.2d 12 (N.D.N.Y. 2000)(preliminary injunction); *New York v. County of Delaware*, 2000 U.S. Dist. Lexis 12595 (N.D.N.Y. Aug. 16, 2000).

186 *Lightbourn v. County of El Paso*, 904 F.Supp. 1429, 1433 (W.D.Tex. 1995), *rev'd on other grounds*, 118 F.3d 421 (5th Cir. 1997), and *vacated* 127 F.3d 33 (5th Cir. 1997).

187 *Lightbourn v. Garza*, 118 F.3d 421 (5th Cir. 1997).

188 Tex. Elec. Code § 122.0111; *see also* 1 Tex. Admin. Code § 81.57; Tex. Elec. Code § 43.034.

189 *Nelson v. Miller*, 170 F.3d 641 (6th Cir. 1999).

190 *Lightbourn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997).

191 418 U.S. 24 (1974).

192 U.S. Const., Amend XIV, Sec. 2 (emphasis added).

193 *Frequently Asked Questions About Election Day and Voting Procedures* (visited June 19, 2001) <http://www.fec.gov/pages/faqvdayprocedures.htm>

194 *See Gingles*, 478 U.S. at 36-37 (1986) (quoting S. Rep. No. 97-417, at 28-29 (1982)).

195 *United States v. Gradwell*, 243 U.S. 476, 485 (1917).

¹⁹⁶ Compare *Hendon v. North Carolina State Bd. of Elec.*, 710 F.2d 177, 181 (4th Cir. 1983) (“A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state.”) with *Bush v. Gore*, 121 S. Ct. 525, 530-31 (2000) (holding that lack of rules resulting in “unequal evaluation of ballots . . . is not a process with sufficient guarantees of equal treatment”), and *NAACP v. Harris*, No.01-Civ-120-Gold (S.D. Fla.) (class-action complaint alleging 14th Amendment equal protection and VRA § 2 claims arising from non-uniform election practices and machinery).

¹⁹⁷ U.S. Const. Art. I, § 4, cl. 1.

¹⁹⁸ See *Foster v. Love*, 522 U.S. 67, 69 (1997) (“[I]t is well settled that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the States. The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.”) (internal quotation marks and citations omitted).

¹⁹⁹ *Cook v. Gralike*, 121 S. Ct. 1029, 1038 (2001) (describing the term “manner” as encompassing “matters like 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”) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

²⁰⁰ U.S. Const., Art. 1, § 8, cl. 1.

²⁰¹ See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987).

²⁰² See *Roberts*, 679 F. Supp. 1513 (holding that refusal to manually review cast ballots rejected by punch card tabulation equipment which resulted in rejection of large numbers of ballots cast by black voters violated § 2), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989); *United States v. Post*, 297 F. Supp. 46 (W.D. La. 1969) (holding that changing voting machine such that pulling lever for political party's candidates did not cast vote for one of that party's candidates, contrary to previous instructions, violated § 2).

²⁰³ 384 U.S. 214.

XI. WHAT COUNTS AS A VOTE

What Counts as a Vote?

A Report of the Task Force
on Legal and Constitutional Issues

National Commission on
Federal Election Reform

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As the confusion last year in Florida revealed, states and localities employ a variety of sometimes inconsistent standards to determine what counts as a vote. Does a chad have to be completely detached; detached at all but one, two, or three corners; or merely dimpled? What if a voter circles the chad's position instead? What if a voter punches a chad for a particular candidate and also writes in that candidate's name in the separate write-in portion of the ballot? Punch card systems pose all these questions and optiscan and paper ballots pose still more.

We have surveyed all 50 states and the District of Columbia to analyze the prevalence of various approaches to counting. Our research indicates that states now employ three different schemes. The most common is a general intent-of-the voter standard. Well over half the states employ it in one form or another. The Colorado scheme is typical. Colo. Rev. Stat. § 1-7-309 states that “[v]otes shall not be counted if ... for any reason it is impossible to determine the elector's choice of candidate or vote concerning the ballot issue” and the Colorado Supreme Court has acted consistently: “a ballot cast by a qualified elector should be rejected only if the elector's intent cannot be ascertained with reasonable certainty.” *Moran v. Carlstrom*, 775 P.2d 1176, 1180 (Colo. 1989).

The next most common approach is an objective standard. Nearly 20 percent of states employ it with all or some of their voting technologies. The Hawaii scheme is illustrative. For both paper and optiscan ballots, it gives a detailed series of graphic examples of acceptable and unacceptable marks. A voter must (i) draw two lines that intersect somewhere within the choice-box on a paper ballot, Haw. Admin. R. § 2-51-80, (ii) make any mark within the choice-dot on an optiscan ballot, *id.* § 2-51-85.1, and (iii) punch a chad out completely in a punch card, *id.* § 2-51-83(e), to make a vote count.

The least common approach is a hybrid standard. Only a few states employ it. The Texas scheme illustrates how it works. Its punch card provision reads as follows:

- (d) Subject to Subsection (e), in any manual count conducted under this code, a vote on a ballot on which a voter indicates a vote by punching a hole in the ballot may not be counted unless:
 - (1) at least two corners of the chad are detached;
 - (2) light is visible through the hole;
 - (3) an indentation on the chad from the stylus or other object is present and indicates a clearly ascertainable intent of the voter to vote; or
 - (4) the chad reflects by other means a clearly ascertainable intent of the voter to vote.

- (e) Subsection (d) does not supersede any clearly ascertainable intent of the voter.

Tex. Elec. Code Ann. § 127.130(d)-(e)(West Supp. 2001). We characterize this scheme as hybrid because it combines aspects of both the intent-of-the-voter and objective approaches. Although the intent of the voter clearly trumps in the end, Texas does try to constrain the discretion of the person counting punch card votes by giving some objective guidelines.

Some cautions are in order. First, although for every state we have both contacted elections officials and researched the code, administrative materials, and court cases, we cannot claim to have a solid idea of how the counting process works in practice. In some cases, when we asked officials in the office of the Secretary of State how particular things were done, we were told that no one had ever previously asked the question. Since it seems improbable that the simple issues we raised had never occurred in practice, we concluded that there is often some gap between the top election office and the field. Election officials somewhere in the state were surely making these decisions but largely on their own.

Second, the gap worked in the other direction as well. Even when the top elections officials knew how a particular issue should be handled, there was often no guarantee that field workers would know. In some states, field workers do receive detailed instruction on how to count ballots but we have no reason to believe that that is the case everywhere. In some other states, top elections officials told us that field workers were given a copy of the appropriate state statutes, but in our reading those same statutes gave no real guidance at all.

Third, the relevant legal materials were often incomplete or unclear. The law in a few states, for example, clearly indicates a particular approach but describes it purely in terms of a technology—e.g., paper ballots—that we have reason to believe the state no longer employs widely, if at all. In a few other states, the legal sources are silent or contradictory on critical counting matters and election officials were unable to furnish any authoritative guidance.

In short, our survey is best approached as a general guide to the prevalence of particular approaches rather than as an authoritative statement of how each state approaches things. In a few cases, in fact, we had so little confidence in our understanding of how the state counted votes that we declined to categorize it with respect to some or all technologies.

State	Intent	Hybrid	Objective
Alabama	✓		
Alaska	✓ (nonpaper ballots)		✓ (paper ballots)
Arizona	✓		
Arkansas			
California			✓
Colorado	✓		
Connecticut	✓ (absentee ballots)		✓ (paper ballots)
Delaware	✓		
District of Columbia	✓		
Florida			✓
Georgia			✓
Hawaii			✓
Idaho	✓		
Illinois	✓		
Indiana		✓	
Iowa	✓		
Kansas	✓		
Kentucky	✓		
Louisiana		✓	
Maine	✓		
Maryland	✓		
Massachusetts	✓		
Michigan			✓
Minnesota	✓		
Mississippi	✓		
Missouri		✓	
Montana		✓	
Nebraska	✓		
Nevada			✓ (punch card and optiscan)
New Hampshire	✓		

State	Intent	Hybrid	Objective
New Jersey		✓	
New Mexico	✓ (absentee ballots)		
New York		✓	
North Carolina	✓ (other)	✓ (punch card)	
North Dakota	✓		
Ohio	✓		
Oklahoma			✓
Oregon	✓		
Pennsylvania	✓		
Rhode Island	✓		
South Carolina	✓		
South Dakota	✓		
Tennessee	✓		
Texas	✓ (other)	✓ (punch card)	
Utah	✓		
Vermont	✓		
Virginia	✓		
Washington	✓		
West Virginia	✓		
Wisconsin	✓ (other)	✓ (paper ballots and write-ins)	
Wyoming	✓		

XII.

Recounts and Contests

A Report of the Task Force on Legal and Constitutional Issues

National Commission on Federal Election Reform

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June 29, 2001

Introduction

We have set out some general observations, with specific examples, of the various approaches states have taken to the construction of recounts and contests. In any state, of course, the statutes may speak clearly

to some issues, and less so to others. Issues not covered by statute are addressed by rule, decided by the time-honored discretion of local officials, or entrusted to the courts.

Since time did not permit a comprehensive review of all the sources of authority for the conduct of recounts or contests, our focus has been the statutes. The state speaks first by statute. If the statute is incomplete or vague on material points, this presents serious problems for the efficiency of the process and undermines public confidence in the result—even if a court or elections official ultimately decides the issue. If nothing else, the presidential recount controversy makes that point.

A survey or summary necessarily overlooks or minimizes significant issues or even differences in state approaches. The Federal Election Commission's National Clearinghouse for Election Administration, in its 1990 summary of state recount and contest statutes, stated then that these laws were “enormously complex” varying by type of elections, criteria and process. The discussion below isolates and summarizes basic issues of common concern that likely to be found in most state codes. These include:

- who may—and in what manner—initiate a recount or contest
- the grounds for seeking either recounts or contests
- timelines established for actions by the parties or state, including for the resolution of the contest
- the nature of the relief that may be requested—whether for partial counts, reaching some ballots and not others, or part but not all of the electoral jurisdictions (e.g. some precincts but not all)
- the provisions for bearing costs
- legal standards if any for deciding issues such as voter intent (to be covered in a separate chapter)
- rights of appeal
- remedies

Following a general overview on these points, the discussion turns to selected states with approaches sufficiently distinct, or illustrative of a certain approach, that their codes merit additional comment.

Overview

Review of Election Results

Election results are commonly subject to two different types of review: recounts and contests. Although their character can vary from state to state, recounts are typically administrative proceedings (often subject to judicial review) in which the votes are recounted—either mechanically or by hand—to determine whom they were cast for. Contests, on the other hand, are more exceptional judicial proceedings in which votes can be excluded as improper. A recount is only one possible remedy in a contest. Recounts precede contests when both are available.

Application to Federal Elections

Many states clearly include federal elections within the class of elections subject to recounts or contests. Others are less clear, and some provide for contests and not recounts, or vice versa. Some of this ambiguity about the availability of contests may reflect the awareness of states that the House and Senate are empowered under the Constitution to judge the returns of their members, and perhaps the belief that any “contest” properly lies with those bodies.

Initiation of Recounts and Contests

Recounts

States provide for a range of procedures for initiating a recount or contest. By and large, the largest numbers of states initiate recounts on petition or request of the candidate. A number of others provide for “automatic” or mandatory recounts in the event of a “tie,” where the margin is close (typically 0.5% or less), for all elections, or for federal elections in particular.

In some states, voters may initiate a recount. In certain of these states, including states the size of California and Florida, a single voter may request a recount, whereas in others, a larger number is required to initiate the action.

Provisions conferring on political parties the authority to seek recounts are rare and may also be limited in scope. For example, in Indiana, a party may seek the recount but only if a candidates does not.

Contests

Once again, the largest number of states confers on candidates the right to seek a contest. Voters may also initiate contests, and in a handful of states, a political party. In one state, Oregon, a county clerk may also do so.

Time for Requesting Initiation

The timeframes for initiating an action vary widely across the states and run either from the day of the election, the day the canvass is completed, or the day the result is officially certified. The canvass, which can vary from state to state, is a post-election process that usually begins with the initial counting of ballots and ends with the official report of the election results by the appropriate elections official. A review of the chart below tells the tale.

For recounts

On election night	OK
Within 2 days of canvass	MI, WV, WY
Within 3 days of election	NH
Within 3 days of canvass	AK (for Gov./Lt. Gov.), MD, NV, NH, ND, OK, WA, WI (within 3 rd day following the last meeting of the board of canvassers)
Within 5 days of official canvass/certification	AK (except Gov./Lt. Gov.), CA (a second voter may request a new recount within 24 hours of the completion of an initial recount), FL, GA, ME, MT, OH, PA, TX (5 days after election or 2 days after canvass)
Within 6 days of canvass	NM
Within 7 days after election	IN (by candidates-7; by party chairmen-10), MO, RI
Within 7 days of canvass	UT

Within 10 days of election	MA, SD, VT
Within 10 days of certification	VA
On or before 2 nd Saturday following election	NJ
Within 15 days of election	CO (within 14 days if initiated by state)
Within 20 days of canvass	ID
Within 5 days after the 29 th day following state election	CA
Within 35 days of election	OR (supplemental demand permitted until 50 th day)

For contests (focussing on general elections, with the caveat that time frames for primary contests could be shorter).

Within 5 days after canvass	GA, KS, SC
Within 7 days after canvass	MN
Within 9 days after election	LA
Within 10 days of state review or certification	AK, DE (for presidential electors), FL (or within 5 days of certification following a protest), IA, TN, WA
Within 13 days of election	TX
Within 5 days of recount, 14 days of election	NV, ND
Within 15 days of election	KY & WY. OH & VT (or within 10 days of recount).
Within 20 days of election	HI, MS (local offices), PA
Within 15 days of official proclamation	IL
Within 20 days of certification	AR (except within 15 days for election to Arkansas Home of Representatives), DE (and within 60 days before first day of court term)
Within 30 days of election	MA, MS (state offices), NJ, VA
Within 30 days of certification	MO, NM
Within 40 days of election	NE, OR, UT

Scope of Relief (Partial v. Complete Recount Ballots)

It is generally the case that where a state statute speaks to the question at all, candidates are expressly entitled to select for recount some but not all of the geographic voting units within a jurisdiction. California, Georgia, Idaho, Indiana, Massachusetts are just a few of the states that permit the candidate or initiator to designate individual precincts or counties for recount.

Many statutes are silent, though practice in this area suggests that candidates are encouraged to ask for the most limited geographic recount compatible with the grievance they have experienced or the relief they hope to obtain. Mandatory recounts, triggered by a close election, generally extend to all ballots for the election subject to recount.

Contest provisions are also not particularly detailed on the point, but it is fair to say that candidates or others initiating a contest would be looking to identify particular problems—specific “irregularities,” as many statutes refer to them—and it would be common that the relief sought would be tailored to those problems. So by its nature, a contest is selective.

Grounds for Recounts and Contests

The grounds for seeking a recount in various state codes may be classified as follows:

Belief of mistake or error	AK, CA, GA, IN, MA, MI, NJ, NM, NC, OK, PA, SD, TX, WY
Misconduct or fraud affecting outcome	CA, ID, MI, OK, PA, WY
Mechanical failure	IN, OK, TX

Close election	AK, AZ, CO, GA, MO, NC, ND, OH, SD, TX, UT, VT, VA, WY
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The grounds for contests are as follows:

Misconduct, fraud or corruption on part of election official	AL, AK, AZ, CA, CO, CT, DE, FL, GA, HI, IL, IA, KS, LA, MN, NE, NV, NJ, OK, OR, TX, UT, VT, VA, WA, WY
Ineligibility of candidate	AL, AK, AZ, CA, CO, DE, FL, GA, IA, KS, MN, NE, NV, NJ, ND, OR, UT, VA, WA, WY
Erroneous count sufficient to change the result of election	AZ, CA, CO, CT, GA, HI, IL, IA, KS, KY, LA, MN, NE, NV, NJ, NC, ND, OR, TX, UT, VT, VA, WA, WY
Illegal votes	AL, AZ, AR, CA, CO, CT, DE, FL, GA, IL, IA, KS, MN, NE, NV, NJ, NC, ND, OR, TX, UT, WA, WY
Rejection of legal votes	AL, CO, IA, KS, MN, NE, NJ, ND, OR, UT, WY
Bribery, intimidation or malconduct designed to prevent a fair election	AL, AK, AZ, CA, DE, FL, IA, KS, KY, LA, MN, NE, NV, NJ, OR, TX, UT, WA, WY
Candidate's prior felony conviction	IA, NE, NJ, WA
For any other reason casting outcome in doubt	CO, FL, GA, HI, IA, KS, LA, MN, MO, NE, NV, NJ, VT, VA

Financial Liability for Recounts and Contests

The question of who pays for recounts also varies widely by state and by type of recount. Typically, when states have mandatory recount provisions, the state or locality will pick up the tab. States in which candidates or individuals may request a recount may charge nominal filing fees, demand payment of the entire cost of the recount, or request posting of a bond for the possibility that the outcome does not change. Costs may also vary depending on the extent of the recount and the margin of votes cast.

Most contest statutes contemplate filing with a state court, and fees are typically handled by the courts in a manner consistent with allocation of costs and legal fees in civil procedure. Some states, however, do require payment of a bond by the initiator to cover contest contests in the event the outcome does not change.

Who Pays – Recounts

Paid by state/locality	AK, AZ, CO, ID & VA (if close). MA, MO, MT, NE, ND, OH & WA (if automatic), NC, OR (if requested by government), RI, SD, UT, VT
Paid by campaign/candidate	AR, NV, ID (\$100/precinct), ME & NH (fee varies by margin), NE (if not automatic), NM (\$50/precinct), VA (if margin >0.5% and no change in result), WI (no fee if close; \$5/precinct), WY (max \$500 if no change)
Paid by initiator (if not candidate)	AK (deposit req. unless close), CA (costs daily), CO (total estimate), IN (\$100 minimum), MI (\$10/precinct), MT, NJ (costs vary), OH (max \$10/precinct if not automatic), OK (costs vary), OR (\$15/precinct), TX (costs vary)
Bond or deposit required	MD, MT (if margin > 0.25%), NM (in lieu of advance), ND (if not automatic), PA (deposit or bond), WA (deposit of \$.05/ballot)

Who Pays – Contests

Paid by initiator	CA (daily advance), CO (post-judgment liability), GA (contestant and defendant post judgment liability), IL (\$15,000 fee—potential liability up to \$75,000), TN, WY (if result is confirmed)
Bond required from initiator in event outcome does not change	AZ, CT, DE, IA, KS, MN, MO, NE, OH, OK, PA, UT

Rights of Appeal

The process for appealing recount and contest decisions also varies widely. Generally, if a state lacks a separate contest procedure, a petitioner can appeal the final recount determination to state court. In the interest of expedition, recount decisions are generally not appealable when there exists a separate contest proceeding.

Contests conducted in court are generally appealable to the next highest court.

Recounts

To courts	AK, CO (for local elections/ballot measures), ID (within 24 hours of recount), ME (if disputed ballots sufficient to effect result, Secretary of State shall forward ballots to Supreme Judicial Court for determination), MD, NM, SD, WI
To legislature	AK
To Secretary of State	CO (for state elections)
Citizen-suit enforcement of election procedures	MD (court may declare election void or order other relief)

Contests

Higher courts	AR, CA, CT, GA, IL, KS, LA, MN, NJ, NM, NC, ND, OH, OR, PA, TN, TX, UT, WA. MO & NE (except from legislative hearing)
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Variations: Specific States

We offer a series of comments on specific states, less to establish a typology of approaches than to illustrate more concretely the differences among them. We do not believe that a model can be found in any one state, in the sense of an ideal type, but a model might be constructed from the different parts of several states' codes to reflect the best practices currently in place.

One additional note of caution, rooted in the experience of practitioners. Recount and contest statutes, particularly the former, typically work as well as the good faith and competence with which they are administered—and no more. Washington State, for example, was widely lauded last year for a United States Senate recount conducted for the most part free of complaints about fairness or impartiality. The Washington Code discussed below is constructed adequately in most respects. But more important to the successful outcome was (1) an administrative structure and staff that commanded respect and (2) an expectation within the state that the candidates and parties would not, without reason, fail to exhibit that same respect in their own legal and public responses to the recount.

Alaska

Alaska allows for recounts to be initiated by candidates or by 10 voters, and it mandates recounts where the margin of victory is .5% or 20 votes or less. One of its unusual features is a provision allowing formal participation by “organized groups,” as well as by candidates and political parties. Also of interest is the provision that requires the state to pay for the recount not only when the result changes (which is typical), but also if the applicant’s vote increases by 4% or more, even if the outcome does not change. Timelines for the conduct of the recount are tight: the recount must be completed within ten days, and an appeal to the courts, if any, must occur within five days thereafter. A court hearing an appeal must review all of the ballots in the election, not only a disputed subset.

California

Detailed provisions for the conduct of recounts in California include some of interest, particularly as they affect the right of voters seeking recounts to specify how they should be conducted. Any voter may ask for a recount, and the statute is clear that this right applies to federal offices and to the election of slates of presidential electors. For statewide elections, the Secretary of State may also ask for a recount but only within 5 days of the 29th day after the election.

For a statewide race, the initiator may seek a recount of all counties and may specify the order in which they will be counted. Where punch cards or computer systems are used, the initiator may specify either a manual or machine recount and may also request a recount of all ballots “whether voted or not.” Ballots may be challenged for “incompleteness, ambiguity or other defects.”

Florida

Attention has been paid to the recently enacted reforms in Florida, which include new requirements for the approval of electronic or electro-mechanical machines. The state also amended its recount procedures, providing that counties must direct machine recounts where the margin of victory is .5% or less and requiring that they be completed by the second day after the election. If the machine recount shows a difference of .25% or less, then a manual recount of undervotes and overvotes is required “in the entire geographic jurisdiction of such office....” Where the difference lies between .25% and .5%, the candidate is “entitled” to a manual recount if timely requested (by 5:00 p.m. of the second day after the election).

Florida also made changes to its counting rules, requiring that a vote be counted where there is a “clear indication...that the voter has made a definite choice.” The Department of State is charged with implementing this mandate with further rules, but it is enjoined from resorting to vague formulations, such as “catch-all provisions” that state, tautologically, that a vote is “any other mark or indication clearly indicating that the voter has made a definite choice.” The Department may also not promulgate a rule relying exclusively on the question of whether the voter “properly” marked the ballot.

Florida also made changes to its contest provisions, deleting certain open-ended language on the grounds for contests and the authority of the courts in disposing of them. The law had previously allowed for contestants to allege “[a]ny other cause or allegation” that the certified outcome was wrong, and this language was deleted in the recently enacted reform. Also courts considering a contest could “fashion such orders” as necessary to investigate each allegation, to “prevent or correct any alleged wrong,” or to “provide any relief appropriate.”

Michigan

Michigan offers considerable detail in the construction of its recount provisions. Of some interest are provisions intended to provide for “speedy and efficient means for the preservation of evidence of the intention of voters” in United States Senate and House elections. Recounts are provided for automatically in statewide elections when the margin of victory is 2000 votes or less. In all other instances, a recount may be ordered on the petition of a candidate, but only upon pleading fraud or mistake within 48 hours of an election. In addition to detailed pleading requirements, the Code provides clear timetables for notices to candidates and for hearings. The State Board of Canvassers, the administrative body which manages recounts, has broad investigative powers, including subpoena power, “in all matters relating” to the recount, and the power to make rules and regulations. The statute reflects an overall policy favoring uniformity, as well as fairness and impartiality, in the recount process.

New Hampshire

New Hampshire offers an example of an anomaly on one important issue. Its contest provisions do not appear to apply to federal elections. As noted, this may be a function of state deference to the constitutional process under which a “contest” may be brought directly to the U.S. House or Senate. In any event, the state provides at the same time for a specific process for the “resolution of ties” for U.S. Senate and House races.

Washington State

Washington State provides clearly in its recount process for federal candidates, who may file for recounts with the Secretary of State. The state has structured a two-tiered “mandatory” process. One applies where the margin of victory is less than .5%. The other, when the margin is still less--under .25% and fewer than 150 votes--calls for a full manual recount. Candidates, however, may agree on alternatives to the manual

process, if it is appropriate to the balloting system used and also involves the use of a vote tallying system. The Code also contains a provision allowing for no more than two recounts of the vote in any county, reflecting a statutory policy favoring “closure to the recount process.”

Contests in Washington are available upon petition by registered voters who must plead by affidavit “particular causes.” Grounds include official misconduct, bribes paid to voters or election officials, and illegal votes, and the asserted irregularity must be material. An illegal vote does not include a vote by an “improperly registered” voter who was not challenged in the first instance as authorized by law.

Concluding Comments

This survey is intended to provide only an overview of variations in state codes, with attention to basic issues and some of the more significant differences in approach. Many codes are remarkably similar in a number of respects—for example, the circumstances in which a mandatory recount is provided (where the margin is .5% or less) or the grounds for a contest. The differences reside in factors such as

- Detail or comprehensiveness on process, pleading requirements, and the like
- Clarity and internal consistency
- Reasonableness of timeframes, balancing the need for “closure” against the imperatives of accuracy and fairness
- Discretion afforded election officials and reviewing courts, and related coherence of the case law construing that discretion.

It is also true that to understand the state legal structures for recounts and contests in their entirety, attention must also be paid to administrative rules and judicial decisions, which this analysis has not focused on. One important and related question facing a legislature in considering its code is a basic one of responsibility—how much may the code reasonably prescribe, and where does the discretion of the courts and election administrators lie? This is a fundamental question with broad implications for democratic practice and for public acceptance of the outcome.

XIII.

CONGRESSIONAL AUTHORITY
TO REGULATE WHEN VOTES
CAN BE COUNTED

CONGRESSIONAL AUTHORITY TO REGULATE WHEN VOTES CAN BE COUNTED

MEMORANDUM

To: National Commission on Federal Election Reform
From: Daniel Ortiz, Coordinator, Task Force on Legal and Constitutional Issues
Re: Congressional Authority to Regulate When Presidential Votes Can Be Counted
Date: June 28, 2001

Can Congress prevent the states from counting presidential votes before a certain time?

Yes, Congress can regulate the time when the states can count presidential votes. Although Congress very likely has the power to regulate the time of counting presidential votes directly, it certainly can regulate the timing indirectly through its power to regulate the time of counting congressional ballots and its power to attach conditions to any federal election spending.

Until last year, it was clear that Congress had very broad power to regulate presidential elections directly. In *Burroughs v. United States*, for example, the Supreme Court rejected the view that Article I, section 2's explicit grant of power to Congress to "determine the Time of chusing the Elector[s] and the Day on which they shall give their Votes" excluded other powers not mentioned. 290 U.S. 534, 544 (1934)("So narrow a view of the powers of Congress in respect of the matter is without warrant."). In particular, the Supreme Court held, Congress could regulate the process of selecting presidential electors in order to prevent violence, fraud, and corruption:

While presidential electors are not officers or agents of the federal government . . . , they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. 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.

Id. at 545; *accord Ex parte Yarbrough*, 110 U.S. 651, 657-58 (1884)("That a government whose essential character is republican, whose executive head and legislative body are both elective . . . 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."). Thus, it was settled law that Congress could legislate somewhat beyond setting the time of choosing electors and the day on which the Electoral College would vote. Under this broad view, Congress would almost certainly have the power to prevent the states from counting presidential votes before a certain time, particularly if its aim was to protect the integrity of the electoral process in western states.

Last year, however, in *Bush v. Palm Beach County Canvassing Board*, 121 S.Ct. 471 (2000)(per curiam)(*Bush I*), and *Bush v. Gore*, 121 S.Ct. 525 (2000)(per curiam)(*Bush II*), the Court suggested that Congress's power might not be so broad. In *Bush I*, the Florida Supreme Court had ordered Florida's Secretary of State to accept the results of recounts that she believed too late under Florida law. In reaching its conclusion that the Florida statutes required the Secretary to accept these recount results, the Florida Supreme Court "relied in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution . . ." *Bush I*, 121 S.Ct. at 473. The United States Supreme Court found this reliance extremely troubling. Believing that Article II, section 1 might not allow the state constitution to circumscribe the legislative power in this way, it unanimously remanded the case back to the Florida Supreme Court for a clarification of the basis of its decision. It avoided deciding this issue until it was sure the Florida Supreme Court's ruling presented it.

When the case returned as *Bush II*, seven individual justices decided the issue. Four justices explicitly decided that a state constitution *could* limit a state legislature's power to select presidential electors, 121 S.Ct. at 539 (Stevens, J., dissenting)(Ginsburg and Breyer, JJ., joining)("[Article II, section 1] does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions."); *id.* at 549 (Ginsburg, J., dissenting)(Stevens, Souter, and Breyer,

JJ., joining) (“a State may organize itself as it sees fit”); *id.* at 552 (Breyer, J., dissenting)(Stevens, Ginsburg, and Souter, JJ., joining)(“[N]either the text of Article II itself nor the only case ... that interprets Article II ... leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors.”); three justices explicitly indicated a state constitution *could not* limit this power, *id.* at 534 (Rehnquist, C.J., concurring)(Scalia and Thomas, JJ., joining)(“Art. II, § 1, cl. 2 ... conveys the broadest powers of determination and leaves it to the legislature exclusively to define the method of appointment.”)(internal quotation marks and citations omitted); while two justices were silent on the issue. In short, the litigation over the presidential election created doubt where none existed before. The extent to which a state legislature’s power over the selection of presidential electors can be controlled is now somewhat unsettled. Although *Bush I* and *Bush II* specifically raised the issue only of whether a state constitution could circumscribe this power, their outcome raises even more doubt about Congress’s authority to circumscribe it. If, as at least three justices believe, a state constitution—the law that defines the state’s fundamental political organization—cannot circumscribe a state legislature’s power to appoint electors, then *a fortiori* the United States Congress should not be able to.

Even under this narrow view, however, Article II, section 1 likely gives Congress the power to set the time when presidential votes should be counted. The section expressly grants Congress two powers: the power to determine (i) the time of “choosing” electors and (ii) the day the electors should cast their votes. Although there is no judicial precedent even remotely on point and no helpful legislative history, the commonsense (“plain”) meaning of “choosing” strongly argues in favor of Congress having this power. In ordinary speech, we clearly use “choosing” to refer to the casting of votes but we just as clearly use it sometimes to include their counting as well. In fact, we often go further to use the term to include not only the casting and counting of ballots, but also the announcement of the results. We do not, for example, say that the Academy of Motion Picture Arts and Sciences has chosen its Academy Award winners when just the voting is complete or even when the accountants have counted the ballots, but only later when the results are publicly announced. In politics, moreover, the winners are not chosen until any post-election contests are over. Thus, any prior phase of the election that bears on the ultimate choice should be considered part of the “choosing” as well. For these reasons, Congress’s express power to determine the time of choosing of electors should encompass setting the time when presidential ballots can be counted.

Even if Congress cannot directly regulate the timing of counting presidential ballots, however, it can certainly regulate their counting indirectly by regulating the time of counting congressional ballots in the same election. Under the Elections Clause, Congress has plenary power to regulate the “times, places, and manner” of congressional elections. In its most recent decision discussing this clause, the Supreme Court stated that “in our commonsense view [the] term [‘Manner of holding Elections’] encompasses matters like ‘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.’” *Cook v. Gralike*, 121 S. Ct. 1029, 1038 (2001)(quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The term certainly sweeps broadly enough to encompass the time of counting of votes for a congressional election. And since presidential elections are held at the same time as congressional elections, barring the states from counting or handling congressional ballots or machinery until a certain time would effectively stop them from counting presidential ballots as well—at least with respect to most existing voting technologies.

Congress could also condition the receipt of any federal funds related to elections upon state agreement not to count presidential votes until a certain time. In *South Dakota v. Dole*, the Supreme Court identified three key limitations on the scope of the spending power: (i) the exercise of the spending power must be in pursuit of “the general welfare”; (ii) the congressional regulation must be unambiguous so that states understand the choice they are making in agreeing to receive the funds; and (iii) the conditions on the federal funds must be related to the purposes of the federal spending. 483 U.S. 203, 207 (1987). A congressional grant of funds for the states to improve their voting technologies, poll worker training, or voter education would certainly be in pursuit of the general welfare. And Congress could easily make unambiguous the condition that presidential votes not be counted before a certain time. That would be a simple matter of legislative drafting. Such a condition would also be related to the purposes of the federal spending. Both aim to improve the election process. In sum, the spending power certainly allows Congress to lay down this condition for the states to receive federal election funds.

Nothing, of course, requires the states to accept the federal bargain. They can, if they want, simply walk away from the offer. And, for those that do, Congress’s condition has no bite. They can continue to count presidential votes whenever they want. The effectiveness of the spending power, then, depends not so much on Congress’s constitutional authority as on the attractiveness of the overall bargain it proposes.

Although Congress clearly has the power to set the time of counting presidential votes—either directly or indirectly—one small issue remains. Would Congress’s exercise of this authority in order to prevent media from forecasting results in some states before polls had closed in others violate the First Amendment? The answer is no. Although the First Amendment grants great protection to the press once it has acquired information, it gives the press little right against the government to provide it with information it does not make available generally. *Pell v. Pecunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). In particular, no case has ever held that the First Amendment requires the government to structure activities other than trials in such a way as to generate information for the press. Without such a right, there is no first amendment claim here.