Introduction

The Lost Story of Federal Voting Rights Enforcement

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

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

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

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

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

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

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

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

[2] Ibid.

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

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

[5] Ibid.

[6] Ibid.

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

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

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

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

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

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

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

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

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

10 Ibid., p. 32.

11 Ibid., p. 22.

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

13 Ibid., p. 36.

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

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

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

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

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

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

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

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

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

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

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

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

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

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

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

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

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

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

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

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

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

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

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

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

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

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

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

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

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

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

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

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

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

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

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

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

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

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

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

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

[29] Ibid., p. 186.

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

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

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

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

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

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

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

Ibid., 196.

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

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

[35] Ibid.

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

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

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

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

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

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

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

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

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

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

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

[42] Ibid., 1.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

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

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

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

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

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

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

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

Congress should utilize the full scope of congressional power moving forward, particularly in light of recent proposals to shift significant authority over elections back to the states.[47]

In Congress We Trust? provides historical and theoretical grounding for these debates, offering an important and timely clarification about the scope of federal power over elections. In recent years, a more diverse and representative Congress began to rediscover the breadth of its constitutional powers, drawing on long-overlooked provisions and underused authority in an effort to safeguard the nation's electoral system. For a time, this marked a quiet but meaningful departure from the institutional reluctance that had long characterized legislative oversight of elections. Yet the aftermath of the 2024 election has complicated this trajectory. Faced with renewed political pressures while demonstrating inexplicable deference to its sister branches, Congress has grown more cautious once again, hesitant to assert its constitutional prerogatives with the same vigor, or alternatively, acting in ways that are contrary to is constitutional role.[48] Updating our understanding of this shifting dynamic is not only timely but essential, as it reflects the evolving institutional position of Congress in defending the foundations of American democracy.

This book offers a blueprint for policymakers, serving as a reminder that congressional authority over election regulation surpasses that of the states in more instances than is commonly known. As illustrated by Alabama's hotly disputed congressional election at issue in *Smith v. Shelley*, Congress has pursued election reform not only through the widely known Reconstruction Amendments, but also through the comparatively obscure structural provisions that are the focus of this book.

The book will also appeal to courts and commentators struggling to understand how the United States can implement a system of elections that is as accessible and inclusive as the Constitution theoretically permits. A progressive election system is possible because Congress is a co-equal branch of government with the Supreme Court.

2022, www.nytimes.com/2022/01/18/us/politics/senate-voting-rights-debate.html [https://perma.cc/2MD4-6TRW]. After Senate Republicans filibustered the bill, Joe Manchin and another Senate Democrat (now Independent), Kristen Sinema, joined with the 50 Republicans to reject a voting-related carve-out to the filibuster that would have allowed the bill to proceed. Li Zhou, "Democrats' Failure on Filibuster Reform Will Haunt Them," *Vox*, January 19, 2022, www.vox.com/2022/1/19/22881837/senate-filibuster-vote-voting-rights-joe-manchin-kyrsten-sinema [https://perma.cc/V5B9-E6KP]. At the time that this book went to press, the failure to reform the filibuster allowed these fifty-two Senators to prevent a final vote on the bill, effectively eliminating its chances of passage.

47 The Leadership Conference, "Project 2025: What's at Stake for Voting Rights," August 2024, https://civilrights.org/wp-content/uploads/2024/08/Project-2025-Voting-Rights.pdf.

48 See Franita Tolson, "Whose Congress Is This, Anyway? Some Thoughts on the Constitutionality of the SAVE Act," *Democracy Project*, February 4, 2026, https://democracyproject.org/posts/whose-congress-is-this-anyway-some-thoughts-on-the-constitutionality-of-the-save-act (arguing that the proposed SAVE Act, which would disenfranchise thousands through its requirement of documentary proof of citizenship to vote in federal elections, is unconstitutional because Congress does not have "the authority to impose federal rules that violate the principles of republicanism that Congress [under the Guarantee Clause] is constitutionally obligated to protect").

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

Not only is Congress tasked with protecting the right to vote from undue encroachment by the states, but Congress has also historically played a role in interpreting the scope of its own authority independent of the courts.[49] In ignoring that Congress regulates at the intersection of structure *and* rights rather than just structure *or* rights, the case law and the scholarly literature have promoted a state-centered vision of our electoral system that more adequately reflects Madison's original Constitution of 1789 rather than the Constitution that emerged, redefined for a new era, after the ratification of the Twelfth, Thirteenth, Fourteenth and Fifteenth Amendments.

Congress's deference to, and tacit endorsement of, the Madisonian conception is not surprising given the Supreme Court's pronouncement over two centuries ago, in *Marbury v. Madison*, that, "It is emphatically the province and duty of the judicial department to say what the law is."[50] Some scholars have rejected *Marbury*'s core tenet, shifting attention to the nonjudicial actors whose behavior also bear on constitutional meaning.[51] Mark Tushnet, for example, has argued that judicial supremacy is not (and indeed cannot) be absolute, despite the Supreme Court's assertions to the contrary, because implementation of the Court's dictates by nonjudicial actors has just as much import for constitutional meaning as the judicial opinion itself.[52]

[49] Compare Gregory Ablasky, "Beyond the Indian Commerce Clause" (2015) 124 *Yale Law Journal* 1012–90 (detailing how constitutional understandings of federal authority over Indian affairs developed over time outside of the courts); Vicki C. Jackson, "Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy" (2016) 57 *William & Mary Law Review* 1717–1788 (describing the normative role of elected officials in Congress as "advanc[ing] the purposes of constitutional democracy within their own constitutional system" in ways that include, but are not limited to, constitutional and statutory interpretation).

[50] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[51] See, e.g., Joshua A. Chafetz, *Congress's Constitution: Legislative Authority and Separation of Powers* (New Haven: Yale University Press, 2017) (detailing the power that Congress has, beyond its lawmaking authority, that allow it to assert its authority vis a vis the other branches); Jerry Mashaw, "Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective" (2011) 32 *Cardozo Law Review* 2241–2254 (discussing how it would be beneficial, for the purposes of the separation of powers, for Congress, rather than the courts themselves, to establish the parameters of judicial review of executive agency actions); Bertrall L. Ross II, "Against Constitutional Mainstreaming" (2011) 78 *University of Chicago Law Review* 1203–62 (arguing against the constitutional validity of the Supreme Court's practice of "constitutional mainstreaming," in which the Court interprets statutes "as a superlegislature … in accordance with the constitutional values it prizes," rather than interpreting them in accordance with congressional intent as indicated in subsequent legislative enactments); Anne J. O'Connell, "Agency Rulemaking and Political Transitions" (2011) *Northwestern University Law Review* 471–534 (arguing that courts should take political transitions in consideration when reviewing agency rules); Louis Fisher, "The Curious Belief in Judicial Supremacy" (1991) 25 *Suffolk University Law Review* 85–116, 87 (arguing that a model of constitutional interpretation "in which all three branches … insist[] on independent construction" is superior to the emergent "unrealistic expectation that the Supreme Court can resolve every constitutional dispute that comes its way").

[52] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999), pp. 154, 169, 227 (distinguishing between the "thick" constitution, which are the "detailed provisions describing how the government is to be organized" and the "thin" constitution that elevates broad principles such as equality and liberty and arguing that disagreement about the meaning of the "thin" constitution is best conducted by the people, not the courts).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

In Congress We Trust? joins this debate and centers Congress as a consequential, nonjudicial actor in the interpretation of constitutional provisions that regulate voting and elections. Seeking to clarify the historical record, this book describes the constitutional and political evolution of congressional power, from an unduly narrow and sparsely used version of federal authority to regulate elections in the early decades of the Founding to one in which federal power was exercised liberally and in the aggregate, deriving from multiple constitutional provisions, during the Reconstruction period. The book concludes by detailing Congress's retreat – sparked by politics, not law – from exercising this broad authority in the late nineteenth and early twentieth centuries, a retreat that has spearheaded a federalism narrative in which the states, rather than Congress, are generally sovereign over the regulation of all elections.

Before the Civil War, Congress already possessed broad authority to regulate voting and elections through the Constitution of Political Structure. This authority was – importantly – unconstrained by federalism and substantially increased with the ratification of the Reconstruction Amendments, enhancing Congress's institutional role relative to the courts and the states. By expanding the Constitution of Political Structure and altering the Constitution of Political Rights, these Amendments shifted significant authority to protect voting rights from the states to Congress, merging the natural right to alter or abolish government with the right to vote. No longer just a privilege granted by states or constrained by courts, voting became a right that Congress had a constitutional duty to protect – broadly, affirmatively, and with significantly less deference to judicially defined parameters that narrowly confined Congress's enforcement authority to "appropriate legislation."

Focusing on the evolution of congressional power through the Constitutions of Political Structure and Political Rights reveals a larger story about the creation and death of the political norms that govern our system of elections. Through this lens, the book explores the role of politics and partisanship in shaping the boundaries of federal power over elections. The Supreme Court currently views principles of federalism as the main constraint on federal power over elections, but *In Congress We Trust?* marshals significant historical evidence that Congress's decision whether to adhere to federalism norms, particularly when enforcing the Constitution of Political Structure, was significantly shaped and influenced by partisan considerations. In other words, Congress had broad authority to regulate elections pre–Civil War, but political norms dictated that it act with caution and restraint. Operating under the label of federalism, Congress followed these norms until it became politically inconvenient to do so. The dispute over the 1842 Apportionment Act[53] and the events surrounding the Kansas–Nebraska Act[54] are two notable examples discussed

[53] An Act for the Apportionment of Representation Among the Several States According to the Sixth Census (Apportionment Act of 1842), ch. 47, 5 Stat. 491 (1842).

[54] An Act to Organize the Territories of Nebraska and Kansas, ch. 59, 10 Stat. 277 (1854).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

in these pages that illustrate the ease with which these federalism norms were disregarded in the face of partisan politics.

The norms surrounding the Constitution of Political Rights similarly reveal a complicated story about federal power over elections and the need to limit the natural right to alter or abolish government to prevent societal upheaval. Premised on the idea that the people exercise collective sovereignty, the right of the people to alter or abolish government flourished during the country's first few decades. As scholars such as Akhil Amar and Christian Fritz have argued, this authority operated independently of official mechanisms of constitutional amendment provided by state constitutions and through the Article V amendment process.[55] The right was long revered as a justification for breaking from unruly monarchs and, perversely, as a defense for a narrowly defined electorate since people retained this political right even if they could not vote.

Larry Kramer, for example, has pointed to alter or abolish (or as he terms it, "constitutional mob action") as a form of popular constitutionalism that negates the need for the robust judicial review that we have today.[56] Historically, the people engaged in constitutional amendment and interpretation in their day-to-day practices. These practices manifested through implementation of state and federal constitutional provisions and in the creation of new precedents (which extended to the outright rejection of unconstitutional laws).[57] On this view, the people, as the governed, were tasked with the ultimate responsibility of determining the legality of official action.[58]

[55] See Akhil R. Amar, "The Consent of the Governed: Constitutional Amendment Outside Article V" (1994) 94 *Columbia Law Review* 457–508, 458; Christian G. Fritz, "Recovering the Lost Worlds of America's Written Constitutions" (2005) 68 *Alabama Law Review* 261–293, 268. See also Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition before the Civil War* (Cambridge: Cambridge University Press, 2009).

[56] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), pp. 24–28 (noting that the people resisted unconstitutional laws through voting, petitioning the government, speaking out in public meetings, boycotts, and finally, constitutional "mob" action that Kramer referred to as "a direct expression of popular sovereignty").

[57] Ibid., Chapter 1 (discussing the founding era understanding of fundamental law as based in part on the British notion of a customary constitution that can improve without changing, modified by usage and prevailing standards). The American constitutional tradition has long been one in which the people, as sovereigns, have resisted laws that they believed to be unjust or unconstitutional. See, e.g., Allison LaCroix, *The Interbellum Constitution: Union, Commerce, and Slavery in the Age of Federalisms* (New Haven: Yale University Press, 2024), pp. 384–409 (discussing the case of Joshua Glover and Wisconsin residents' opposition to the Fugitive Slave Act). Other examples include the people's resistance to the Stamp Act, which provided a basis for the Anti-Federalists to advocate for the protection of the rights to assemble and petition that would ultimately be enshrined in the First Amendment; popular resistance to Prohibition and the Eighteenth Amendment, ultimately leading to its formal repeal in 1933; the boycotts, protests, and noncompliance central to the Civil Rights Movement, which resulted in the passage of a number of federal statutes and constitutional provisions in the 1960s; and opposition to the Vietnam War, which triggered large scale noncompliance and public protests in the 1960s and 1970s and eventually led to the informal demise of the draft.

[58] Kramer, *The People Themselves*, p. 24 ("The community itself had both a right and a responsibility to act when the ordinary legal process failed, and unconstitutional laws could be resisted by community members who continued to profess loyalty to the government and to follow its other laws.").

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

Contrary to these longstanding political norms, however, invocations of the right to alter or abolish government were rarely respected when politics made adhering to the norm impossible. Domestic uprisings such as the Whiskey Rebellion,[59] Shays' Rebellion,[60] the Dorr Rebellion,[61] and finally, the rise of the Confederacy, would challenge the reverence previously enjoyed by the right to alter or abolish government. This breakdown of norms proved that institutional actors like Congress had to help American Democracy because its excesses, particularly in the case of the Confederacy, were real and not imagined. As some scholars have noted,[62] Reconstruction was indeed the second founding, necessitating the creation of a new legal and political framework to: (a) mitigate the right to alter or abolish

[59] In response to a federal excise tax on whiskey enacted by Congress in 1791, after several years of muted protests, Anti-Federalist farmers in western Pennsylvania who were opposed to the tax converged on Pittsburgh and engaged in a violent "insurrection," which the federal government quelled by sending in a multi-state militia. Saul Cornell, *Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788–1828* (Chapel Hill: University of North Carolina Press, 1999), p. 195.

[60] Shays' Rebellion took place in Massachusetts during the winter of 1786–87, when an insurgent militia, angered by high taxes and debt-collection enforcement, attacked Massachusetts government institutions. Richard D. Brown, "Shays' Rebellion and the Ratification of the Federal Constitution in Massachusetts," in Richard Beeman, Stephen Botein, and Edward C. Carter II (eds.), *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press, 1987), p. 115. The government responded by not only violently suppressing the rebellion and suspending laws that guaranteed civil rights, but also by barring some members of the "Shaysite army" from voting in the state's 1787 gubernatorial election. Ibid., pp. 116–19. Many citizens who did not consider themselves Shaysites viewed this action by the government, which was spearheaded by Governor James Bowdoin, as a clear misuse of government power, and it cost Bowdoin his reelection to the governorship. Ibid., pp. 119–121.

[61] The Dorr Rebellion took root in 1842, when the state of Rhode Island effectively had two governments. Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878* (Washington, D.C.: Center of Military History, U.S. Army, 1988), pp. 119–120. One was the "Charter" government, organized under the state's original charter, under which the only people who were permitted to vote were "freeholders" who held property and their oldest sons. Ibid., p. 120. The other government was established by reformists referred to as "suffragists," who found the voting rights regime under the Charter to be inequitable. Ibid. The latter group became known as "Dorrites" after Thomas Wilson Dorr was elected its governor. Ibid., p. 122. The Dorrites found enough support that the Charter government's governor made multiple requests to the federal government for military assistance. Ibid., pp. 120–123. Although the Dorrites were able to assemble some armed forces, they were no match for the Charter government's militia. Ibid., pp. 123–125. Dorr was eventually convicted of treason, sentenced to life in prison, and pardoned after a year. Ibid., pp. 125. However, the rebellion he led did eventually yield his desired result: by November 1842 the state of Rhode Island had a new constitution "providing for practically universal manhood suffrage." Ibid.

[62] Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York: W.W. Norton & Company, 2019); Kermit Roosevelt III, "Reconstruction as Revolution: The Fourteenth Amendment and the Destruction of Founding America" (2023) 25 *University of Pennsylvania Journal of Constitutional Law* 1073–1096. See also Kermit Roosevelt III and Kellen McCoy, "Second Founding, Second Redemption" (2024) 26 *University of Pennsylvania Journal of Constitutional Law* 1369–1423 (describing *Students for Fair Admissions v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023), the decision striking down affirmative action in higher education, as one in which the Supreme Court, ironically embraced the reference to Reconstruction as a "Second Founding").

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

government; (b) recognize African Americans as full participants in the political community; and (c) expand Congress's power over elections and the right to vote. However, the scholarship has not fully assessed how this chapter in our history demonstrated the breadth of federal power over elections, through constitutional provisions (both new and old), in response to an ever-changing political situation. This gap in the literature has likewise affected Congress's willingness to exercise the full scope of its authority, with that body needlessly ceding constitutional ground to the Court based on a false federalism narrative.

I.2 CONGRESS, THE COURTS, AND THE DANGERS OF A CLAUSE-BOUND INTERPRETIVISM

In the nineteenth century, New Orleans was known – not for its amazing cuisine, vibrant musical culture, and amazing nightlife – but rather, for its public health crisis, a reputation earned in part from how butchers in the city mishandled meat with poor waste disposal, lack of refrigeration, and unhealthy conditions. The stench that came from animal carcasses tossed in the street unfortunately defined the city more than Mardi Gras, its second line brass bands, and its elaborate parades.[63] By centralizing all slaughtering in a single location, New Orleans tried to address the rise of cholera and yellow fever among its inhabitants, but it unwittingly gave rise to the first case to test the boundaries of the recently ratified Fourteenth Amendment.[64] A group of butchers filed suit, claiming that the 1869 New Orleans law that created a slaughterhouse monopoly violated their economic rights in violation of the Privileges or Immunities Clause of the Fourteenth Amendment.[65]

In ruling against the butchers, the Supreme Court held that the Privileges or Immunities Clause did not protect economic rights, but only a narrowly defined category of federal rights (such as the right to interstate travel, the right to access the federal courts, and the right to sail the high seas).[66] As the dissenters in the case argued, this interpretation of the Clause – to protect rights already guaranteed elsewhere in the Constitution – rendered the Privileges or Immunities Clause "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[67]

[63] See Jonathan Lurie and Ronald M. Labbe, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (Lawrence: University Press of Kansas, 2005), pp. 25–26 ("In New Orleans, animals were routinely herded through the streets. Slaughtering sometimes took place out in the open within sight of the public. Carts loaded with slaughterhouse waste were driving, leaking and reeking, through the streets to 'nuisance wharves,' where the waste was supposed to be dumped into the river. But much of it was simply discarded into the streets and gutters or left to rot and fester in butchers' backyards.").

[64] Ibid., p. 47 ("An Act to Protect the Health of the City of New Orleans, and to Locate the Stock Landings and Slaughter Houses").

[65] Ibid., p. 71.

[66] *Slaughter-House Cases*, 83 U.S. 36, 79 (1872).

[67] Ibid., 96 (Field, J., dissenting).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

The *Slaughter-House Cases* have been widely reviled by commentators, particularly those who point to the case as the explanation for why the Due Process Clause of the Fourteenth Amendment has, in the last century, uncomfortably become a source of implied fundamental rights that were arguably meant to be protected by the Privileges or Immunities Clause.[68] At the heart of *Slaughter-House* lies a deeper problem, however: the danger of interpreting a constitutional provision in isolation, disconnected from adjacent clauses that shape and inform its meaning. That kind of clause-bound formalism not only narrows the universe of protected rights,[69] it also narrows the scope of institutional power to enforce them. While *Slaughter-House* is often invoked as a cautionary tale about the judicial contraction of individual rights, Congress, too, has sometimes succumbed to a similarly restrictive interpretive approach. By treating its own enforcement powers under the Reconstruction Amendments as more limited than the Constitution arguably requires, Congress has often reinforced the very constraints that decisions like *Slaughter-House* put in motion.

The irony is striking. When Congress adopts the Supreme Court's clause-bound methodology – narrowly grounding its legislative authority in a single constitutional provision as it did with H.R. 1 – that body often finds its efforts deemed

[68] See John H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), p. 18 (arguing that "'substantive due process' is a contradiction in terms – sort of like 'green pastel redness.' One might assume that this doesn't matter, that it is revisionism for the sheer hell of it, since I've advertised that the Fourteenth Amendment does contain provisions – notably the Privileges or Immunities Clause … that contain the sort of invitation to substantive oversight that the Due Process Clause turns out to lack."). See also Akhil R. Amar, "Forward: The Document and the Doctrine" (2000) 114 *Harvard Law Review* 26–134, 123 ("Does a documentarian gain anything by changing the label on the lid of the black box of unenumerated rights from 'substantive due process' to 'privileges or immunities of citizens?' Perhaps a little. Because the very phrase 'substantive due process' teeters on self-contradiction, it provides neither a sound starting point nor a directional push to proper legal analysis. …But given that the origins of substantive due process doctrine are not particularly admirable – Dred Scott and Lochner haunt this swamp – perhaps we can do better."). But see Jamal Green, "Constitutional Rhetoric" (2016) 50 *Virginia Law Review* 519–543, 532 ("While there may be a strong case against substantive due process on historical or prudential grounds, the textual case against it is remarkably weak.").

[69] My references to "clause-bound formalism" or "clause-bound methodology" should be distinguished from John Hart Ely's invocation, and criticism of, a "clause-bound interpretivism" that is limited to the written constitution and ignorant of any norms that cannot be traced to the document. See Ely, *Democracy and Distrust*, pp. 11–42 (cautioning against a "clause-bound interpretivism"). My use of this term is slightly different – where courts interpret a constitutional provision in isolation from any other provisions of the written constitution that may bear on its meaning as well as any norms relevant to the text. While this book does not focus exclusively (or primarily) on the courts, per se, my view of congressional power would lend itself to an interpretive approach that expands on Akhil Amar's theory of intratextualism. See Akhil Amar, "Intratexualism" (1999) 112 *Harvard Law Review* 747–827. While Amar focuses on like words or phrases within the document, I would expand this approach to advocate for assessing the meaning of related constitutional provisions as a collective rather than treating each provision independent and assigning meaning within an interpretive vacuum. See Tolson, "Constitutional Structure of Voting Rights Enforcement," 379–439 (applying intratextualism to advocate for a judicial interpretation of the Elections Clause and the Fourteenth and Fifteenth Amendments that is coherent and internally consistent).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

constitutionally suspect by the very Court it emulates. For decades, the Court has misconstrued the overlapping (and sometimes conflicting) authority over elections that Congress shares with the states.[70] Retracing the path set by the *Slaughter-House Cases*, the Court has embraced an increasingly rigid view of federal power – one that prioritizes structural federalism over substantive rights.

Foreshadowing the key points against H.R. 1 in the Heritage Report, the Court's decision in *Shelby County v. Holder* has the dubious honor of undermining a federal statute that has long protected the right to vote while simultaneously circumscribing Congress's enforcement authority under the Fourteenth and Fifteenth Amendments on federalism grounds.[71] In *Shelby County*, the Court invalidated the coverage formula of Section 4(b) of the Voting Rights Act, which required those jurisdictions with a history of race-based discrimination in voting to preclear all changes to their election laws with the federal government. Because the formula used forty-year-old data to single out certain jurisdictions for federal preclearance, but not others that might have acted illegally, the Court held that this provision violated the "equal sovereignty" of the states.[72] Since the coverage formula did not account for the decrease in racial discrimination in voting in covered jurisdictions over the last three decades, the Court insinuated that the formula impermissibly gave minority groups a political advantage over the majority at the expense of state sovereignty.[73] In framing the challenge to the Voting Rights Act as a false choice between safeguarding federalism and protecting minority voting rights, the Court's attempt to strike a balance between these principles has led to a jurisprudence that is inconsistent, insufficiently protective of voting rights, and overvalues state sovereignty over elections.[74]

The Court has taken a similar approach with legislative redistricting. The false dichotomy between expansive voting rights and state sovereignty has breathed new life into racial gerrymandering claims,[75] where the Court has struggled to balance the sometimes conflicting obligations that state legislatures have under state and federal law to ensure that minorities can elect their candidate of choice. But the Court has

[70] Compare *Shelby County v. Holder*, 570 U.S. 529 (2013) with *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

[71] *Shelby County v. Holder*, 570 U.S. 529 (2013). See also Guy-Uriel Charles and Luis Fuentes-Rohwer, "The Voting Rights Act in Winter: The Death of a Superstatute" (2015) 100 *Iowa Law Review* 1389–1439, 1391, 1421–1422. The Supreme Court's recent decision in *Louisiana v. Callais* joins *Shelby County* in effectively gutting the VRA - in this case, Section 2 of the Act. 608 U.S. __ (2026).

[72] *Shelby County*, 570 U.S. at 539–545, 555–556.

[73] Ibid., 534–535, 543–545, 556–557. This issue of segregating political losses from losses attributable to racial discrimination has long been a concern for the Court. See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

[74] See Tolson, "Reinventing Sovereignty?,"1200.

[75] See, e.g., *Cooper v. Harris*, 581 U.S. 285 (2017) (holding that North Carolina's gerrymander was based on race and, therefore, unconstitutional). But see *Alexander v. NAACP*, 602 U.S. 1 (2024) (suggesting that plaintiffs have to produce at least some direct evidence to win on racial gerrymandering claims and a purely circumstantial case would not be enough, especially if the state has a partisan defense).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

also sanctioned partisan justifications that can legitimize these same regressive and problematic plans.[76] It was once true that an excessively gerrymandered redistricting plan raised federal constitutional concerns, even if the Supreme Court doubted its ability to police them,[77] but now the Court has signaled that states enjoy unfettered authority to pursue partisan ends. The Court makes its unjustifiable deference to the states clear in a recent 2024 case, *Alexander v. NAACP*, where it asserted a presumption that the legislature acted in good faith while gerrymandering districts to harm a particular class of voters.[78] Other cases in which the Court showed undue solicitude to the states, such as those involving voter identification laws and various restrictive voting regulations,[79] illustrate that the storied position of state sovereignty as the focal point of our federalist system holds steady, even when unwarranted.[80]

The federalism narrative has persisted despite the substantial authority that Congress has under the Constitution of Political Structure to regulate federal, and to a lesser extent, state elections. Oddly enough, each of the structural provisions that are the focus of this book has made an appearance at least once in the last ten U.S. Supreme Court terms, but in most cases, for reasons other than clarifying the scope of congressional authority over voting and elections.

For example, Congress has never enforced Section 2 of the Fourteenth Amendment, but the Court has relied on its terms in analyzing the scope of Section 1 of that provision, resolving disputes over felon disenfranchisement and redistricting by reference to Section 2's text and legislative history.[81] In 2016, the Court decided *Evenwel v. Abbott*, holding that the one person, one vote rule enshrined in Section 1 of the Fourteenth Amendment did not require states to draw districts containing an equal number of voters.[82] Relying on the legislative history of Section 2, the Court argued that the framers of that Amendment rejected a standard for drawing districts based on total population. Is *Evenwel* relevant to the state's authority over

[76] See *Rucho v. Common Cause*, 588 U.S. 684 (2019) (holding that partisan gerrymandering claims present a political question and are not justiciable in federal courts). See also *Louisiana v. Callais*, 608 U.S. __ (2026).

[77] See *Vieth v. Jublierer*, 541 U.S. 267 (2004).

[78] See *Alexander v. NAACP*, 602 U.S. 1, 6 (2024) ("Legislators are almost always aware of the political ramifications of the maps they adopt, and claims that a map is unconstitutional because it was drawn to achieve a partisan end are not justiciable in federal court. Thus, as far as the Federal Constitution is concerned, a legislature may pursue partisan ends when it engages in redistricting.").

[79] See, e.g., *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (declaring that Indiana's voter ID law was valid because it furthered the state's interest in preventing election fraud).

[80] See Tolson, "Reinventing Sovereignty?" 1196–1198, 1200.

[81] *Richardson v. Ramirez*, 418 U.S. 24, 54–56 (1974), decided over four decades ago, concluded that Section 2's express exemption of disenfranchisement grounded on prior conviction of a felony meant that states do not violate the Equal Protection Clause by excluding these individuals from the franchise. *Richardson* was the blueprint for the Court's later deployment of Section 2 to torpedo the argument the redistricting had to be based on total voters.

[82] *Evenwel v. Abbott*, 578 U.S. 54, 1130–1133 (2016). But see *Reynolds v. Sims*, 377 U.S. 533, 594 (1964) (Harlan, J., dissenting) (refuting that Section 1 protects a right to vote and pointing to Section 2 as the only remedy for voting rights violations).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

redistricting and the Court's interpretation of Section 1? Yes. But is the decision central to understanding congressional power to enforce Section 2? Not so much.[83]

Article I, Section 5 – like Section 2 of the Fourteenth Amendment – has also made an appearance in the case law in the last decade, albeit for reasons other than its delegation to Congress of authority to determine who should sit within its chambers. In its 2014 decision *NLRB v. Noel Canning*, the Supreme Court invoked this clause's prohibition on either congressional chamber being able to adjourn for more than three days without the consent of the other to discern the meaning of "recess" for purposes of the Appointments Clause of Article II, Section 2.[84]

Outside of *Noel Canning*, the Court has not substantially weighed in on the scope of Article I, Section 5 in at least five decades. In the last case to do so, *Powell v. McCormick* (decided in 1969),[85] the Court held that, although Congress has authority to judge the "elections, returns, and qualifications" of its members under this provision, it could not do so in a way that adds to the qualifications for office listed in Article I, Section 2.[86] Thus, Congress could expel Adam Clayton Powell pursuant to its authority under Article I, Section 5, but it must first seat him because Congress was not constitutionally authorized to exclude any person, duly elected, who meets the age, citizenship, and residency requirements in Article I, Section 2.[87] By considering Congress's power under Article I, Section 5 in conjunction with the qualification requirements in Article I, Section 2, *Powell* synthesized related constitutional provisions to ensure internally consistent and coherent constitutional meaning. Yet no recent cases discussing the scope of federal authority over elections

[83] The lack of guidance from the courts has led some commentators to fill in the blanks about what Section 2 might require. For example, some have argued that Section 2 requires that the U.S. Census Bureau include a citizenship question on the American Community Survey to enforce the penalty of reduced representation. See, e.g., David B. Rivkin Jr. and Gilson B. Gray III, "How to Put Citizenship Back in the Census," *Wall Street Journal*, July 4, 2019, www.wsj.com/articles/how-to-put-citizenship-back-in-the-census-11562264430 (arguing that Section 2 of the Fourteenth Amendment requires the addition of a citizenship question on the census). For scholarship on Section 2's relevance to the census, see, e.g., Delaram Takyar, "'The Cornerstone of the Stability of Our Government': The Forgotten Penalty Clause and Electoral Reform in the Aftermath of the 2020 Election" (2021) 39 *Yale Law & Policy Review Inter Alia* 1–12; Michael Hurta, "Counting the Right to Vote in the Next Census: Reviving Section Two of the Fourteenth Amendment" (2015) 94 *Texas Law Review* 147–173. See also *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019) (finding that, under the Enumeration Clause, Congress, and by extension the Secretary of Commerce, can inquire about citizenship for purposes of the census, but this decision is reviewable under the Administrative Procedure Act).

[84] *NLRB v. Noel Canning*, 573 U.S. 513, 526–536 (2014).

[85] 395 U.S. 486, 550 (1969).

[86] "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." United States Constitution Art. I, s. 2.

[87] *Powell v. McCormack*, 395 U.S. 486, 559 (1969) ("[W]e hold that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership.").

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

have considered how Article I, Section 5 interacts with other provisions that delegate authority to Congress, and not the courts, over voting and elections.

This oversight stems from the Supreme Court's desire to keep the constitutional structure, which expressly delegates to Congress authority over various areas of the political system, separate and distinct from the right to vote under the Fourteenth and Fifteenth Amendments, which empower Congress subject to parameters set by the Court. The Court maintains these silos even when issues regarding the Constitutions of Political Structure and Political Rights are present in the same case, oftentimes leading to calamitous results.

For example, both of these constitutions made an appearance in *Rucho v. Common Cause*, which held that partisan gerrymandering claims were nonjusticiable despite evidence that these gerrymanders rendered meaningless the votes of those in the opposition party.[88] In *Rucho*, the plaintiffs challenged congressional redistricting plans in North Carolina and Maryland as unconstitutional partisan gerrymanders in violation of the First and Fourteenth Amendments as well as Article I, Section 2 and the Elections Clause. In rejecting these claims, the Court asserted that any argument "that partisan gerrymanders violate the core right of voters to choose their representatives is an objection more likely grounded in the Guarantee Clause," which "does not provide the basis for a justiciable claim."[89]

Notably, the reapportionment cases, starting with *Baker v. Carr* in 1962,[90] were premised on the idea that judicial intervention was warranted *precisely* because the failure to redistrict violated the voters' right to choose their representatives under the Fourteenth Amendment. *Baker* rejected the argument that the political nature of malapportionment, which, in the Court's view, made it a justiciable "political case" rather than a nonjusticiable "political question," meant that such claims could not be judicially resolved.[91] In making a distinction between "political questions" and "political cases," *Baker* sought to evade the line of precedents finding Guarantee Clause claims to be nonjusticiable.[92] But in doing so, the Court inadvertently rendered the Clause's broader purpose and meaning inconsequential as it relates to issues other than justiciability, choosing instead to confine core questions of voting and representation to the Equal Protection Clause.[93] By treating partisan gerrymandering as a structural harm beyond the

[88] *Rucho v. Common Cause*, 588 U.S. 684 (2019).
[89] Ibid., 716–717.
[90] 369 U.S. 186 (1962).
[91] Ibid., 217 ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.").
[92] Ibid., 289–290.
[93] Ibid., 218 ("We shall discover that Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.").

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

purview of federal courts,[94] *Rucho* exploits *Baker*'s distinction between political questions and political cases, and obscures that the Guarantee Clause's conception of republicanism marries rights-based questions about the disbursement of political power with structural questions about how political power should be aggregated and organized.

Rucho also rejected the argument that the Elections Clause, by providing Congress with the power to enact legislation that overrides state election laws, presented a manageable standard to resolve partisan gerrymandering claims. The Elections Clause allows Congress to serve as an express check on partisan gerrymandering in the absence of meaningful judicial standards to govern such claims, even though, according to the *Rucho* Court, the Clause did not delegate exclusive authority to the political branches over redistricting.[95] It is unclear why the Court left open the possibility of an Elections Clause challenge to partisan gerrymandering should manageable standards ever develop, even though the Elections Clause claim involved the same underlying (presumably nonjusticiable) Guarantee Clause argument that North Carolina deprived voters of the right to choose their representatives. The Court had rejected this claim as derivative of the Guarantee Clause because they viewed it as a challenge to the republican nature of state governments rather than an overreach by state governments in setting the times, places and manner of federal elections, or alternatively, as an abridgment or denial of the right to vote. But the Guarantee Clause implications of partisan redistricting would still be present even if manageable standards under the Elections Clause exist.

With the Elections Clause, the Court has struggled to articulate a coherent approach when cases, like *Rucho*, involve issues touching on both the structure of our system of elections and the individual right to vote. For example, in *Arizona v. Inter Tribal Council of Arizona*, decided in 2013,[96] the Court confronted whether the National Voter Registration Act (NVRA), enacted pursuant to the Elections Clause, permitted states to require documentary proof of citizenship as a prerequisite to registering to vote in federal elections, even though the Act itself imposed no such requirement.[97] Recognizing that the Elections Clause gives Congress broad authority over federal elections, the Court nonetheless struggled with the conflict between voter registration (a permissible "manner" regulation) and proof of citizenship (a voter qualification that falls within the state's domain). The Court's reticence to confront the issue head on – by finding that states can challenge application of the NVRA through the administrative process if the statute frustrates their ability to enforce their voter qualifications – likely stemmed from five decades of priming in

[94] *Rucho v. Common Cause*, 588 U.S. 684, 707 (2019) ("Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.").

[95] Ibid., 705–706.

[96] 570 U.S. 1 (2013).

[97] Ibid., 19–20.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

which many of these core democratic disputes have been treated as matters of structure or individual rights, but not both.

Thinking about the Constitution in neat and convenient silos means that there has been no consideration of the full spectrum of congressional authority over elections as a matter of both constitutional rights and constitutional structure. Piecemeal efforts consider structural provisions in a vacuum, as a means of illuminating the scope of individual rights, the nature of the constitutional structure, or alternatively, to flesh out the judiciary's constitutional obligations. This approach follows a long history of Supreme Court intra-clausal interpretivism that has little to do with clarifying how Congress has deployed these provisions or ensuring consistent and coherent meaning.[98] Even the Elections Clause, certainly better theorized than the rest, has nonetheless been marginalized due to the failure to consider its meaning and scope in the broader context of congressional power over elections.[99]

Unsurprisingly, the *Shelby County* Court's blind adherence to federalism principles, together with its faulty logic that the preclearance regime was unconstitutional because the exigency that justified its existence – virulent racism – no longer exists,[100] has created confusion about the *actual* scope of congressional power to regulate elections as a practical matter. *Shelby County* rested on a very narrow interpretation of Congress's authority under the Fourteenth and Fifteenth Amendments, essentially adhering to a vision of the constitutional structure that predates the Reconstruction Amendments.

From this perspective, the sin of *Shelby County* is not only the neutering of a significant provision of one of the most successful civil rights statutes in history, but also that it leaves a legacy of constitutional interpretation that fails to engage the full spectrum of congressional authority in this area. The Court focused on the substantial federalism costs of the VRA, ignoring that the Act arguably could have been sustained based on sources of authority beyond the Fourteenth and Fifteenth Amendments.[101] Interpreting federal authority over elections in the aggregate, based on all of the provisions from which such power derives, would properly account for the allocation of authority between Congress and the states over elections that emerged after the Reconstruction Amendments. This approach would create a theoretical framework that is centered in 1870 rather than 1789, and account for both constitutional rights and constitutional structure in election regulation.

[98] See, e.g., *Evenwel v. Abbott*, 578 U.S. 54 (2016) (relying on the text of Section 2 of the Fourteenth Amendment to interpret the scope of Section 1 of the Fourteenth Amendment); *Richardson v. Ramirez*, 418 U.S. 24 (1974)(same); *Minor v. Happersett*, 88 U.S. 162 (1874) (same).

[99] See, e.g., *Rucho v. Common Cause*, 588 U.S. 684 (2019) (rejecting the First and Fourteenth Amendment challenges, in part, because Congress could address partisan gerrymandering under the Elections Clause but doing so without any discussion of how Congress has actually deployed this authority).

[100] *Shelby County v. Holder*, 570 U.S. 529, 547 (2013) (citing increases in African American voter participation to illustrate that preclearance requirements for selected states is no longer justified).

[101] Tolson, "Reinventing Sovereignty?," 1241.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

I.3 IN CONGRESS WE TRUST? A ROADMAP

The longest filibuster in history would not be the only hurdle that the Civil Rights Act of 1964 would have to overcome before it took its place as one of the most transformational pieces of legislation in American history. Within two hours of becoming law, Moreton Rolleston, owner of the segregated Heart of Atlanta Motel, filed a lawsuit challenging the 1964 Act as a violation of the Takings Clause of the Fifth Amendment and as exceeding the scope of Congress's power under the Commerce Clause. Rolleston was fully committed to segregation, forbidding African American patrons at his hotel and including a rider in the deed to his private home that people of African descent could never purchase or stay at the property.[102] Rolleston – like General Charles Miller Shelley – will eventually be lost to history or, preferably, recalled as a side character in the story of how Congressman John Lewis conducted a sit-in at the counter of the restaurant in Heart of Atlanta Motel.

Rolleston will also likely be remembered in one of history's greatest ironies because his property was purchased by African American media mogul Tyler Perry in 2005. Rolleston sued Perry to regain control of the property (even though he hadn't been the owner since losing the property in unrelated litigation in the 1990s[103]) before eventually being jailed for contempt and barred from filing any additional lawsuits.[104]

But more importantly for our purposes, his lawsuit challenging the 1964 Civil Rights Act presented an opportunity for the Supreme Court, for the first time in almost a century, to endorse a view of federal authority where congressional power was assessed in the aggregate, as Congress sought to create a new blueprint for civil rights and enforce the commitment to democracy and racial equality promised by long dead constitutional provisions.

Congress passed the Civil Rights Act of 1964 pursuant to its authority under the Commerce Clause and Section 5 of the Fourteenth Amendment.[105] In some ways, Congress's reliance on the Commerce Clause was additive, a safeguard in response to an unfavorable Supreme Court decision in the late nineteenth century that invalidated an earlier Civil Rights Act (of 1875) and circumscribed Congress's ability to reach private discrimination.[106] But at least three members of the Court argued that the Commerce Clause, as a source of congressional authority for the Act, was not

[102] Amy R. Dobson, "The Full Circle Moment behind the Record-Breaking Sale of Tyler Perry's Former Mansion, Now Owned By Steve Harvey," *Forbes*, June 24, 2010.
[103] *Rolleston v. Cherry*, 487 S.E.2d 354 (Ga. App. 1997).
[104] Dobson, "Full Circle Moment."
[105] *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 249 (1964).
[106] See, e.g., *Civil Rights Cases*, 109 U.S. 3, 11 (1883). The *Heart of Atlanta Motel* Court declined to revisit the *Civil Rights Cases*, finding that the 1964 Act was constitutional under the Commerce Clause. *Heart of Atlanta Motel*, 379 U.S. at 250–51.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

the only provision that Congress could have invoked to justify its terms.[107] As Justice Black noted in his concurrence,

> In the view of the Commerce Clause it is not possible to deny that the aim of protecting interstate commerce from undue burdens is a legitimate end. In view of the Thirteenth, Fourteenth and Fifteenth Amendments, it is not possible to deny that the aim of protecting Negroes from discrimination is also a legitimate end [under the Necessary and Proper Clause].[108]

While any one of these clauses would have arguably been sufficient justification for the Act,[109] especially if coupled with the Necessary and Proper Clause,[110] federal authority is at its most expansive when Congress legislates pursuant to more than one provision.[111]

This book builds on that insight. It examines Congress's authority over voting and elections as similarly aggregate – rooted not in any single clause, but in the interaction among multiple, often overlooked constitutional provisions – to offer two major contributions. First, it shows the historical connection between the Constitution of Political Structure and the Constitution of Political Rights in the regulation of state and federal elections. By focusing on congressional oversight in this area from the founding to the early Jim Crow era, this book presents a stark contrast to narratives that often center on either (a) how Congress and the courts have shaped the modern electorate since the 1960s[112] or, (b) how both of these institutions have, at various points throughout the history of the United States, abdicated their responsibilities to protect the right the vote.[113] The story of voting rights in America is not just about the non-linear march toward universal suffrage;[114] it is also a story about the enlargement and concentration of federal power over the course of two centuries.

[107] *Heart of Atlanta Motel*, 379 U.S. at 260 (Black, J., concurring) (arguing that the Act is valid under the Commerce Clause and the Necessary and Proper Clause); Ibid., 279 (Douglas, J., concurring) (joining Court's Commerce Clause opinion but preferring that the Court's holding be based on Section 5 of the Fourteenth Amendment); Ibid., 292–293 (Goldberg, J., concurring) (noting that the Act is constitutional under the Commerce Clause and Section 5 of the Fourteenth Amendment).

[108] Ibid., 276–277 (Black, J., concurring).

[109] Ibid., 279 (Douglas, J., concurring). See also *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (holding that Congress, under Section 5 of the Fourteenth Amendment, could enact legislation that expanded rights beyond those recognized by the courts).

[110] See, e.g., the Civil Rights Act of 1866, ch. 31, 14 Stat. 27; the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (both enacted pursuant to the Thirteenth Amendment and the Necessary and Proper Clause).

[111] *Heart of Atlanta Motel*, 379 U.S. at 280 (Douglas, J., concurring) ("In determining the reach of an exertion of legislative power, it is customary to read various granted powers together.").

[112] See, e.g., Ari Berman, *Give Us the Ballot* (New York: Farrar, Straus and Giroux, 2016); Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (New York: New York University Press, 2006).

[113] See, e.g., Michael Waldman, *The Fight to Vote* (New York: Simon & Schuster, 2022); Carol Anderson, *One Person, No Vote* (New York: Bloomsbury Publishing, 2019).

[114] See, e.g. Keyssar, *The Right to Vote*; Anderson, *One Person, No Vote*.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

A central argument of this book (and its second major contribution to the literature) is that Congress's understanding of its constitutional power has not been static. Rather, this authority has evolved dramatically over time, moving from a narrow, clause-bound approach to one that has reflected a more expansive, multi-clausal view of federal authority during key periods in American history. In the early years of the republic, Congress tended to regulate federal elections by anchoring its actions in single, isolated provisions of the Constitution. However, political controversies over slavery and the exigencies of war necessitated that Congress change its election regulation practice and aggressively draw on numerous constitutional provisions, both new and old, to force systemic change.

The history will show that, prior to the Civil War, the desuetude of certain clauses, notably the Elections Clause and the Guarantee Clause, was not driven exclusively by respect for federalism; rather, it reflected institutional pathologies, partisan concerns, and constitutional text that treated state regulation as a discretionary default unless circumstances dictated greater congressional intervention. Despite the current Court's singular focus on federalism, Congress, like any institutional actor, legislates (or fails to legislate) for a multitude of reasons that cannot be neatly packaged in the language of constitutionalism.[115]

Part I (Chapters 1 and 2) focuses on the Constitution of Political Structure and argues that the Guarantee Clause, the Elections Clause, and Article I, Section 5 defined the basic parameters of the federal–state relationship over elections during the founding and antebellum periods. Notably, Congress's deference to the states when acting pursuant to these provisions was not driven solely by abstract concerns about federalism. In many cases, Congress determined its level of involvement based on (a) whether federal intervention would exacerbate disputes over the extension of slavery in the territories and (b) whether state election procedures adequately ensured the continued existence and legitimacy of federal elections consistent with republican ideals. This was an era defined by a respect for versions of federalism and republicanism that centered on the state as the primary organizational force for state and federal elections until politics (and war) made this deference untenable.

The founding generation coalesced around the Guarantee Clause as the touchstone for an ideal government structure in the American system because of an almost universal sentiment, after the ratification of the Twelfth Amendment, that republicanism required that the preferences of the majority hold sway. While the meaning of republicanism was contested, the Clause arguably allowed Congress to intervene in state political systems, both at the point of admission to the Union and on a continuing basis, whenever there was a threat to republican ideals.

Chapter 1 highlights the changing definitions of republicanism in light of the adoption of the Twelfth Amendment, debates over slavery, and the admission of

[115] See LaWanda Cox and John H. Cox, "Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography" (1967) 33 *The Journal of Southern History* 303–330.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

new states. The Twelfth Amendment elevated the voters to a central position in republican theory by creating an expectation that the president be the choice of a majority of those who wield political power on behalf of the state. This version of majoritarianism, filtered through the medium of political parties, also became a limit on the types of political systems that states could adopt in accordance with the Guarantee Clause. However, Congress's power under the Clause was stunted because of a slaveocracy that consistently made federalism arguments to protect that institution, even when such arguments were contrary to newly redefined republican ideals.

Chapter 2 discusses how Congress pushed back against this abuse by powerful slave interests after the controversy over the Kansas–Nebraska Act,[116] fully embracing its constitutional obligations in the name of election integrity. Indeed, Congress's willingness to assert itself vis-à-vis the states was notable given its commitment, for much of the early nineteenth century, to defer to political systems in which election winners were chosen from a process legitimized by clear rules and a definitive outcome. These goals generally trumped any desire to use electoral disputes as a vehicle for asserting the supremacy of federal law or to promote views of republican government that stood in tension with the form preferred by states seeking admission to the Union. Deference to state law brought coherence and administrative ease to a system in which multiple states had de facto control over federal elections.[117] Even when state procedures were not ideal, Congress deferred to state authority to promote broader values of ease and predictability.

As this chapter shows, federalism did not necessarily mandate this deference. On occasion, Congress had to intervene in state political systems and reassert the primacy of federal law, negating any inference that the states were truly sovereign over elections. This chapter's discussion of early federal election legislation, such as the

[116] An Act to Organize the Territories of Nebraska and Kansas, ch. 59, 10 Stat. 277 (1854).

[117] That Congress would be conservative and reserved in regulating federal elections is consistent with at least some views of federal power under the Clause at the country's founding. See Tolson, "Reinventing Sovereignty?," 1224–1225 (discussing proposals in Massachusetts and New Hampshire that would limit Congress's power under Elections Clause to only those situations in which states failed to call for congressional elections or where state legislation endangered rights otherwise protected by Constitution). During their constitutional conventions, some states included language in their proposed amendments reflecting their desire that the federal government defer to state election laws. New York provides an example of this: "Congress shall not make or alter any Regulation in any State respecting the times places and manner of holding Elections for Senators or Representatives, unless the Legislature of such State shall neglect or refuse to make Laws or Regulations for the purpose, or from any circumstance be incapable of making the same; and then only until the Legislature of such State shall make provision in the premises…." "Ratification of the Constitution by the State of New York (July 26, 1788)," in *Documentary History of the Constitution of the United States of America, 1786–1870*, 3 vols. (Washington, D.C.: Department of State, 1894), vol. 1, p. 197. Rhode Island's proposed constitution, submitted two years after New York's, includes identical language. "Ratification of the Constitution by the State of Rhode Island and the Providence Plantations (May 29, 1790)," in *Documentary History of the Constitution of the United States of America, 1786–1870*, 3 vols. (Washington, D.C.: Department of State, 1894), vol. 1, p. 315.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

Apportionment Act of 1842 and the decision to seat representatives elected in violation of this federal law, shows that Congress made purely partisan decisions to weigh in on issues long considered to be the domain of the state, further undermining the inference that Congress was constrained by federalism during this period.

Importantly, this book builds on the idea that one cannot understand Congress's place in our system of elections without appreciating that decisions to exercise the federal government's power over elections were predominantly rooted in politics rather than federalism. The book illustrates this principle by showing the dependent relationship between the scope of federal power over elections and the robustness of the underlying right to vote. During Reconstruction, this relationship would, for a time, find a home in the Constitution of Political Rights, subject to congressional regulation, but its beginnings were very different. Prior to the Civil War, the norm was that the political community entitled to exercise the right to vote was defined almost exclusively by state law. During the founding and antebellum eras, there was little room for federal intervention in states with a limited suffrage, but as the political community grew, so too did federal power.

Using the lens of political community, Part II (Chapters 3 and 4) focuses on the Constitution of Political Rights, and argues that the U.S. Constitution's mandate that Congress guarantee to every state a republican government, judge the elections of its members, and legislate with respect to the times, places and manner of federal elections was an implicit limit on the power that states had to create, shape, and protect their political communities. These communities include the enclave of voters ("We the Voters") and the broader community of nonvoters ("We the People"). Political community, as a theoretical concept, has played an important role in how the atom of sovereignty was divided among the federal government, the states, and the people. Community is defined by denoting the scope of rights that any person is entitled to as a matter of law and that the government is bound to respect.

For much of our history, the states, with little input from the federal government, have determined the boundaries of their political communities and the rights of those within. The question of who should have access to the ballot has been bloody and contested precisely because the Constitution, as ratified in 1789, gave states the authority to heavily police these communities, and states constantly reconceptualized those boundaries to limit influx. Scores have died challenging the boundaries of the political nomos.[118] These communities have been defined based on citizenship, geography, religion, race, gender, age, profession, length of residency, and financial means, to name the most common characteristics.[119] Whether by barring

[118] See Chapter 6.

[119] Chilton Williamson, *American Suffrage: From Property to Democracy, 1760–1860* (Princeton: Princeton University Press, 1960), p. 15 (discussing voting restrictions as applied to "free Negroes in the Carolinas, Georgia, and Virginia" and "legal discriminations against Catholics in some colonies even where there were no Catholics or very few.").

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

active military from voting,[120] or limiting the ability of college students to participate in local elections,[121] political communities have been artificial constructs, enforced by law, that exist to divvy up and protect scarce resources among the "haves" while excluding the "have nots."

As Chapter 3 discusses, the political community of "We the People" represented all of those individuals in the American polity who could claim the protection of the federal government (including women, children, and property-less White men) but who were not necessarily voters.[122] The Founders believed that government could limit the electorate and still be republican in form because "We the People" retained their natural right to alter or abolish government even if they could not vote, and states preserved this right when amending their constitutions during the Confederation period from 1776 to 1789.[123] The right's presence in state constitutions allowed the founding generation to claim that no one was truly without political power to influence government (which might have otherwise prompted federal intervention to enforce the republican guarantee), effectively leaving in place the privileged classes who would choose representatives and voters from among their ranks.

In contrast, the community of "We the Voters" had suffrage rights, but their access to the ballot was closely policed by the state. The right to vote was treated

[120] *Carrington v. Rash*, 380 U.S. 89 (1965).

[121] See Joseph A. Bollhofer, "Disenfranchisement of the College Student Vote: When a Resident is Not a Resident" (1983) 11 *Fordham Urban Law Journal* 489–524, 521; Michael Wines, "The Student Vote Is Surging. So Are Efforts to Suppress It," *New York Times*, October 24, 2019, www.nytimes.com/2019/10/24/us/voting-college-suppression.html [https://perma.cc/BH4G-C5RP].

[122] During the Constitutional Convention, Alexander Hamilton advocated for apportionment based on total population, reasoning that "[t]here can be no truer principle than this – that every individual of the community at large has an equal right to the protection of the government." "Comments of Alexander Hamilton (June 29, 1787)," in Max Farrand (ed.), *Records of the Federal Convention of 1787*, 2 vols. (New Haven: Yale University Press, 1911), vol. 1, p. 473.

[123] In paragraph 2, the Declaration of Independence decreed that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." United States Declaration of Independence, para. 2 (1776). Among the rights established by the Declaration of Independence is the right to "alter or abolish" any form of government that fails to secure people's "unalienable rights," including those to "Life, Liberty and the pursuit of Happiness." United States Declaration of Independence, para. 2 (1776).

The right to abolish the government was enshrined, with similar language, in some state constitutions that were ratified the same year. For example, the relevant clause in the Pennsylvania state constitution reads as follows: "[T]he community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal." Constitution of the State of Pennsylvania art. V (1776). The word "majority" was used to qualify "community" in a similar clause in the constitution of Virginia: "[A] majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal." Constitution of the State of Virginia s. 3 (1776). This right was also contemplated by the Founders as they debated the U.S. Constitution, as evidenced by James Madison's invocation of the "transcendent and precious right of the people to 'abolish or alter their governments' as justification for a new constitution. Madison, "The Federalist 40" p. 315.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

as a property right, denial or abridgment of which was subject to recovery in tort. At the founding, the electorate consisted of a small subset of Americans who could meet varying requirements concerning property ownership, age, gender, race, and citizenship. Post–Twelfth Amendment, states could no longer exclude those entitled to be in the community of "We the Voters" without running afoul of republican principles. In other words, once an individual was deemed part of the political community entitled to vote in both state and federal elections,[124] states could not abridge or deny their right to vote without violating the Guarantee Clause's requirement of republican government.[125]

Despite broad text authorizing federal enforcement of the republican guarantee, the founding and antebellum eras were defined by deference to state level determinations regarding who possessed political rights and the circumstances under which the right to alter or abolish had been properly exercised. The Dorr Rebellion, detailed in Chapter 4, presented the paradigmatic example of an unresponsive state government that had impermissibly narrowed the community of "We the Voters" to maintain power. Yet the federal government refused to intercede on behalf of Dorr and his supporters even after they went through formal legal processes to displace the incumbent legislature. The Dorr Rebellion was but one illustration of how political calculation, rather than legal or moral principle, dictated the terms upon which political communities were policed prior to the Civil War.

The right to vote and the right to alter or abolish government, both of which would ultimately become the foundation of the Constitution of Political Rights, were defined by state law for the period leading up to the Civil War, and congressional attempts to protect the right to vote directly were virtually nonexistent. Instead, Congress used its authority under the Elections Clause to "make or alter" state regulations and its authority to judge the elections of its members under Article I, Section 5, to police federal elections. When acting pursuant to these provisions – key aspects of the Constitution of Political Structure – Congress interpreted its authority as broadly as circumstances warranted, which indirectly impacted, and in some cases, limited, the states' authority to determine the membership of "We the Voters."

[124] Article I, Section 2 provides, in part, that:

> 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.

United States Constitution Art. I, s. 2.

[125] See William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca: Cornell University Press, 1972), pp. 18–19 ("'Democracy', referring to a distinctive form of government, meant the direct, complete, and continuing control of the legislative and executive branches of government by the people as a whole … all but extreme conservatives by 1787 conceded that a 'democratic element' was essential, or at least unavoidable, in the composition of state governments."). James Madison defined a pure democracy as "a Society, consisting of a small number of citizens, who assemble and administer the Government in person." Madison, "The Federalist 10," p. 109.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

By the late 1850s, disputes over slavery and economic issues forced Congress to abandon the conservative posture that defined the first half of the nineteenth century. For example, controversy over the Kansas–Nebraska Act, which involved leading Missouri residents fraudulently voting in territorial elections to get Kansas admitted as a slave state, forced Congress to utilize the Constitution of Political Structure to police voting rights (in this case fraudulent voting). And this was not the only area that saw fundamental change because of slavery politics.

In the onslaught of secession, President Abraham Lincoln and Congress were forced to rethink not only the continued viability of the right to alter or abolish government, but also to conceptualize a new version of the political community of "We the Voters" – one premised on loyalty to the Union rather than racial and economic restrictions. As Chapter 4 shows, the narrowing of the natural right to alter or abolish government, as a right belonging to numerical minorities rather than the institutional state, paralleled discussions about who should be tasked with exercising the political power of the state. The traditional planter class could no longer be trusted with a right of revolution meant to be used sparingly, which necessitated broader access to nonviolent forms of political power. Thus starts a longstanding disagreement in every corner of the Union – from the Executive to Congress to the Supreme Court – about which individuals have demonstrated sufficient virtue to be enfranchised, and even more importantly, who decides? Ultimately, Black people, previously thought unworthy to be a part of "We the People" or as holders of any political rights, challenged existing paradigms and forced Congress's hand.

Picking up on this inquiry, Part III (Chapters 5 and 6) discusses Reconstruction, focusing on Congress's post–Civil War power over voting and elections, which was often at odds with the Supreme Court's interpretation of that authority. Reconstruction was defined, in large part, by the marriage between the Constitutions of Political Structure and Political Rights. This synergy was necessary because the exigencies of war required the creation of new political norms regarding the right to vote, republicanism, and federalism. This expansion of federal power ultimately set Congress on a collision course with the Court as Congress liberally interpreted its constitutional obligation to ensure republican government.

Changing norms, together with the need for new political communities following the demise of the southern planter class, necessitated federal intervention in state political systems. Toward this end, Congress used its power under the Elections Clause, the Guarantee Clause, Article I, Section 5, and the Reconstruction Amendments, the latter of which expanded Congress's power to define the community of "We the Voters."[126] After confederates relied on the alter or abolish power to secede from the Union, Congress required southern states, as a condition of reentry,

[126] See Rebecca Zietlow, "Vision and Revision: Exploring the History, Evolution, and Future of the Fourteenth Amendment: Juriscentricism and the Original Meaning of Section Five" (2004) 13 *Temple Political & Civil Rights Law Review* 485–513, 488, 505–506 (discussing how "the Reconstruction Era

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

to expand voting rights. Voting rights, exercised by a broader swath of the population, supplanted the natural right to alter or abolish government as the mechanism through which the people could express their sovereign authority. Chapter 5 shows that this shift from the alter or abolish right to suffrage as the preferred vehicle for government accountability paralleled the expanded federal presence in the election realm during this period. It was this understanding of the right to vote, derived almost entirely from state constitutions (which were adopted by some of the most racially diverse conventions in history) and infused with moral authority usurped from the natural right to alter or abolish government, that lay at the heart of the new political community that Congress created in enacting Section 2 of the Fourteenth Amendment.

Through Section 2 of the Fourteenth Amendment, congressional Republicans formally recognized the political existence of African Americans. This group had previously been denied such recognition: first, with the Supreme Court's 1856 *Dred Scott* decision[127] and, then post–Thirteenth Amendment, with the adoption of the Black codes in southern states that relegated this group to quasi-slave status.[128] The hope was that Section 2 would penalize states by reducing their representation in Congress for disenfranchising African American men who were now entitled to membership in the political community of "We the Voters." The expansion of federal power and the evolution of the right to vote became manifest in this new political community that emerged from the ashes of the Civil War; namely, an electorate that was no longer predominantly White and privileged.

Chapter 6 illustrates that Congress sought to protect African Americans, not only through Section 2, but also through the Fifteenth Amendment, the adoption of which was an explicit rejection of the clause-bound approach to regulating elections and voting that had existed, however sparingly, prior to the Civil War. Congress's authority to impose the penalty of reduced representation for any abridgment of the right to vote was intended to be an important supplement to Congress's power to enact broad legislation to combat racial discrimination in voting. The debates surrounding these provisions also demonstrated Congress's intent to read its authority

Congress embraced the role of protecting 'rights of belonging,' that is, rights that promote an inclusive vision of who belongs to the national community" such as the right to vote).

[127] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

[128] See Walter L. Fleming, "Race and Labor Problems: 'Black Codes,'" in Walter L. Fleming (ed.), *Documentary History of Reconstruction: Political, Military, Social Religious, Educational & Industrial*, 1865 to the Present Time, 2 vols. (Cleveland: The A.H. Clark Company, 1906), vol. 1, pp. 243–312 (includes excerpts of so-called "Black Laws" or "Black Codes," which were antebellum laws enacted in southern states that applied to formerly enslaved Black people). The formerly enslaved were also kidnapped and sent to countries such as Cuba and Brazil in the wake of emancipation. "Comments of Senator Sumner," 39th Congress, 1st Session, January 9, 1866, 36 *Congressional Globe* (Washington, D.C.: Globe Office, 1866), pt. 1, p. 146 (introducing a resolution to address the issue of enslaved persons who, post-Thirteenth Amendment, were "kidnapped and transported to Cuba and Brazil to be held as slaves…").

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

under the Reconstruction Amendments in tandem with the provisions of the original Constitution that emerged from Reconstruction redefined: the Guarantee Clause, the Elections Clause, and Article I, Section 5. These provisions gave Congress a role in defining the political community entitled to exercise this newly redefined right to vote, a right that was now federally protected and disconnected from its property-like status. Voting now served as the vehicle through which "We the People" could more easily join the community of "We the Voters" and express their political power.

Each provision contributed to the creation of this new collective. The Guarantee Clause legitimized much of the Reconstruction program, especially as Congress brought the southern states under federal control to facilitate the creation of their new postwar governments. The Enforcement Acts, adopted pursuant to the Elections Clause and the Fourteenth and Fifteenth Amendments, punished those who sought to disenfranchise African Americans seeking to exercise their new rights. Article I, Section 5 likewise functioned as an ex-post check on broad disenfranchisement, with Congress refusing to seat beneficiaries of such wrongdoing, like Shelley, in its chambers.

The story of these constitutional provisions, with their limitless potential to alter the political landscape, also sheds light on Congress's post-Reconstruction failures in a way that the scholarship has not fully appreciated. Importantly, Part IV (Chapters 7–9) argues that Congress, in crafting the Reconstruction Amendments, wanted to preserve its authority to exclude those it deemed undesirable from the political community of "We the Voters," which significantly undermined later efforts to protect Black voters. The preservation of some elements of the pre–Civil War constitutional framework – that is, the absence of an affirmative right to vote – when combined with the judicial invalidation of many key aspects of the Reconstruction project provided Congress with the exit for which the institution was searching as Reconstruction became less viable politically.

The Panic of 1873 and widespread economic and social unrest made the Reconstruction project untenable for many Republicans.[129] The desire to minimize the federal presence in the South not only created a tension with the republican ideals and equality norms that Congress sought to impart on the states, but the lack of enforcement of these new political norms at a critical juncture undermined their ability to constrain political actors (even those who were once allies) moving forward. Chapter 7 shows that Congress's hypocrisy and complicity in the treatment of Chinese people, women, and the initial beneficiaries of federal

[129] The years immediately after the Civil War saw an explosive expansion into the west, which included the building of several railroad lines. However, by late 1873, the inability to secure investments, both in the United States and Europe, to meet the funding needs of this railroad expansion, together with the ongoing economic depression in the South following the Civil War, essentially meant that "the depression was everywhere," which caused nearly two weeks of "panic [that was] so wild on the New York Stock Exchange that the governors of the clearing house closed it down and refused to allow sales to go on record." Frederic L. Paxton, *History of the American Frontier, 1763–1893* (Boston: Houghlin Mifflin Company, 1924), pp. 513–521.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

intervention – African Americans – diminished Congress's standing as a counterpoint to the exclusionary tactics used by states.

This loss of moral authority undermined later efforts in the nineteenth century to protect African American voting rights from an onslaught of state disenfranchisement efforts. Violent uprisings across the South, from the Colfax Massacre of the 1870s to the Wilmington Insurrection of the 1890s, further complicated Congress's already precarious standing on these issues, especially given its ongoing war with a Supreme Court intent on limiting congressional power. As Chapter 8 details, the Federal Elections Bill of 1890, which would have instituted federal supervision of congressional elections, as well as several proposed bills seeking to implement the penalty of Section 2 of the Fourteenth Amendment, discussed in Chapter 9, were casualties of Congress's failure to capitalize on the full scope of its authority at a time in which such efforts were politically palatable. Instead of using the Constitutions of Political Structure and Political Rights to ensure that African Americans would be permanent fixtures in the political community of "We the Voters," politics guaranteed that they would remain transient and temporary visitors.

With the failure of these efforts, Congress sporadically used its power under Article I, Section 5 to police racial discrimination in voting, even though much of the disenfranchisement written in law was ostensibly race-neutral. As illustrated in Chapter 9, Congress fought back against these restrictive regimes, which were adopted across the South over the course of the 1890s and set the tone for the exclusion of Black voters from American politics for almost a century. Congress's efforts during this period bring this book back to a reoccurring theme: that political limitations were more of a barrier to the broad implementation of federal power over elections than constitutional constraints like federalism.

Indeed, the controversy over federal enforcement efforts reveals that there were political risks attendant to legislating toward the outer limits of constitutional power, risks that tended to manifest at the ballot box. Republicans enacted five Enforcement Acts in the early 1870s, which contributed to the 1874 defeat that cost them control of Congress for the first time since the Civil War. Similarly, Republicans' support for the Federal Elections Bill cost them in the 1890 elections, with fissures in the Republican caucus ultimately leading to the bill's defeat in 1891, followed by huge Republican losses in the 1892 elections.[130] The 1890 bill, although proposed pursuant to the Elections Clause, was the first time since Reconstruction that the Republicans attempted to merge their authority under both the rights-bearing and structural provisions of the Constitution; in other words, the proposal was a time, place, and manner statute designed to strengthen the 1870s Enforcement Acts – all of which were enacted pursuant to the Fourteenth and Fifteenth Amendments as

[130] Richard M. Vallely, "Partisan Entrepreneurship and Policy Windows: George Frisbie Hoar and the 1890 Federal Elections Bill," in Stephen Skowronek and Matthew Glassman (eds.), *Formative Acts: American Politics in the Making* (Philadelphia: University of Pennsylvania Press, 2007), p. 127.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

well as the Elections Clause – to protect voters in both the North and the South. The failure of this bill meant that the effort to further de-silo these sources of authority had also failed.

Instead, the piecemeal, case-by-case enforcement efforts that Congress undertook pursuant to Article I, Section 5 became an incomplete alternative to the broad legislation that was needed, signaling the limits of federal power when Congress does not tap into the full spectrum of its authority to address systemic voting discrimination. As was true in the antebellum era, contested elections brought before each house illustrate the difficulty of disentangling politics from any federalism concerns underlying Congress's motivations for deploying (or neglecting) its constitutional duties. In the end, politics won, and Congress abandoned its efforts to protect voting rights in federal elections by the early twentieth century.

After the clarification of the historical record offered by the book,[131] the Epilogue explores the implications of this history for modern disputes between the Supreme Court and Congress. Given that the history offered in these pages stops around 1910, and as such is necessarily incomplete, the Epilogue seeks to draw a somewhat limited comparison between the Voting Rights Act of 1965 – in particular, the preclearance regime of Sections 4(b) and 5 – and past congressional voting rights efforts during Reconstruction and its aftermath. Notably, the Voting Rights Act was built on the framework created by moderate Reconstruction-era Republicans, but the Act also reflects lessons learned from a nineteenth century Supreme Court hostile to broad federal power.

The Roberts Court has ignored both this framework and these lessons. The Court insists on interpretating congressional power over elections in a manner that

[131] The historical narrative in this book is not, and does not seek to be, comprehensive. Readers will notice that there is virtually no discussion of Congress's power under Article II, Section 1, Clause 3 to count the electoral college votes – or of the contested elections that arose under this provisions in 1800, 1824, 1876, and 1888 – beyond the limited focus on how the Twelfth Amendment, and its changes to the presidential election process, altered our understanding of what majoritarianism requires under the Guarantee Clause. Also excluded is any discussion of the Electoral Count Act of 1887. There is also very little focus on Congress's power under Section 3 of the Fourteenth Amendment to disqualify those who commit insurrection from running for certain state and federal offices, limited only to those instances in which this provision was relevant to Congress's power to judge the elections of its members under Article I, Section 5 as well as various Reconstruction-era legislation.

While this project seeks to understand the political valence of constitutional arguments made throughout this period – a topic that Article II and Section 3 undoubtedly have some bearing on – I am primarily interested in overlooked or under-theorized structural provisions that directly affected the composition of the political community of "We the Voters." Article II concerns the procedure for allocating and counting electoral college votes, a provision that has fundamentally changed the trajectory of U.S. history at various points (most notably, in 1876) but involves political decisions that only tangentially touch on the actual and theoretical composition of the electorate. Congress has never rejected a state's electoral college votes on the grounds that the underlying vote was fraudulently obtained, which makes this provision of limited relevance to the current project. In the same vein, by excluding ex-confederates from office, Section 3 is arguably less about who can vote rather than who can run for office. As such, this provision is also beyond the scope of this project.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001

misconstrues the original constitutional structure, minimizes the nation's march toward a more inclusive suffrage, and discounts the changes to this structure by the Civil War Amendments. The Court's perception that states retain sovereignty over elections that must be protected from federal overreach is a relic of a history that has been grossly misunderstood and misinterpreted.

As this book shows, Reconstruction fundamentally altered our system of federalism, resulting in more active federal oversight in which Congress was willing to aggregate its powers to protect voting rights. To be sure, the Reconstruction Amendments did not completely displace the states' authority to define voter qualifications. Nonetheless, the Amendments fundamentally changed the terms of federal engagement, making it impossible to return to the world envisioned by the Founders, even during the period after Reconstruction in which the aggressive policing of state and federal elections declined.

For this reason, it is important for Congress to understand the scope of its authority, particularly in the face of conflicting and sometimes incoherent judicial precedents. The Epilogue shows how Reconstruction-era voting rights legislation was a model for both the preclearance regime of the Voting Rights Act and recent bills seeking to regulate state and federal elections such as the aforementioned H.R. 1 as well as H.R. 4, which would have reauthorized the coverage formula of the Voting Rights Act. These comparisons not only illustrate that these bills are significantly more modest than their historical counterparts but also refute the federalism narrative that has hampered federal authority in this area over the past three decades.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 11 Nov 2026 at 02:54:42, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009781657.001