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## (MIS)TRUSTING STATES TO RUN ELECTIONS

JOSHUA A. DOUGLAS\*

### INTRODUCTION

Recent Supreme Court election law jurisprudence reflects an unspoken, pernicious trend. Without identifying a specific new rule, the Court has been unjustifiably deferring to state laws regarding election administration, thereby giving states tremendous power to regulate elections. At the same time, the Court has diminished Congress's oversight role. That is a mistake. Placing too much power in states to administer elections is both constitutionally wrong and practically dangerous.

During the past few years the Court has considered many controversial election-related issues, from voter identification<sup>1</sup> to campaign finance<sup>2</sup> to race relations and the Voting Rights Act.<sup>3</sup> The majorities in these cases have generally deferred to states to run elections as they see fit. The Court has employed light-touch judicial review to state election administration laws while at the same time subjecting federal election rules to higher scrutiny.

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1. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (plurality opinion).

2. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

3. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

Although not explicitly part of its analysis, the Court has been deferring to states in two ways, one substantive and the other procedural. First, the Court has accepted almost any assertion of a state interest to protect the integrity of the election, failing to dig deeper into the actual rationale for the state's regulation of the voting process. This differs from the Court's approach to federal election statutes and is contrary to historical practice.<sup>4</sup> Second, the Court has discouraged facial challenges to state voting laws but has sustained facial challenges to congressional enactments, thereby using a procedural mechanism to uphold state rules and invalidate federal laws.<sup>5</sup> These two themes, both unstated, infiltrate the recent case law. They also help to reconcile the Court's seemingly disjointed election law jurisprudence.

The Court has deferred to states substantively by failing to scrutinize the actual rationale behind a voting rule. When considering the first prong of the constitutional test and assessing the state's interest, the Court has credited at face value a state's general assertions of "election integrity."<sup>6</sup> The Court has failed to probe the underlying, more specific reason for a law, which is often to gain partisan advantage for the majority party. At the same time, it has scrutinized more carefully Congress's justifications for its voting regulations.<sup>7</sup> Thus, the Court is treating state election administration rules differently, giving less meaningful scrutiny to a state's voting processes.

Procedurally, the Court has deferred to state election administration laws through its approach to facial and as-applied challenges.<sup>8</sup> A facial challenge is a claim that the law is unconstitutional in all of its applications, whereas an as-applied challenge asserts the invalidity of the law only with respect to how it operates as to that specific plaintiff.<sup>9</sup> At first glance, it is difficult to reconcile the interpretation of this procedural question in cases such as *Shelby County* (Voting Rights Act), *Citizens United* (campaign finance), and *Crawford* (voter ID), as well as other

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4. See *infra* Part I.A.

5. See *infra* Part II.

6. See *infra* Part I.A.

7. See, e.g., *Shelby Cnty.*, 133 S. Ct. at 2628–30. The only area in which this differential deferral has not occurred consistently is campaign finance, where the Court has been skeptical of both Congress and the states. See, e.g., *Citizens United*, 558 U.S. at 333; *Randall v. Sorrell*, 548 U.S. 230, 253–62 (2006).

8. For an extensive discussion of the difference between facial and as-applied challenges in election law, see Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 639–42 (2009).

9. See Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010).

lower-profile decisions,<sup>10</sup> because the analysis has diverged markedly regarding the propriety of facial or as-applied challenges. But a closer look reveals an interesting trend: the Court validates only piecemeal, as-applied litigation for state voting rules but will sustain broad facial challenges to other election laws. The usual result is judicial sanctioning of state voting regulations but a concurrent invalidation of federal election rules. This framework provides a procedural mechanism for the Court to defer to state election administration.

The Court's broad deference to state voting rules is concerning for two main reasons. First, it is doctrinally inconsistent with the structure of the United States Constitution. Second, it is alarming given the increasing number of restrictive and partisan-laden voting laws states are enacting.

Deferring to states while more closely questioning Congress's justifications for an election rule is inconsistent with our constitutional design. The Court's shift of power from Congress to the states to regulate elections is wrong under the U.S. Constitution, which provides that states run elections but that Congress has important oversight responsibilities.<sup>11</sup> The Elections Clause of the U.S. Constitution says so explicitly: the states shall "prescribe[]" the "Times, Places, and Manner" of holding elections for federal office, but Congress can "make or alter" such regulations as it deems necessary.<sup>12</sup> Further, the Fourteenth Amendment, as well as other voting-specific amendments, provides enforcement power to Congress to ensure equality in voting.<sup>13</sup> This means, quite pointedly, that the federal government plays an important oversight role in how our elections operate. The current judicial approach, however, elevates a state's role and minimizes the ability of Congress to oversee the election process.

The Court's approach is also dangerous, as it emboldens state legislatures to enact partisan voting rules in an effort to influence electoral outcomes. States across the country, particularly where one party controls both houses and the governor's mansion, are increasingly passing strict voting laws.<sup>14</sup> Many of these regulations have an underlying partisan tinge,

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10. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008).

11. U.S. CONST. art. I, § 4.

12. *Id.*

13. U.S. CONST. amend. XIV, § 5; see, e.g., U.S. CONST. amend XV, § 2.

14. See Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97, 98 (2012) (noting that "the new spate of state regulations include several highly controversial laws that appear to exact real burdens on real Americans, making it more difficult for citizens to exercise their rights to vote"). For example, both Texas and North Carolina have recently passed new voting laws that are under legal challenge. See Aaron Blake, *Justice Department Will Challenge Texas Voter ID Law*, WASH. POST (Aug. 22, 2013, 12:47 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/22/justice-department-will-challenge-texas-voter-id-law/>, archived at

with Republicans supporting laws aimed at “voter integrity” and Democrats pushing laws intended to ease voter restrictions—both in an effort to help their parties’ electoral chances.<sup>15</sup> Of course, the legislators usually do not justify the laws based on their partisan effects; they instead cite a generalized interest, such as “election integrity.” When courts defer to this governmental interest without careful scrutiny, these laws receive less meaningful judicial oversight. In turn, states will become even bolder in the kinds of election practices they promulgate. But election outcomes should not depend on partisan-laden voting rules. Partisan-based rules that dictate how our elections operate, and thus who wins, are dangerous for democracy, as they allow incumbents to entrench themselves in power and undermine the very foundation of our democratic system.<sup>16</sup> To dissuade politically motivated voting laws, the Court should ratchet up the level of scrutiny for all voting regulations to ensure that Congress and state legislatures justify their election laws with actual, specific evidence of the purpose for the rule.

This Article critically examines recent Supreme Court election law jurisprudence, with a particular eye toward cases involving state election administration—a hotbed of litigation at the Court in recent years. Election administration entails the rules of operating an election and encompasses laws such as voter identification requirements, regulation of primaries, and other “nuts-and-bolts” aspects of the voting process.<sup>17</sup> The Article focuses primarily on the last decade, mainly because that is when states have increasingly enacted stricter election regulations,<sup>18</sup> supposedly in the name of “election integrity,” but more likely to gain partisan advantage for the ruling party. In addition, during the first decade of the Roberts Court’s era, the Court’s jurisprudence, in various areas, has amplified the distinction

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<http://perma.cc/6B7H-RZMJ>; Charlie Savage, *Justice Department Poised to File Lawsuit over Voter ID Law*, N.Y. TIMES (Sept. 30, 2013), <http://www.nytimes.com/2013/09/30/us/politics/justice-department-poised-to-file-lawsuit-over-voter-id-law-in-north-carolina.html>; see also Nicholas Confessore, *A National Strategy Funds State Political Monopolies*, N.Y. TIMES (Jan. 11, 2014), <http://www.nytimes.com/2014/01/12/us/politics/a-national-strategy-funds-state-political-monopolies.html> (noting the rise in one-party control in the states and the corresponding partisan manipulation of voting rules).

15. See, e.g., Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL’Y REV. 185, 189 (2009) (noting that voter ID laws tend to disadvantage Democratic voters more than Republican voters).

16. See Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 ELECTION L.J. 288 (2014).

17. See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 315 (2007).

18. See *Voting Laws Roundup 2013*, BRENNAN CTR. FOR JUST. (Dec. 19, 2013), <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup>, archived at <http://perma.cc/38BN-9FTW>.

between facial and as-applied challenges, so it is important to understand the practical effects of this procedural feature of election law cases.<sup>19</sup>

Part I analyzes the Court's failure to examine critically a state's asserted interests in election administration cases, while at the same time questioning more carefully Congress's reasoning for an election-related law. The analysis shows that the Court allows states to satisfy easily the governmental interest prong of the constitutional inquiry, while Congress receives greater scrutiny. Part II considers the Court's contradictory discussion of facial and as-applied challenges, particularly in cases involving election administration. Both Parts reveal that the Court is using these judicial mechanisms to defer to states in how they run elections. Part III attempts to explain why the Court is taking this approach, situating the case law within the Roberts Court's overall concept of federalism. It also highlights the influence of Chief Justice Roberts himself, showing that he has joined the majority in every single election law case of his tenure (so far) and has authored more majority opinions than any other Justice. Part IV explains why this deference to state election administration, accompanied by vigorous judicial scrutiny of federal election laws, is both incorrect and dangerous. It is wrong because the U.S. Constitution explicitly acknowledges an important and higher-level role for Congress in regulating an election; it is dangerous because it encourages states to enact partisan-based laws that, under current jurisprudence, will not receive meaningful judicial review. The Court is unwarranted in putting so much trust in the states. It should instead scrutinize more carefully a state's rules involving election administration and require both states and Congress to articulate the specific justifications for a voting regulation.

#### I. DEFERENCE TOWARD STATE INTERESTS IN ELECTION ADMINISTRATION

The Court has deferred to state regulation of the voting process by crediting, at face value, a state's asserted rationale for its laws. A state typically justifies its election rules by reference to generic platitudes such as "ensuring election integrity,"<sup>20</sup> yet the Court rarely questions that

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19. See generally Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 *FORDHAM URB. L.J.* 773 (2009) (summarizing the Court's facial and as-applied cases from 2005–08 and discussing the implications of this jurisprudence).

20. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality opinion) (discussing "the State's interest in protecting the integrity and reliability of the electoral process").

explanation. The Court has been more skeptical, however, of Congress's justifications for passing an election statute.<sup>21</sup>

Courts apply a familiar two-part test to constitutional challenges to an election regulation, whether under the First Amendment, Fourteenth Amendment, or another constitutional provision. First, does the government have a sufficiently important reason for adopting the rule in question (the interest prong)? Second, is the rule properly tailored to achieve the government's goals (the tailoring prong)?<sup>22</sup> The government's obligation for the kind of justification it must provide under both the interest and tailoring prongs differs based on whether the Court applies strict scrutiny review or a lower balancing test, which in turn depends on the burdens the law imposes on voters.<sup>23</sup> Laws that amount to severe burdens must pass strict scrutiny; laws that impose minor burdens must survive only a lower balancing test.<sup>24</sup> Under either standard, the Court has generally deferred to a state's rationale, particularly on the first prong. States usually lose only if the law is insufficiently tailored. The Court has not been as complaisant toward Congress on the interest inquiry. This Part considers how the Court has analyzed the interest prong for both state voting rules and congressional acts regulating elections. It shows that, unlike prior practice, recent case law has given wide leeway to states to administer elections without meaningful judicial oversight.

#### A. *Deferring to a State's Interest in "Election Integrity"*

Today's election administration cases present a shift in how the Court scrutinizes a state's asserted interest in its laws regulating the election process. Currently, the Court generally accepts, at face value, a state's proffered justification for its law, which is typically a generic statement about the need to protect the integrity of the election process.<sup>25</sup> As one scholar notes, current jurisprudence "enables federal courts to selectively defer to a state's interest in preventing election fraud without requiring a

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21. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2625–31 (2013) (invalidating a portion of the Voting Rights Act).

22. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358–59 (1997) (explaining two-part test in the context of voting laws and First Amendment associational rights); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (adopting test in which courts consider "the precise interests put forward by the State as justifications for the burden imposed by its rule" and then evaluate "the extent to which those interests make it necessary to burden the plaintiff's rights.>").

23. *Burdick v. Takushi*, 504 U.S. 428, 432–34 (1992).

24. See *infra* Part I.A.

25. See *Crawford*, 553 U.S. at 196.

more objective inquiry into whether states have a higher interest in addressing some kinds of election fraud than others.”<sup>26</sup>

But in the 1960s—when election law first became a distinct field—the Court questioned more vigorously a state’s underlying rationale for its election rules, even when the state asserted something more specific that went beyond a broad interest in election integrity. For example, in *Carrington v. Rash*, the Court rejected Texas’s detailed justifications for denying voting rights to service members who recently moved to the state.<sup>27</sup> Texas argued that it had a “legitimate interest in immunizing its elections from the concentrated balloting of military personnel” and “a valid interest in protecting the franchise from infiltration by transients.”<sup>28</sup> But the Court understood the state’s true desire as ensuring that an influx of military voters would not sway an election a particular way<sup>29</sup>—an inherently results-based justification. The Court rejected this interest as invalid under the Equal Protection Clause.<sup>30</sup> That is, Texas did not have a legitimate interest in disallowing recently-moved members of the military from voting based on how they might vote.<sup>31</sup> The Court refused to credit the state’s more generalized, sanguine justification of “protecting the franchise.” Similarly, in *Harper v. Virginia Board of Elections*, the Court invalidated the state’s poll tax, rejecting the state’s justifications for the law because the state did not have a sufficiently important interest in imposing a wealth requirement for voting.<sup>32</sup> Thus, the state lost at the first prong of strict scrutiny: it could not justify the need for its law with a compelling interest.<sup>33</sup>

The Court’s more deferential approach toward state election administration began in 1983 with a test first announced in *Anderson v. Celebrezze*, a challenge to Ohio’s ballot access rules for independent candidates.<sup>34</sup> But even there, the Court closely examined the state’s

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26. Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 31 (2009).

27. 380 U.S. 89, 93–95 (1965).

28. *Id.* at 93.

29. *Id.* at 93–94.

30. *Id.* at 94, 96–97.

31. *Id.*

32. 383 U.S. 663, 668 (1966).

33. *Id.* (“[T]he interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”).

34. 460 U.S. 780 (1983).



asserted justifications for the law. The Court noted that when reviewing a state election regulation, a court

must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.<sup>35</sup>

Notably, when “identify[ing] and evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed,”<sup>36</sup> the Court did not simply defer to the state's general declaration of its desire to seek integrity in the election process.<sup>37</sup> Instead, it carefully scrutinized the state's more specific interests in “voter education,” “equal treatment” of all candidates, and “political stability,” going beyond the state's broad justifications to determine the law's actual intent.<sup>38</sup> The state's true interest in the more restrictive ballot access rules for independent candidates, the Court found, was not simply to foster “political stability” but instead represented an effort to protect the two main political parties from external competition from independent candidates.<sup>39</sup> This justification, the Court ruled, was insufficient.<sup>40</sup>

Similarly, the Court carefully considered Hawaii's rationale behind its write-in ban in a 1992 case that further extrapolated the *Anderson* test.<sup>41</sup> The Court found the state's specific interests satisfactory and upheld the law.<sup>42</sup> It determined that, because the prohibition on write-in votes did not impose a severe burden on voters' rights, the state did not need to assert a compelling interest.<sup>43</sup> Yet the Court still required a detailed explanation of

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35. *Id.* at 789.

36. *Id.*

37. *Id.* at 796–806.

38. *Id.* at 796, 799, 801.

39. *Id.* at 801.

40. *Id.* at 805–06.

41. *Burdick v. Takushi*, 504 U.S. 428, 439–40 (1992).

42. *Id.*

43. *Id.* at 438–39.

the state's rationale for the write-in ban, thereby requiring the state to assess critically the purposes behind the law.<sup>44</sup> The Court sustained the state's goals of guarding against "the possibility of unrestrained factionalism at the general election"<sup>45</sup> and preventing "sore-loser candidacies,"<sup>46</sup> which are more specific justifications than simply preserving the integrity of the election process. Because these particularized interests were legitimate and because the law was sufficiently tailored to achieve these goals, the Court upheld Hawaii's rule. Thus, even when the Court carefully scrutinizes a state's interest in an election regulation, a state can prevail. The state is simply put to a higher threshold to justify its rule.

As recently as 2000, the Court flatly rejected an approach that accepted at face value a state's generalized interest in fostering election fairness, even when the state provided more extensive justifications for its law.<sup>47</sup> In a case about California's "blanket" primary system, in which any voter could participate in any party's primary for any race, the Court wrote, after dismissing the state's first three justifications, that

[the state's] remaining four asserted state interests—promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy—are not, like the others, automatically out of the running; but neither are they, *in the circumstances of this case*, compelling. That determination is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant. And for all four of these asserted interests, we find it not to be.<sup>48</sup>

That is, when the Court required a more specific explication of the state's interests in an election practice, it correspondingly gave careful scrutiny to the state's proffered reasons.

Recently, however, the Court has taken a different approach, rubberstamping a more generalized state interest in "election integrity."<sup>49</sup> By broadly conceptualizing a state's interest in election administration, it

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44. *Id.* at 439–40.

45. *Id.* at 439 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986)).

46. *Id.* at 439–40.

47. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000).

48. *Id.* at 584.

49. *See infra* notes 54–73 and accompanying text.

now more readily defers to states' choices on how to run an election.<sup>50</sup> As a result, a state now can justify an election practice by simply claiming, as a general matter, that it has an interest in election integrity or running a smooth election.<sup>51</sup> Whether under strict scrutiny, in which it must demonstrate a compelling interest, or under a lower-level balancing test, in which it must show a sufficiently weighty interest, the state usually has no trouble meeting this threshold.<sup>52</sup> The real question becomes whether the law is properly tailored to achieve that interest.<sup>53</sup>

The fact that states now always meet this initial burden is highly significant for how the Court approaches these cases: a state is always credited with a valid rationale for its election rule. This demonstrates the high level of deference afforded to state election practices. As discussed below, this same level of deference typically does not attach to federal election laws. This approach epitomizes a theme running through the election law jurisprudence: tremendous trust in states to administer elections.

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50. Not all lower courts have followed suit. For example, the Sixth Circuit, in ruling Ohio's ballot access laws unconstitutional, explained that

[t]he State has made no clear argument regarding the precise interests it feels are protected by the regulations at issue in the case, relying instead on generalized and hypothetical interests identified in other cases. Reliance on suppositions and speculative interests is not sufficient to justify a severe burden on First Amendment rights.

*Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 593 (6th Cir. 2006). The court also questioned the state's asserted interest in "political stability," stating that "[t]here is some question as to whether this rationale is even reasonable." *Id.* at 594. But this kind of inquiry has been absent from more recent Supreme Court jurisprudence, and there is a danger that lower courts will follow the Court's lead in future cases.

51. See Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 188–91 (2008).

52. See *infra* notes 54–75 and accompanying text; see also Benson, *supra* note 26, at 18. State courts have followed the U.S. Supreme Court's lead, declaring that a vague interest in preserving the "integrity of the election process" is a compelling interest even without any evidence that there are any election fraud problems. See, e.g., *City of Memphis v. Hargett*, 414 S.W.3d 88, 103 (Tenn. 2013). In fact, the Tennessee Supreme Court went even further, affirmatively declaring that the state need not have any evidence of election fraud before enacting a law in the name of election integrity. *Id.* at 104 (stating that "protection of the integrity of the election process empowers the state to enact laws to prevent voter fraud before it occurs, rather than only allowing the state to remedy fraud after it has become a problem"). As discussed below, given the importance of the right to vote and the danger of partisan legislatures enacting partisan-based laws, this formulation places too high of a burden on plaintiffs. Instead, courts should require a state to justify its election regulations with particularized evidence of the harm the state is trying to avoid. Cf. *Rickert v. State Pub. Disclosure Comm'n*, 168 P.3d 826, 830 (Wash. 2007) (questioning the "actual purpose" behind a law banning false campaign speech and failing to accept at face value the state's interest in "preserving the integrity of the election").

53. See Douglas, *supra* note 51, at 191 (noting that the "narrowly tailored prong provides the key to most election law disputes under strict scrutiny").

Consider *Crawford v. Marion County Election Board*, a 2008 case in which the Court upheld Indiana's voter ID law.<sup>54</sup> The Court identified three interests the state had invoked to justify its law: "detering and detecting voter fraud," "preventing voter fraud" based on Indiana's flawed registration rolls, and "safeguarding voter confidence."<sup>55</sup> These are broad platitudes that amount to little more than an assertion of unfettered discretion to dictate how a state's elections are run in the name of "election integrity." After concluding, with very little discussion, that these interests were valid and "unquestionably relevant" to an ultimate interest in "protecting the integrity and reliability of the electoral process," the Court moved on to consider whether the voter ID law actually achieved these interests.<sup>56</sup> The Court failed to recognize that, given the lack of evidence of any actual fraud occurring in the state's elections, Indiana's law was really a solution in search of a problem.<sup>57</sup> Moreover, the Court glossed over what surely was the actual reason behind the law: partisan motivations.<sup>58</sup> Justice Stevens, in the Court's plurality opinion, acknowledged that "[i]t is fair to infer that partisan considerations may have played a significant role in the decision to enact" the voter ID law, and that "[i]f such considerations had provided the only justification for a photo identification requirement, we may also assume that [the voter ID law] would suffer the same fate as the poll tax at issue in *Harper*."<sup>59</sup> But Justice Stevens then credited, in a conclusory fashion without explanation, the state's vague "valid neutral justifications" for the law.<sup>60</sup> Thus, without much discussion, the Court disregarded the Indiana legislature's probable *primary* reason for the law: a desire for partisan gain for the majority party, which enacted the law on a party-line vote.<sup>61</sup> A generic recitation of

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54. 553 U.S. 181 (2008) (plurality opinion).

55. *Id.* at 191.

56. *Id.*

57. See Benson, *supra* note 26, at 18 ("Despite the scant evidence of this form of voter-initiated fraud, the Court deferred to the state's decision and upheld the law as a justifiable burden on the right to vote.").

58. See *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

59. *Crawford*, 553 U.S. at 203.

60. *Id.* at 204.

61. See *id.* at 203; Dan Carden, *Indiana Turnout Not Affected by Voter ID Requirement*, NWI TIMES, Aug. 31, 2014 ("In 2005, the Republican-controlled General Assembly approved, on party lines, one of the nation's first voter ID laws."); see also Jamelle Bouie, *Republicans Admit Voter-ID Laws Are Aimed at Democratic Voters*, THE DAILY BEAST (Aug. 28, 2013), <http://www.thedailybeast.com/articles/2013/08/28/republicans-admit-voter-id-laws-are-aimed-at-democratic-voters.html>, archived at <http://perma.cc/628V-H9XR>.

the state's goal to ensure election integrity allowed the state to escape any meaningful scrutiny of its true rationale.<sup>62</sup>

A similar failure to address the real underlying state interest also occurred in a 2008 case regarding New York's primary process.<sup>63</sup> A candidate for judicial office challenged New York's law that required political parties to select their nominees for state supreme court justice (the state's trial court) at a convention of delegates that the party members choose in a primary election.<sup>64</sup> The candidate alleged that this system violated her First Amendment rights because it precluded any chance for "outsider" candidates that the leading political machine did not favor, as the party leaders had significant sway in the selection of delegates and thus the delegates' choice of the nominee.<sup>65</sup> In rejecting this argument, the Court's majority deferred to the state's ability to choose the candidate selection method it found most suitable.<sup>66</sup> When a state gives a political party's nominee placement on the general election ballot, the Court found, the state "acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be."<sup>67</sup> Thus, in weighing the rights of a candidate to a "fair shot" at the nomination with a state's role in administering the primary system, the Court simply deferred to the state's choices. The Court credited the generic state interest in "ensuring the fairness of the party's nominating process"<sup>68</sup> without probing further into what actually motivated New York's law: a desire to protect the ruling party machinery.<sup>69</sup> That is, the Court failed to force the state to provide a *specific* reason for the law. Although the nominating process was a "classic patronage system"<sup>70</sup> and the law was surely intended to entrench

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62. As Professor Benson explains, deferral to a generic state interest in preventing election fraud has also led lower federal courts to uphold voter purges and other "voter-initiated fraud." See Benson, *supra* note 26, at 18–20. Professor Benson argues that the Court has deferred to a state's interest to prevent "voter-initiated" fraud but has not shown this same level of deference for "voter-targeted" fraud. *Id.* at 25.

63. N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196 (2008).

64. *Id.* at 198.

65. *Id.* at 204–05.

66. *Id.* at 203.

67. *Id.*

68. *Id.*

69. See Ellen D. Katz, *Barack Obama, Margarita Lopez Torres, and the Path to Nomination*, 8 ELECTION L.J. 369, 379 (2009) (quoting Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1771 (1993)) (explaining that the decision "'immunizes [party leaders] from the results of the give-and-take' of the political process, and thereby favors 'unaccountable and generally obscure party officials'").

70. *Id.* at 380 (citing lower court opinion).

the party leaders,<sup>71</sup> the Court neglected to conduct a thorough analysis of the real rationale behind the system, instead simply crediting the state's broad justification of election integrity.

One more example of the Court's recent deferral to a state's asserted interests for a voting rule will drive the point home. The Court in *Doe v. Reed* also neglected to consider meaningfully the state's asserted rationale for a law requiring disclosure of petition signatures.<sup>72</sup> The state claimed that it enacted the law to "preserv[e] the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability."<sup>73</sup> The Court simply found this state interest to be sufficient without much inquiry, noting in a conclusory fashion that "[t]he State's interest in preserving the integrity of the electoral process is undoubtedly important."<sup>74</sup> By couching the state's interest at such a high level of generality, it becomes impossible to question whether that interest is legitimate. Saying the state has an interest in election integrity begs the question, as no one would reasonably disagree that a state cannot seek to preserve the integrity of its election process. But there are almost always deeper reasons for an election law. Here, that interest might be to ensure that those who propose a ballot initiative cannot hide behind a shield of anonymity, as revealing the proponents tells the electorate something meaningful about the merits of the proposition. Or, more nefariously, the state might require disclosure to dissuade too many challenges to the status quo, as some individuals might be less likely to sign a petition if they know their names will be disclosed. The Court, however, failed to look beyond the generalized rationale of election integrity to examine the legislature's likely true reason for enacting the election practice.<sup>75</sup>

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71. *See id.* at 379.

72. *Doe v. Reed*, 561 U.S. 186 (2010).

73. *Id.* at 197.

74. *Id.*

75. The only recent situation in which the Court has meaningfully scrutinized a state's asserted interest in its election-related law is for a campaign finance regulation. In a case about Arizona's public financing regime, the Court discredited Arizona's proffered interest in avoiding actual or apparent corruption and instead claimed that the real (and impermissible) interest of the law was to equalize the playing field between candidates. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825–26 (2011). It thus did not take at face value the state's more general argument regarding its justification for the law, instead probing deeper to consider the actual effect of the law and therefore the state's corresponding interest in its promulgation. *See also* *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam) (rejecting Montana's independent expenditure ban based on *Citizens United v. FEC*, 558 U.S. 310 (2010)). *But see* *Randall v. Sorrell*, 548 U.S. 230, 261–62 (2006) (plurality opinion) (crediting Vermont's justification for its contribution limitation but invalidating the law under the tailoring prong).

This is not to suggest that federal courts will blindly affirm a state's election rules; for instance, there were two important Sixth Circuit cases just before the 2012 election in which the court enjoined Ohio from enforcing election practices that the court deemed unconstitutional.<sup>76</sup> These Sixth Circuit panels properly put the state to a more rigorous test to justify these laws. Then again, many commentators suggested that the Supreme Court would have reversed these decisions had it agreed to hear them.<sup>77</sup> Moreover, states still might lose on the tailoring prong.<sup>78</sup> Regardless, the relevant point is the jurisprudential trend: the Supreme Court has largely deferred to a state's asserted interests in the first prong of the constitutional analysis. This is dangerous because it sends a signal to states that the Court will not scrutinize a new state voting regulation—even if enacted with clear partisan intentions—so long as the state asserts a generic interest in “election integrity.”

### *B. Scrutinizing Carefully Congress's Justifications for an Election Rule*

The Court, in *Shelby County v. Holder*, was not as generous toward Congress's rationale for its voting rule involving the preclearance mechanism of the Voting Rights Act, which required certain states to seek federal governmental approval before implementing any new voting regulations.<sup>79</sup> Although just one case, *Shelby County* is extremely significant in part because it demonstrates the Court's deep skepticism toward Congress's asserted reasoning for its election laws.<sup>80</sup> This interpretive methodology incorrectly disregards the constitutional authority delegated to Congress to oversee the election process.<sup>81</sup>

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76. See *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012) (early voting); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012) (wrong precinct provisional balloting).

77. Edward B. Foley, *The “Equitable” Aspect of the Sixth Circuit’s Early Voting Decision*, ELECTION LAW AT MORITZ (Oct. 7, 2012, 4:20 PM), <http://moritzlaw.osu.edu/election-law/article/?article=9823>, archived at <http://perma.cc/7LK-VJ4M>; Rick Hasen, *“The Soundness of the Equal Protection Holding in the Ohio Early Voting Decision”*, ELECTION LAW BLOG (Oct. 8, 2012, 12:01 PM), <http://electionlawblog.org/?p=41281>, archived at <http://perma.cc/52QM-VLEE>. But see Joshua A. Douglas, *The Soundness of the Equal Protection Holding in the Ohio Early Voting Decision*, ELECTION LAW AT MORITZ (Oct. 8, 2012, 10:44 AM), <http://moritzlaw.osu.edu/election-law/article/?article=9825>, archived at <http://perma.cc/3RDS-PQNA>.

78. See, e.g., *Obama for Am.*, 697 F.3d at 432.

79. 133 S. Ct. 2612, 2631 (2013).

80. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 509 (“[F]rom its inception, the Court has understood the [Voting Rights Act] precisely [as a superstatute] and has willingly cooperated with Congress, as the people’s representatives, in fulfilling the Act’s considerable promise.”).

81. *Id.* at 507–08.

Moreover, it is contrary to historical practice, in which the Court had previously recognized Congress's primacy in regulating elections.<sup>82</sup>

Rejecting Congress's asserted rationale for reauthorizing the preclearance formula in 2006 pervades Chief Justice Roberts's analysis for the majority in *Shelby County*. Although Chief Justice Roberts did not identify the constitutional test he was employing in his opinion,<sup>83</sup> it appears he would have rejected Congress's justifications even under rational basis review. He stated that "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions," which is another way of saying that Congress did not have even a reasonable basis for passing the law.<sup>84</sup> Instead of deferring to Congress's reliance on the lengthy legislative record—a common feature of rational basis review<sup>85</sup>—he faulted Congress for failing to explain why it targeted some states but not others when maintaining the coverage formula in reauthorizing the Voting Rights Act.<sup>86</sup> This is quite different from deferring to legislative judgment on election rules. As Justice Ginsburg wrote in her dissent,

It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference . . . . When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.<sup>87</sup>

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82. See Richard M. Valelly, *The Reed Rules and Republican Party Building: A New Look*, 23 *STUD. AM. POL. DEV.* 115, 123–25 (2009) (citing *Ex parte Siebold*, 100 U.S. 371 (1879), *Ex parte Clarke*, 100 U.S. 399 (1879), and *Ex parte Yarbrough*, 110 U.S. 651 (1884) as a means of explaining how historically "a unanimous Court ruled that in order to protect the electoral processes that made it a national representative assembly, Congress could protect the right to vote of any citizen, black or white").

83. *Shelby Cnty.*, 133 S. Ct. at 2627–31.

84. *Id.* at 2629. For a further discussion of the ways in which the Court can reject congressional justifications for a law, see Ruth Colker & James J. Brudney, *Dissing Congress*, 100 *MICH. L. REV.* 80, 83 (2001) (noting that "the Court has undermined Congress's ability to decide for itself how and whether to create a record in support of pending legislation"); see also *id.* at 104–05 (discussing the Court's rejection of Congress's legislative record in supporting a law).

85. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981) ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.").

86. *Shelby Cnty.*, 133 S. Ct. at 2630–31 ("It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story.").

87. *Id.* at 2636 (Ginsburg, J., dissenting).



The majority, however, rejected this conception, elevating its own view of what Congress intended over explicit congressional statements regarding its justifications.<sup>88</sup> As Professors Guy-Uriel Charles and Luis Fuentes-Rohwer state, “In *Shelby County*, the Court declared that the era of deference [to Congress] was over.”<sup>89</sup>

Of course, regardless of the outcome in *Shelby County*, the main problem this Article identifies still exists: the Court too readily defers to state interests when faced with a constitutional challenge to a state election regulation. *Shelby County* compounds the problem, demonstrating that the Court will not give the same deference to congressional enactments on voting rights. The combination of these approaches shifts the balance of power to the states to regulate the election process.

*Shelby County* represents the only constitutional challenge to a federal voting rule in recent years, yet the Court’s lack of deference to Congress pervades the analysis for other kinds of election laws as well. For instance, the Court has been extremely skeptical of federal campaign finance regulations. In *Citizens United*, which involved federal limitations on corporate and union spending on elections, the Court discounted the federal government’s asserted justification of preventing corruption or the appearance of corruption through increased donor access to legislators.<sup>90</sup> Minimizing the significance of the government’s asserted interest, the Court found that “[i]ngratiation and access, in any event, are not corruption.”<sup>91</sup> Thus, the Court rejected Congress’s explicit rationale for the law, finding that it failed to meet the interest prong of the constitutional analysis.<sup>92</sup> Similarly, in another case, the Court flatly rejected Congress’s justification for differing contribution limits for wealthy and non-wealthy candidates, finding that the government could not support the law under the interest prong.<sup>93</sup> Congress passed the law to equalize electoral opportunities for candidates of different wealth, but the Court stated that the only permissible justification for a campaign finance regulation is to prevent corruption or the appearance of corruption.<sup>94</sup> Unlike the Court’s approach to state voting rules, this analysis of federal election laws limits

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88. *Id.* at 2629 (maj. op.).

89. Charles & Fuentes-Rohwer, *supra* note 80, at 512.

90. *Citizens United v. FEC*, 558 U.S. 310, 359–60 (2010).

91. *Id.* at 360.

92. *Id.* at 360–61. In addition, the Court held that Congress’s remedy in limiting corporate and union campaign speech was unconstitutional, meaning that the tailoring prong was also important to the Court’s holding. *Id.* at 340.

93. *Davis v. FEC*, 554 U.S. 724, 738–40 (2008).

94. *Id.* at 740–42.

the available justifications Congress can rely upon to legislate in this area. Broad platitudes about preserving election integrity are insufficient.<sup>95</sup>

In sum, the Court has been much more meticulous in examining Congress's interests in its election regulations as compared to how it treats states. The Court has not said explicitly that it defers more readily to states to regulate elections. But the underlying message is that states have a lower burden to justify their election administration and simply must cite a generalized notion of election integrity to pass the first prong of the constitutional inquiry.<sup>96</sup>

## II. FACIAL VERSUS AS-APPLIED CHALLENGES TO ELECTION LAWS

The Court has largely deferred to states, but not Congress, by distinguishing between facial and as-applied challenges in election litigation, a procedural difference that alters the scope of the Court's opinions. Recent case law has demonstrated that the Court strongly

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95. *See id.* The only election-related statutes in which the Court has deferred more broadly to the government's asserted interests are disclosure and disclaimer laws regarding campaign finance; the Court has said that the government has a very low burden to justify these provisions. *See, e.g., Citizens United*, 558 U.S. at 366–67.

96. Besides emergency appeals, which typically present procedural issues, only one other federal election administration case has reached the Supreme Court on the merits during Roberts's term, but it was not a constitutional challenge. Yet the decision still had the effect of elevating the role of states in regulating the election process.

In a case involving federal preemption of a state's voter registration requirements, the Court embellished a state's authority in determining voter qualifications. *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2251 (2013). The case actually represented a win for the federal government, as the Court held that the National Voter Registration Act preempted Arizona's contrary law. But the underlying message was that Congress has no role to play in determining the contours of the electorate. The Court explained that, under the U.S. Constitution, states—not Congress—have wide leeway to determine voter qualifications, seeming to place particular emphasis on this facet of constitutional allocation of power. *Id.* at 2253–54. The ultimate significance of the decision therefore may be opposite from what the actual holding reflects, as states will be able to use the reasoning in the majority's opinion to defend their election regulations, at least regarding voter qualification requirements.

For a slightly different view of the import of the Court's opinion in *Arizona v. Inter Tribal Council*, see Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 112–13 (2013) (arguing that “there is untested room for expansion of congressional intervention under the Elections Clause”). I do not disagree with Professor Issacharoff that, as a matter of constitutional interpretation, the Elections Clause provides broad authority to Congress to regulate the electoral process. *See infra* Part IV.A. I am just not as optimistic, given the language regarding Congress's inability to regulate issues of voter eligibility, that this interpretation is the best reading of Justice Scalia's majority opinion in *Arizona v. Inter Tribal Council*. Instead, this portion of the opinion elevates the role of states in determining voter qualifications, at the expense of Congress. *See Inter Tribal Council*, 133 S. Ct. at 2258 (internal quotation marks omitted) (“Prescribing voting qualifications, therefore, forms no part of the power to be conferred upon the national government by the Elections Clause, which is expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.”).

disapproves of facial challenges to state laws involving voting rules, yet it has sustained at least two significant facial challenges to federal laws.<sup>97</sup> In a facial challenge, the plaintiff asserts that the law is invalid in every application, irrespective of how the law might operate for that plaintiff.<sup>98</sup> The plaintiff wins only if he or she can “establish that no set of circumstances exists under which the [law] would be valid.”<sup>99</sup> An as-applied challenge, by contrast, is narrower, as the plaintiff claims only that the law is invalid with respect to that particular plaintiff.<sup>100</sup> The claim is thus more dependent on the facts and evidence regarding that specific plaintiff, as it asks whether the law operates unconstitutionally for that plaintiff and those similarly situated.<sup>101</sup>

In many of these cases, the Court has provided specific guidance on the propriety of bringing facial or as-applied challenges to election regulations. But the Court has vacillated, sometimes rejecting facial challenges and other times sustaining them.<sup>102</sup> When the Court has determined that facial challenges are inappropriate and that only as-applied challenges are allowed, it has rejected the plaintiff’s claim and upheld the law, at least until the plaintiff can provide specific evidence on how the law unconstitutionally impacted that particular individual. This has been the general approach to reviewing state laws involving election administration. When the Court has allowed facial challenges, by contrast, it has struck down the laws under review, for both federal election administration laws and all campaign finance laws. But the Court has failed to provide a meaningful doctrinal justification for why it prefers one approach over the other.<sup>103</sup> This procedural distinction has a practical consequence: by rejecting facial challenges to state election administration

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97. The Court’s delineation between facial and as-applied challenges is not limited to the election setting. For example, recent abortion cases have included lengthy discussions of the distinction. *See, e.g.,* *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–31 (2006); *see also* Metzger, *supra* note 19, at 776–83.

98. *See* Douglas, *supra* note 8, at 639; *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994).

99. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

100. *See* Douglas, *supra* note 8, at 639; Dorf, *supra* note 98, at 236.

101. Professor Richard Fallon has suggested that the distinction between facial and as-applied challenges is not as meaningful as the Court has suggested. *See generally* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011) (examining six Court terms to uncover “facts” and “fictions” about the Court’s approach to facial challenges). Because the Court continues to rely on the distinction, however, it is important to understand its effects.

102. *Id.* at 919 (“[C]ontrary to the conventional wisdom, the Supreme Court does not routinely insist on ruling on as-applied challenges before deciding whether to hold a statute invalid on its face, nor should it almost always do so.”).

103. *See* Metzger, *supra* note 19, at 774–75 (summarizing the Roberts Court’s varied approach and noting the Court’s “strategic use of the facial versus as-applied distinction”).

laws, the Court implicitly sanctions the state's practice. That is, the Court's approach provides a procedural mechanism for allowing states to regulate elections while scrutinizing Congress more closely.

#### A. *Facial Challenges to Rules Regulating Election Administration*

This section examines the Court's approach to facial and as-applied challenges for both state election rules and congressional enactments regarding election administration. The analysis reveals that the Court allows only as-applied challenges to state voting laws but will sustain a facial challenge to a congressional statute—meaning that state voting rules stay in place and are subject only to piecemeal litigation involving particular circumstances, while the federal law is struck down in its entirety. The Court is using the procedural distinction between facial and as-applied challenges to allow states to continue enforcing their election regulations while imposing greater judicial scrutiny on federal laws.

##### 1. *Rejecting Facial Challenges to State Laws Involving Election Administration*

The primary explication of the differences between facial and as-applied challenges in election law cases occurred in *Washington State Grange v. Washington State Republican Party*, a 2008 ruling with little salience and minimal significance in terms of its substantive holding.<sup>104</sup> The Court upheld Washington's "top-two" primary law, in which candidates run in a "blanket" primary open to all voters and the top two vote recipients move on to the general election.<sup>105</sup> The law allows candidates to state their political party preference on the ballot, even if the party did not endorse the candidate.<sup>106</sup> The Court rejected the political parties' arguments that this system violates their associational rights, in part because they brought only a facial challenge. The majority opinion, written by Justice Thomas, explained that the political parties challenged

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104. 552 U.S. 442 (2008). There were prior campaign finance cases that presented the distinction between facial and as-applied challenges, but *Washington State Grange* entails the Court's first major discussion of the difference in the election administration setting. *See, e.g.,* *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (per curiam).

105. *Wash. State Grange*, 552 U.S. at 444–45.

106. *Id.* at 447.

the law “not in the context of an actual election,”<sup>107</sup> meaning that they had a heavy burden:

Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.<sup>108</sup>

In the context of the top-two primary law, the Court determined that the political parties’ argument regarding voter confusion about the party’s endorsement of a candidate rested on “sheer speculation.”<sup>109</sup> The Court explained that it could not strike down an election law on its face merely because there was a possibility of voter confusion<sup>110</sup>; the plaintiffs would have to show actual evidence of confusion in an as-applied challenge. Because the Court could conceive of a ballot designation of political party preference that would not confuse voters, it rejected the plaintiffs’ facial argument.<sup>111</sup> The “factual determination” of whether there actually would be voter confusion “must await an as-applied challenge.”<sup>112</sup>

Chief Justice Roberts, joined by Justice Alito, concurred, stating that “because respondents brought this challenge before the State of Washington had printed ballots for use under the new primary regime, we have no idea what those ballots will look like.”<sup>113</sup> He therefore wanted to see the ballots before he could determine if they would confuse voters about whether the party was endorsing a candidate.<sup>114</sup> That is, he bolstered

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107. *Id.* at 449–50.

108. *Id.* at 450–51 (citations and internal quotation marks omitted) (brackets in the original).

109. *Id.* at 454.

110. *Id.* at 455.

111. *Id.* at 456.

112. *Id.* at 458.

113. *Id.* at 460 (Roberts, C.J., concurring).

114. *Id.* at 462.

the notion that only an as-applied challenge to a specific ballot design was appropriate.<sup>115</sup>

The upshot of *Washington State Grange* is that a plaintiff may not challenge a newly-enacted state election regulation on its face. Instead, the plaintiff must wait until the state implements the law and then gather evidence on the law's impact, potentially having to endure at least one election cycle under the law to obtain that information.<sup>116</sup> The plaintiff may then bring a narrower, as-applied challenge to the specific manner in which the law operates. This allows the law to stay in force, meaning that the Court is deferring to state election processes until the plaintiff can show that the state's implementation of the law during an actual election is constitutionally suspect.

The Court used the precedent from *Washington State Grange* a few weeks later in *Crawford v. Marion County Election Board*, a much more salient and controversial decision regarding Indiana's new voter identification law.<sup>117</sup> At the time, Indiana had one of the strictest voter ID laws in the country.<sup>118</sup> Nevertheless, the plurality ruled that the plaintiffs had failed to provide enough evidence of the burdens the law imposed in this facial challenge.<sup>119</sup> Under the plaintiff's facial assault, the Court was required to consider the application of the voter ID law to all voters in the abstract, outside of the context of a real election. There was insufficient evidence, according to the plurality, of the burdens on specific groups of individuals who would suffer greater barriers to vote because of the law, such as indigent voters or those who have religious objections to being photographed.<sup>120</sup> The Court thus deferred to the state's asserted need for a voter ID requirement unless and until the plaintiffs could generate real evidence, from an actual election, of how the law impermissibly denied the right to vote.<sup>121</sup>

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115. *See id.* Justice Scalia, joined by Justice Kennedy, dissented, arguing that there was no ballot the state could design under the law that would not confuse voters regarding a political party's endorsement of a candidate. He therefore would have struck down the law on its face. *See id.* at 462 (Scalia, J., dissenting).

116. *See Douglas, supra* note 8, at 681.

117. 553 U.S. 181 (2008) (plurality opinion).

118. *Id.* at 222 (Souter, J., dissenting).

119. *Id.* at 200 (plurality opinion) (“[O]n the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.”). Justice Stevens wrote the plurality opinion, joined by Chief Justice Roberts and Justice Kennedy.

120. *Id.* at 199.

121. Justice Scalia, joined by Justices Thomas and Alito, concurred in the judgment, stating that he would not leave the door open to as-applied challenges and instead would uphold the voter ID law on its face. *See id.* at 209 (Scalia, J., concurring). Justice Souter (joined by Justice Ginsburg) and

Because of the Court's decision, a law might disenfranchise some voters for at least one election cycle due to their inability to obtain a valid ID. A determination of whether this is unlawful, however, would have to wait for an as-applied challenge in which the plaintiff-voters submit specific evidence of the burdens they suffered during the election. In essence, the plaintiffs would have to gather evidence of how the law unconstitutionally took away their right to vote in the initial election so they could use that evidence in a subsequent as-applied challenge. The problem, of course, is that in the meantime the voters already suffered a potential infringement of their right to vote. In the process, states are given wide leeway to impose voting regulations, such as a photo identification requirement, in at least one election. The Court thus used the procedural distinction between facial and as-applied challenges to defer to state processes for running an election.

Given the discussion in both *Washington State Grange* and *Crawford*, as well as the Roberts Court's application of the facial versus as-applied approach in other contexts,<sup>122</sup> one would expect the Court to continue to reject facial challenges to election regulations, waiting for appropriate evidence of the particularized burdens a law imposes in an as-applied lawsuit. As Professor Gillian Metzger noted in a 2009 article, "[o]ne recurring theme of the Roberts Court's jurisprudence to date is its resistance to facial constitutional challenges and preference for as-applied litigation."<sup>123</sup> Scholars, including me, lamented this shift in allowing only as-applied litigation to challenge an election regulation.<sup>124</sup> This judicial framework meant that plaintiffs would likely have to suffer burdens, including possible disenfranchisement, for at least one election cycle so they could gather the necessary evidence to mount a successful as-applied challenge, making constitutional election litigation proceed in piecemeal fashion.<sup>125</sup> This is not to suggest that states will necessarily win every lawsuit, even in the lower courts, or that courts will refuse to issue

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Justice Breyer each wrote dissents. *See id.* at 209 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting).

122. *See supra* note 103.

123. Metzger, *supra* note 19, at 773.

124. *See* Douglas, *supra* note 8, at 677; Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644 (2009); *Cf.* Metzger, *supra* note 19, at 786–88 (suggesting that the consequence of the distinction rests on how broadly or narrowly the Court defines an as-applied challenge).

125. *See* Douglas, *supra* note 8, at 681.

preliminary injunctions before an election in the right circumstances.<sup>126</sup> But it does present a limiting principle for plaintiffs (as-applied challenges) and a litigation strategy to avoid (facial challenges).<sup>127</sup>

Despite these two cases, however, the Court has shifted its approach dramatically in subsequent election law disputes, invalidating some election laws on their face. Interestingly, as the next section reveals, the difference seems to turn on whether the case involves a federal or state election law.

## 2. *Embracing a Facial Challenge to a Federal Law Involving Election Administration*

Unlike its recent approach to state election administration rules, the Court welcomed a facial challenge to the federal Voting Rights Act, striking down a portion of the law. In *Shelby County v. Holder*,<sup>128</sup> plaintiffs challenged one of Congress's most controversial election administration rules: Sections 4 and 5 of the Voting Rights Act.<sup>129</sup> These provisions, which Congress reauthorized in 2006, required certain "covered jurisdictions" to obtain preclearance, or preapproval, before making any changes to their voting processes.<sup>130</sup> Shelby County, Alabama, a covered jurisdiction, challenged the entire formulation of the law (i.e., on its face), as opposed to bringing a narrower as-applied attack to its own

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126. See, e.g., *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012) (invalidating Ohio's cutback of early voting to all but military voters because it was not sufficiently tailored to the state's interest in smooth election administration).

127. The Court has also directly obscured the distinction between facial and as-applied challenges while still ruling in favor of a state's process. In *Doe v. Reed*, 561 U.S. 186 (2010), the Court upheld a Washington law requiring disclosure of the names of individuals who had signed petitions to put a gay marriage amendment on the ballot by rejecting the plaintiff's lawsuit irrespective of whether it was couched as a facial or as-applied challenge. The case had

characteristics of both: The claim is "as applied" in the sense that it does not seek to strike the [law] in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.

*Id.* at 194. The deciding factor was that the state had an important interest in "preserving the integrity of the electoral process." *Id.* at 197. In this circumstance, then, it was not the rejection of a facial challenge but instead overall deference to the state's generalized interest in election integrity that drove the Court's affirmation of the state's election practice. See *supra* Part I.A; see also Fallon, *supra* note 101, at 971 n.335 (construing *Doe v. Reed* as an as-applied challenge).

128. 133 S. Ct. 2612 (2013).

129. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246.

130. *Shelby Cnty.*, 133 S. Ct. at 2619-20.



inclusion based on evidence of whether it should be subject to preclearance.<sup>131</sup>

Contrary to the approach one might expect from a Court that had permitted plaintiffs to bring only as-applied challenges, the majority did not require Shelby County to demonstrate why it was inappropriate to include *it* within the Act's coverage. That is, Shelby County was not forced to present evidence regarding its own burdens under the law, as would be necessary in an as-applied suit. Instead, the majority agreed with Shelby County's more general facial attack.<sup>132</sup> But the majority surprisingly failed to explain why it was sanctioning a broad-based facial assault to the law. The entirety of the Court's reasoning regarding the appropriateness of the facial challenge amounted to a single, unhelpful analogy:

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shelby County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The county was selected based on that formula, and may challenge it in court.<sup>133</sup>

The situations, however, are not really analogous: Shelby County is not objecting to one policy even though it engaged in some other unrelated and unlawful act. Instead, it is challenging its own inclusion as a covered jurisdiction—the very thing for which it was, under Roberts's analogy, “pulled over.” That is, Shelby County should not be able to challenge the consequences of Congress including others for preclearance if it would be appropriate, given the evidence of Shelby County's own history regarding discrimination in election administration, to have congressional oversight over its voting changes. The analogy thus begs the question of whether Shelby County could have succeeded in a narrower challenge to its own inclusion, irrespective of whether this particular coverage formula was too broad. If Shelby County's history is such that it should be subject to the preclearance requirement, then it is irrelevant whether the coverage

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131. *Id.* at 2621–22.

132. *Id.* at 2625.

133. *Id.* at 2629–30 (citation omitted).

formula that places Shelby County under Section 5 of the Act might be flawed as to other jurisdictions. In an as-applied challenge, Shelby County would have had to question Congress's evidence for creating a coverage formula that included Shelby County itself, regardless of how the formula applied elsewhere. Put differently, the remedy could be to exclude Shelby County without needing to pass upon whether the entire coverage formula was invalid.

In her dissent, Justice Ginsburg focused on this aspect of the majority's reasoning, noting that the majority failed to exercise its "usual restraint" in choosing not to address facial challenges.<sup>134</sup> Under normal rules of constitutional adjudication, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."<sup>135</sup> Shelby County had failed to demonstrate why it should not fall under the coverage formula, even if that formula had incorrectly captured other jurisdictions:

the Court's opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit—Shelby County, Alabama. The reason for the Court's silence is apparent, for as applied to Shelby County, the VRA's preclearance requirement is hardly contestable.<sup>136</sup>

Justice Ginsburg concluded that by "[l]eaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, . . . the Court's opinion can hardly be described as an exemplar of restrained and moderate decisionmaking."<sup>137</sup>

Unlike in previous cases, the majority in *Shelby County* provided very little reasoning for its interpretive methodology, as it merely cited the burdens that the law imposed on certain states and not others. Moreover, the Court's approach to the facial versus as-applied aspect of the case was completely at odds with the analysis from *Washington State Grange* and *Crawford*, in which the Court rejected facial challenges to state laws because it preferred narrower, as-applied litigation. Yet the Court did not cite either case in *Shelby County*. Thus, the decision, although a sample of one, represents a shift in how the Court construes challenges involving

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134. *Id.* at 2644 (Ginsburg, J., dissenting).

135. *Id.* at 2645 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)).

136. *Id.*

137. *Id.* at 2648.

election administration laws. The decision was broad because it struck down all aspects of the coverage formula without addressing whether Shelby County itself was a proper target of preclearance.<sup>138</sup>

This is not to say, of course, that the difference between facial and as-applied challenges motivated the Court's decision in *Shelby County*. But it is certainly inconsistent with the Court's prior approach regarding the proper constitutional mode of scrutiny for cases involving election administration. Taking Congress out of the election administration business—the practical effect of this jurisprudence—provides a reconciling principle.

Moreover, although *Shelby County* is the only recent election case considering the constitutionality of a federal election administration law on the merits, it still represents a significant shift in the Court's jurisprudence.<sup>139</sup> To be consistent with *Washington State Grange* and *Crawford*, the Court should have rejected the plaintiff's facial challenge. The Court's recent election law jurisprudence thus reveals that it will welcome facial challenges to federal election rules but reject facial challenges to state voting laws.<sup>140</sup>

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138. In some ways, the decision was perhaps narrower than it could have been, as the Court issued no ruling on Section 5 itself. It limited its analysis to the coverage formula in Section 4. *Id.* at 2631. But the Court surely knew that by invalidating Section 4 it was effectively gutting Section 5 as well. See John Paul Stevens, *The Court & the Right to Vote: A Dissent*, N.Y. REVIEW OF BOOKS (Aug. 15, 2013), <http://www.nybooks.com/articles/archives/2013/aug/15/the-court-right-to-vote-dissent/> ?pagination=false, archived at <http://perma.cc/BD82-NYJY> (reviewing GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2013)) (highlighting the “unusual feature” of the majority’s reasoning: “Instead of holding that it was unconstitutional to apply the preclearance requirement to Shelby County, the Court merely held that it was unconstitutional to use the formula in the 1965 Act to identify those jurisdictions that must have their proposed voting changes precleared. Presumably that narrower holding was intended to avoid the rule of judicial restraint that normally, in a so-called facial challenge, required the plaintiffs challenging the constitutionality of a federal statute to convince the Court that the statute is invalid under all circumstances.”); see, e.g., Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html>.

139. The other main congressional statutes that regulate the administration of elections are the Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (2014), the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 (2014), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301–20311 (2014), and the Military and Overseas Voter Empowerment Act (MOVE), *id.* The Supreme Court has not heard a constitutional challenge to any of these statutes, and the Court has cited these laws only fleetingly. For a brief discussion of the few lower court decisions involving UOCAVA and the MOVE Act, see Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 144 (2010).

140. The Court has also discussed the facial versus as-applied distinction in the campaign finance context, most notably in *Citizens United v. FEC*, 558 U.S. 310 (2010). There, the majority rejected the plaintiffs’ asserted as-applied challenges and invalidated the federal provision on its face. This might reveal overall skepticism of federal election regulation, or heightened scrutiny of campaign finance

The Court has been extremely inconsistent on whether facial or as-applied litigation is more appropriate to challenge election regulations. Perhaps the Court was simply being results-oriented: the majority of Justices wanted to uphold Washington's top-two system and Indiana's voter ID law, but sought to invalidate the preclearance formula of the Voting Rights Act, and thus chose the procedural device for each case that would achieve those results.<sup>141</sup> Indeed, the merits of the substantive constitutional law on each issue might explain the differing approaches.<sup>142</sup> Furthermore, scholars have demonstrated that judicial decision making often has a partisan bent.<sup>143</sup> But that explanation is fairly simplistic, and it may not capture the full picture. That is, focusing on the results obscures the underlying doctrinal shift in the Court's election law jurisprudence. Instead, a closer look at the analysis reveals that the Court is using the facial versus as-applied distinction to reach the broader constitutional question for federal statutes but not for state voting rules. Allowing facial challenges leads to the invalidation of federal election laws, while requiring only as-applied litigation results in the Court upholding state voting statutes. This procedural difference, combined with the findings of the previous Part—which showed that the Court rarely scrutinizes a state's rationale for an election administration law but at the same time looks more skeptically at the reasoning behind a congressional enactment—makes the trend of the Court's recent election law jurisprudence evident: it trusts the states, but not Congress, to run elections.

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laws in general. *Cf.* *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion) (invalidating Vermont contribution limitation); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (striking down Arizona public financing scheme). In some ways, campaign finance is its own category of First Amendment law that is separate from election administration. Nevertheless, the decision to sustain facial challenges to campaign finance rules makes the Court's deference toward state election administration and the rejection of facial challenges to state voting laws even starker.

141. *See Metzger*, *supra* note 19, at 797 (suggesting the Court may use the facial and as-applied distinction for "strategic ends" and that "these decisions may be result-driven"); *Kreit*, *supra* note 9, at 663 (arguing that the "doctrine [of facial and as-applied challenges] reveals itself as little more than a rhetorical device that Justices use to add support for decisions they would have reached without it").

142. *See Metzger*, *supra* note 19, at 799–801 (arguing that "it is substantive constitutional law that determines not just the availability of facial challenges, but in addition the extent to which as-applied challenges represent a meaningful mechanism for asserting constitutional rights").

143. *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 19–25 (2008) (determining that a judge's partisanship based on the party of the appointing president influences decision making in lower court cases involving the Voting Rights Act); *see also* Joshua A. Douglas, *The Voting Rights Act Through the Justices' Eyes: NAMUDNO and Beyond*, 88 TEX. L. REV. SEE ALSO 1, 8 (2009) (asserting that conservative Supreme Court Justices tend to construe the Voting Rights Act narrowly while liberal justices interpret the Act broadly).

### III. ELECTION LAW, FEDERALISM, AND CHIEF JUSTICE ROBERTS

This Part suggests some reasons why the Court has largely deferred, both substantively and procedurally, to states to administer elections. The explanation has two components. First, the cases fit within the Roberts Court's overall ideals of federalism. Second, Chief Justice Roberts himself has been in the majority in every election-related case during his tenure, demonstrating his own significance in shaping this field and suggesting that ideological motivations regarding the federal-state balance of power may be behind the Court's decisions.

#### A. *Election Law and the Roberts Court's Federalism*

Federalism may explain, at least in part, why the Court recently has been so deferential to state election administration. In fact, federalism, although not explicitly addressed in detail, infuses much of the Roberts Court's jurisprudence.<sup>144</sup> The election law decisions fit within this framework.

Although the Roberts Court has not made many specific pronouncements about federalism per se, it has sent clear signals of its intent to limit congressional power in favor of the states. For example, in *Bond v. United States*, a case about whether a federal defendant had standing to challenge the constitutionality of the law under which she was convicted, the Court went out of its way to elevate federalism principles.<sup>145</sup> Justice Kennedy's majority opinion, which Chief Justice Roberts joined, "virtually basks" in federalism doctrine.<sup>146</sup> Justice Kennedy explained his view that "[f]ederalism secures the freedom of the individual."<sup>147</sup> Invoking obliquely a concern about elections, Justice Kennedy asserted that federalism "enables greater citizen 'involvement in democratic processes'" because it allows states to respond to local issues.<sup>148</sup> Giving more power to states diffuses power from a distant and centralized federal authority that is not as attuned to individual concerns.<sup>149</sup> Chief Justice Roberts's vote to join Justice Kennedy's majority opinion thus signifies his adherence to these broad views of state authority, not only as a structural feature of the

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144. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Bond v. United States*, 131 S. Ct. 2355 (2011).

145. *Bond*, 131 S. Ct. at 2364.

146. See Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 460 (2011).

147. *Bond*, 131 S. Ct. at 2364.

148. *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

149. *Id.*

allocation of power in our system, but also as a means of individual liberty.<sup>150</sup> Federalism provides the basis for shifting power from the federal government to the states.

The Court's high-profile decision to uphold the Affordable Care Act in *National Federation of Independent Business v. Sebelius*—which Chief Justice Roberts authored—follows this principle.<sup>151</sup> Although the Court sustained the law's "individual mandate" under Congress's power to levy taxes, it limited significantly Congress's powers under the Commerce Clause.<sup>152</sup> Thus, Chief Justice Roberts's majority opinion "left Congress with a great deal of power where it often has the least room to maneuver: imposing taxes."<sup>153</sup> At the same time, it curtailed Congress's authority under the Commerce Clause, which is more often the constitutional basis for congressional action.<sup>154</sup> Indeed, the opinion's opening salvo could explain just as accurately the Court's view of election-related legislation: "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder."<sup>155</sup> Of course, that is true as a general matter about any constitutional adjudication. The *real* question relates to the interpretation and scope of Congress's powers. The Court's jurisprudence has curtailed that power in various areas, including election law.

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150. *Id.* ("Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. 'State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'") (quoting *New York v. United States*, 505 U.S. 144, 181, (1992)).

151. 132 S. Ct. 2566 (2012).

152. *Id.* at 2587 (Roberts, C.J.).

153. Glenn H. Reynolds & Brannon P. Denning, *National Federation of Independent Business v. Sebelius: Five Takes*, 40 HASTINGS CONST. L.Q. 807, 831 (2013).

154. Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1209 (2003) ("Between 1937 and 1995, the Court utilized multiple perspectives to find commerce clause connections sufficient to justify the assertion of federal regulatory power.").

155. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2577; see Nicole Huberfeld, *With Liberty and Access for Some: The ACA's Disconnect for Women's Health*, 40 FORDHAM URB. L.J. 1357, 1387–88 (2013) ("The opening statement of Chief Justice Roberts's opinion makes it clear that Court-enforced federalism will be central to the decision, describing federalism as a doctrine that protects the states in the name of individual liberty."); Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 98 (2012) (quoting *Sebelius*, 132 S. Ct. at 2579–80) ("[C]onfidence in the Court's ability to police federalism represents a core undercurrent of both Chief Justice Roberts's opinion and the joint dissent. Despite his deference to Congress in sustaining the mandate under the tax power, the Chief Justice did not shy from articulating limits on Congress—insisting that 'there can be no question that it is the responsibility of this Court to enforce the limits on federal power.'"). Roberts cited *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–76 (1803). *But see* Arnold H. Loewy, *Chief Justice Roberts (A Preliminary Assessment)*, 40 STETSON L. REV. 763, 772–74 (2011) (suggesting that "there is good reason to believe that federal legislation, arguably trenching on state sovereignty, will have smoother sailing in the Roberts Court than it did in the Rehnquist Court").

The Court, and Chief Justice Roberts in particular, is thus employing a long-term strategy to cabin congressional authority; the election law cases epitomize this principle. Although the federal government might win some isolated cases—such as *Arizona v. Inter Tribal Council*<sup>156</sup>—the underlying language and doctrine is hostile to federal power. States are granted more leeway in the process. The Roberts Court’s approach may also reflect another form of federalism: giving state courts a first pass at statutory analysis of their own state rules, rather than leaving it to a federal court, which is likely ill-equipped to construe a state law in conformity with the state legislature’s goals.<sup>157</sup> But even if Roberts thinks he is moving the law incrementally, the consequences of this methodology are significant. It emboldens states to pass more restrictive voting rules that will be subject to less meaningful judicial review.<sup>158</sup>

This explanation of the Court’s election law doctrine cuts against a perception that the Roberts Court may be less attuned than the Rehnquist Court was to principles of federalism.<sup>159</sup> Chief Justice Roberts’s vote with the majority in *United States v. Comstock*,<sup>160</sup> which upheld Congress’s power under the Necessary and Proper Clause to enact a law allowing federal civil confinement of sexually violent criminals, might suggest that “[f]ederalism is the one area in which Chief Justice Roberts seems to differ from his predecessor.”<sup>161</sup> But the trend in election law jurisprudence, along with Roberts’s language in *National Federation of Independent Business v. Sebelius*, suggest that *Comstock* may be an anomaly and that the

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156. 133 S. Ct. 2247 (2013); see also *supra* note 96.

157. See Dorf, *supra* note 98, at 273 n.164 (“Federalism presents an additional reason to reject facial invalidity. If a state statute does not plainly encompass within its scope the allegedly invalid applications, a federal court may assume that the state’s highest court will, in an appropriate case, construe the statute as inapplicable.”).

158. See *infra* Part IV.B.

159. See, e.g., Huberfeld, *supra* note 146, at 459 (“Although the Rehnquist Court’s federalism revolution has been much discussed, until recently observers have found the Roberts Court’s approach to federalism to be opaque, as the Court had not issued an opinion that luxuriates in federalism like the Rehnquist Court had done.”); Loewy, *supra* note 155, at 772–74; David A. King, Note, *Formalizing Local Constitutional Standards of Review and the Implications for Federalism*, 97 VA. L. REV. 1685, 1716 (2011) (footnote omitted) (“[W]hile the Roberts Court has followed the Rehnquist Court’s lead in citing federalism principles to limit the scope of statutes infringing on state and local sovereignty, Chief Justice Roberts has also signaled greater deference to the federal government in cases involving state challenges to federal action.”).

160. 560 U.S. 126 (2010).

161. Loewy, *supra* note 155, at 772. But see Michael C. Dorf & Erwin Chemerinsky, *Three Vital Issues: Incorporation of the Second Amendment, Federal Government Power, and Separation of Powers—October 2009 Term*, 27 TOURO L. REV. 125, 143–44 (2011) (“[I]t is premature to assert that *Comstock* will put an end to what the Roberts Court will do, or that *Comstock* represents the fact that the Roberts Court will not necessarily extend what the Rehnquist Court did with regard to federalism.”).

emerging view from *Bond* and *NFIB* is more accurate: although trying to be incremental on the surface, the Roberts Court is following a federalism ideal in the allocation of power between Congress and the states. Understanding the election law cases through this lens reconciles the otherwise contradictory approaches discussed earlier in this Article.<sup>162</sup> The Roberts Court is heeding to a theory of federalism, limiting Congress's power as much as possible and elevating the states' role in regulating various aspects of our democratic system. Its approach, cabining congressional authority but deferring to state election administration—through its failure to scrutinize a state's asserted justification for an election rule and allowing only as-applied challenges to state voting processes—is consistent with the Roberts Court's overall conception of federalism.

### *B. The Chief Justice's Influence*

Ideologically-driven decision making also might explain the Court's recent election law jurisprudence. In this realm it is not the outcome per se, but rather the message regarding the federal-state balance of power to run elections, that matters the most. In fact, at least one Justice may be pulling the strings—and it is not Justice Kennedy, commonly labeled the “swing” voter on the Court. Instead, Chief Justice Roberts, with his votes, written opinions, and assignment of opinions to other Justices, has had a tremendous impact on the scope of election law jurisprudence. Of course, Roberts would not be in the position to influence the doctrine as much had Justice Alito not replaced Justice O'Connor, resulting in the current 5–4 ideological split on the Court. Moreover, Roberts has not necessarily provided the tiebreaking vote in these cases. He has, however, used his power as Chief Justice to move the Court in the direction he seeks.

Roberts has been in the majority in every single election law case he has heard to date.<sup>163</sup> Since Roberts became Chief Justice in the fall of 2005, the Court has issued merits decisions with written opinions in twenty-four cases involving redistricting, campaign finance, or election administration.<sup>164</sup> The Chief Justice has joined the majority opinion in

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162. See *supra* Parts I–II.

163. Roberts did, however, write a decision concurring in part, concurring in the judgment in part, and dissenting in part in a redistricting case in which the Court was extremely fractured. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

164. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3 (2012) (per curiam); *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct.



every case.<sup>165</sup> No other Justice has been in the majority every time.<sup>166</sup>

Chief Justice Roberts has written the majority opinion in seven of these election law cases, giving him more majority opinions in this field than any other Justice.<sup>167</sup> Seven of the other opinions were per curiam, meaning

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2490 (2012) (per curiam); *Perry v. Perez*, 132 S. Ct. 934 (2012) (per curiam); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Doe v. Reed*, 561 U.S. 186 (2010); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion); *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009); *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008) (per curiam); *Davis v. FEC*, 554 U.S. 724 (2008); *Riley v. Kennedy*, 553 U.S. 406 (2008); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (plurality opinion); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008); *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196 (2008); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Lance v. Coffman*, 549 U.S. 437 (2007) (per curiam); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *League of United Latin Am. Citizens*, 548 U.S. at 399; *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion); *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (per curiam). See also Richard L. Hasen, *The Supreme Court's Shrinking Election Law Docket, 2001–2010: A Legacy of Bush v. Gore or Fear of the Roberts Court?*, 10 ELECTION L.J. 325, 332–33 (2011) (including Appendix that lists every election law case the Supreme Court decided from 2001–2010).

One additional case, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), was not about the operation of the election itself but instead concerned whether an elected judge was required to recuse himself in litigation involving one of the judge's financial supporters. Chief Justice Roberts dissented in that case. *Id.* at 890 (Roberts, C.J., dissenting). Because the case did not involve redistricting, a campaign finance regulation, or another aspect of the election process and touched upon election issues only peripherally, I do not include the decision in my list of election-related cases. But see Hasen, *supra* at 333 (including *Caperton* in the list of election law cases). But even including *Caperton* in the list does not diminish the Chief Justice's overall influence.

165. These numbers reflect an overall trend: Roberts has cast the second-fewest dissenting votes of any of the Justices, with only Kennedy dissenting in fewer cases. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* 136–37 (2013).

166. Justice Kennedy comes close—he did not join the majority at least in part in only one case. See *Wash. State Grange*, 552 U.S. at 462 (Scalia, J., dissenting, joined by Kennedy, J.). That case is instructive, as it is a state election administration dispute involving Washington's choice over its ballot design. Justice Scalia's dissent, which Justice Kennedy joined, focuses on the First Amendment implications to political parties of the candidate designation feature of Washington's top-two primary system. *Id.* at 462–64. Thus, if this case signifies a divergence in the jurisprudence between Chief Justice Roberts and Justice Kennedy, it suggests that Justice Kennedy does not seem to defer as categorically to state election administration rules.

Justice Kennedy also concurred in the judgment in *López Torres*, 552 U.S. at 209 (Kennedy, J., concurring).

In addition, Justice Alito's vote has been influential, as he has joined the majority opinion all but twice, dissenting once and concurring in the judgment once. See *Inter Tribal Council*, 133 S. Ct. at 2270 (Alito, J., dissenting); *Crawford*, 553 U.S. at 204 (Scalia, J., concurring, joined by Alito, J.).

167. *McCutcheon*, 134 S. Ct. at 1440; *Shelby Cnty.*, 133 S. Ct. at 2618; *Bennett*, 131 S. Ct. at 2813; *Reed*, 561 U.S. at 189; *Nw. Austin Mun. Utility Dist.*, 557 U.S. at 195; *Ysursa*, 555 U.S. at 354; *Wis. Right to Life*, 551 U.S. at 454.

The next most frequent author during this same time period was Justice Kennedy, who wrote three majority or plurality opinions. See *Citizens United*, 558 U.S. at 317; *Bartlett*, 556 U.S. at 5; *League of Latin Am. Citizens*, 548 U.S. at 408.

Justice Scalia wrote two majority opinions. See *Inter Tribal Council*, 133 S. Ct. at 2251; *Lopez Torres*, 552 U.S. at 197.

that he might have had a hand in those cases as well. In fact, researchers attempting to identify the author of per curiam opinions, based on the language used, predict that Roberts is either the most likely or second-most likely author of five of the seven election law per curiam opinions during his tenure to date.<sup>168</sup> Thus, fourteen of the Roberts Court's twenty-four cases involving election law were either authored by the Chief himself or were per curiam, with a strong likelihood that Roberts wrote many of the per curiam decisions. Roberts also penned concurring opinions in *Citizens United* (campaign finance), *Washington State Grange* (election administration), and *League of Latin American Citizens* (redistricting).<sup>169</sup>

In addition, as the Chief, Roberts selects the opinion writers when he is in the majority, so he has given himself more election law assignments than any other Justice. This is consistent with the view that the Chief assigns himself the most salient and important cases.<sup>170</sup> His choice of an author other than himself might reflect the scope of the opinion he seeks; for example, selecting Justice Thomas to write the majority in *Washington State Grange* assured an approach that would be highly deferential to the state, setting out the distinction between facial and as-applied challenges that the Court later invoked a few weeks later in *Crawford*, the voter ID case. Similarly, allowing Justice Stevens to write the controlling opinion in *Crawford*, which relied upon this as-applied procedural distinction, may have allowed Roberts to maintain a veneer of "incrementalism" in the Court's jurisprudence even though the doctrine in essence sanctioned voter ID laws.

The language in Roberts's opinions demonstrates the ad hoc nature of the procedural tools the Court has used to decide these cases, as well as his adherence to federalism ideals. For example, in *Citizens United* he wrote a concurrence to expound upon why he believed that judicial restraint did not limit the Court in its decision to overrule prior case law, but in *Washington State Grange* he concurred specifically to explain why the

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168. William Li et al., *Using Algorithmic Attribution Techniques to Determine Authorship in Unsigned Judicial Opinions*, 16 STAN. TECH. L. REV. 503, 529–32 tbl.9 (2013) (predicting that Roberts was the most likely author of *Tennant* and *Wisconsin Right to Life*, and the second-most likely author in *Bullock*, *Perez*, and *Lance*). No other Justice was listed as frequently as Roberts as the most- or second-most likely author of the election law per curiam cases. Justice Kennedy is next, listed as the most likely author in *Perez* and *Purcell*, and the second-most likely author in *Tennant* and *Brunner*. *Id.*

169. *Citizens United*, 558 U.S. at 372 (Roberts, C.J., concurring); *Wash. State Grange*, 552 U.S. at 459 (Roberts, C.J., concurring); *League of Latin Am. Citizens*, 548 U.S. at 492 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

170. See Linda Greenhouse, *Chief Justice Roberts in His Own Voice: The Chief Justice's Self-Assignment of Majority Opinions*, 97 JUDICATURE 90, 96–97 (2013).

facial challenge was inappropriate, that is, why the Court should heed to judicial restraint.<sup>171</sup> He did little to reconcile these approaches, not even citing *Washington State Grange* in his *Citizens United* opinion. Similarly, his majority opinion in *Shelby County* is infused with a discussion of federalism and the federal-state balance of power in regulating elections, thus highlighting the federalism aspect of the Court's voting rights jurisprudence.<sup>172</sup>

Therefore, based on the sheer number of his written opinions, as well as the language and analysis he has used, Chief Justice Roberts has had a significant impact on the recent evolution of election law. His theories on the federal-state allocation of authority to run elections have led the Court to strike down federal voting rules and campaign finance restrictions, but to reject the claims of plaintiffs asserting individual rights-based challenges to state election administration laws.

Plaintiffs seeking judicial relief from restrictive state voting rules likely understand Chief Justice Roberts's deference to state legislatures and therefore may be bringing fewer cases to the Supreme Court. As Professor Rick Hasen has demonstrated, during 2001–2010 the Court received far fewer petitions for review of election law questions than in previous decades.<sup>173</sup> However, there was an uptick in conservative petition filing, particularly to challenge campaign finance regulations.<sup>174</sup> As Professor Hasen explains, “there is some evidence that liberal litigants are more wary of filing petitions in election law cases before the more conservative Roberts Court.”<sup>175</sup> Professor Hasen, however, attributes this changing strategy to the replacement of Justice O'Connor, a moderate, with Justice Alito, a conservative.<sup>176</sup> The Court's changing composition may explain some of this shift and certainly may have flipped the Court in particular cases. But the evidence is more complex and suggests that Chief Justice Roberts may be having a greater impact on the actual doctrinal evolution, at least with respect the jurisprudential direction of deferring more readily to a state's voting processes. That is, Justice Alito may have helped to change certain outcomes in 5–4 decisions, but Chief Justice Roberts has played a significant role in charting the more general doctrinal trend identified in Parts I and II.

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171. Compare *Citizens United*, 558 U.S. at 372–73, with *Wash. State Grange*, 552 U.S. at 459–61.

172. *Shelby Cnty.*, 133 S. Ct. at 2623.

173. See Hasen, *supra* note 164, at 328–29.

174. *Id.* at 331–32.

175. *Id.* at 331.

176. *Id.* at 331–32.

In sum, one explanation for the current scope of recent Supreme Court election law jurisprudence is Chief Justice Roberts's influence in these cases. Certainly, the change in Court personnel, with Justice Alito taking Justice O'Connor's seat, has tipped the balance in many cases toward Roberts's view. But added detail and nuance paints a more complete picture, showing how Roberts is affecting the doctrine on a deeper level. As described above, Roberts has joined every majority and authored more opinions than any other Justice. As the Chief, he is able to assign himself to write the majority opinion, which he has done seven times. In other cases, he has assigned the opinion to a fellow Justice in the majority, and even this choice may be a strategic move to dictate the scope of the opinion.<sup>177</sup> Most significantly, he has used these cases to restrict congressional oversight and to defer to states in how they run elections. He has done so, however, not by explicitly identifying this doctrine, but through judicial maneuvers that define the level of scrutiny afforded to the government's asserted interests and the distinction between facial and as-applied challenges, depending on whether it is a federal or state statute under review. In the end, the Chief himself may be responsible, at least in part, for the Court's current deference to states to run elections and its desire to push Congress out of the field as much as possible.

#### IV. DOCTRINAL INCONGRUENCE AND DANGEROUS CONSEQUENCES OF DEFERRING TO STATES TO RUN ELECTIONS

Underlying the Court's recent election law jurisprudence is skepticism toward congressional power to regulate elections and a corresponding deference to state election rules. The Court has given greater leeway to states to administer elections with little judicial oversight. But there are at least two significant problems with this approach. First, it is constitutionally suspect. Second, it is alarming given the string of partisan-motivated restrictive voting laws that states have recently enacted. This Part explores both reasons for rejecting the Court's current deferential approach to states. It also calls on the Court to reverse its current trend and more carefully scrutinize a state's rules involving election administration. Ultimately, the Court should adopt a test akin to strict scrutiny for restrictions on the right to vote and should require both Congress and state legislatures to provide specific, particularized rationales for election laws.

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177. See Douglas, *supra* note 143, at 21 (identifying an ideal of "strategic compromise" to explain Justice Stevens's controlling opinion in *Crawford*, which Chief Justice Roberts joined).

### A. *Constitutional Allocation of Election Law Authority*

Although the United States Constitution does not explicitly grant the right to vote,<sup>178</sup> it allocates authority to administer federal elections. First, the Constitution states that “[t]he Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”<sup>179</sup> Under this “Elections Clause,” states are given primary authority to administer an election, but Congress may “make or alter” those rules “at any time.”<sup>180</sup> Second, both Article I and the Seventeenth Amendment provide that voters in federal elections shall have the same “Qualifications” as voters for the state’s largest legislative chamber.<sup>181</sup> But various other provisions of the U.S. Constitution cabin this state power to dictate the qualifications of voters. In particular, a state may not deny the right to vote on account of race (Fifteenth Amendment),<sup>182</sup> sex (Nineteenth Amendment),<sup>183</sup> inability to pay a poll tax (Twenty-Fourth Amendment),<sup>184</sup> or age over eighteen years old (Twenty-Sixth Amendment).<sup>185</sup> In addition, the Equal Protection Clause of the Fourteenth Amendment provides a significant backdrop of federal voting rights protection and limits a state’s authority to determine voter qualifications.<sup>186</sup> Each of these constitutional amendments gives enforcement power to Congress through “appropriate legislation.”<sup>187</sup>

Any voting rules that states promulgate therefore must be consistent with these federal requirements. Moreover, the Constitution contemplates

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178. See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95–101 (2014).

179. U.S. CONST. art. I, § 4.

180. *Id.*

181. U.S. CONST. art. I, § 2; U.S. CONST. amend. XVII; see Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 159 (2015) (arguing that Article I “incorporates both i) state constitutional law governing the right to vote and ii) the democratic norms that existed within the states at the founding as the basis for determining the qualifications of federal electors”).

182. U.S. CONST. amend. XV.

183. U.S. CONST. amend. XIX.

184. U.S. CONST. amend. XXIV.

185. U.S. CONST. amend. XXVI.

186. U.S. CONST. amend. XIV, § 1, cl. 2; see, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966).

187. U.S. CONST. amend. XIV § 5, XV § 2, XIX, XXIV § 2, XXVI § 2. For an examination of Reconstruction Republicans’ goal of giving the federal government the power to “construct constitutional politics” under the Fourteenth Amendment by enfranchising newly-freed slaves, see Mark A. Graber, *Constructing Constitutional Politics: The Reconstruction Strategy for Protecting Rights* (Sept. 2013) (unpublished working paper), available at [http://digitalcommons.law.umaryland.edu/fac\\_pubs/1390/](http://digitalcommons.law.umaryland.edu/fac_pubs/1390/).

a significant role for Congress in regulating the election process, particularly for state-run elections for federal office.<sup>188</sup> Contrary to the implicit message from current Supreme Court doctrine, states do *not* have limitless power over their election rules.

Indeed, the original debate over the Elections Clause suggested that the Framers sought to give significant power to Congress over the regulation of elections.<sup>189</sup> Proponents of the clause understood it “more to be a grant of power to Congress than to the states.”<sup>190</sup> The delegates to the constitutional convention believed that “electoral oversight power was essential to national government” and that “control over elections [was] inherent in the idea of sovereignty.”<sup>191</sup> James Madison’s view was that “congressional oversight is a check not only on state legislatures abdicating their duty to seat representatives, but also on their political maneuverings.”<sup>192</sup> Ultimately, the Framers’ understanding was that “the structure of the Elections Clause is meant to allow Congress to police state legislative affronts to republican government.”<sup>193</sup>

Prior to the Supreme Court’s recent decision in *Arizona v. Inter Tribal Council*,<sup>194</sup> the Court had echoed the Framers’ general understanding of the Elections Clause as giving Congress broad power to regulate elections. In *U.S. Term Limits, Inc. v. Thornton*, the Court invalidated an Arkansas law that prohibited a candidate from appearing on the ballot for Congress if the person had already served three terms in the U.S. House of Representatives or two terms in the U.S. Senate.<sup>195</sup> The Court held that this ballot restriction violated Congress’s ability to determine the qualifications of its members under Article I, Sections 4 and 5 and was not a state-permitted “times, places and manner” regulation under the Elections Clause.<sup>196</sup> Moreover, as Justice Stevens wrote for the majority, “[t]he Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude

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188. Because states typically run their elections for federal and state offices simultaneously, the rules that apply to federal elections usually apply for state elections as well. See, e.g., Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 927 (2007) (“As a practical matter, this power over mixed elections gives Congress leverage over the electoral process as a whole, since few jurisdictions can afford to run dual election systems.”).

189. See Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021, 1030–34 (2005).

190. *Id.* at 1031.

191. *Id.* at 1032.

192. *Id.* at 1033.

193. *Id.* at 1039.

194. 133 S. Ct. 2247 (2013).

195. 514 U.S. 779, 783 (1995).

196. *Id.* at 804–05.

classes of candidates from federal office.”<sup>197</sup> Under this reasoning, states have the initial authority to dictate procedural aspects of the voting process, but potential congressional alteration cabins that power significantly. Similarly, in *Cook v. Gralike*, the Court struck down a required ballot designation for candidates who would not support term limits by concluding that the Elections Clause prohibits states from “attempt[ing] to ‘dictate electoral outcomes,’” thereby reducing a state’s influence on the election process.<sup>198</sup>

The Court also previously recognized that the Constitution limits a state’s ability, as compared to Congress, to dictate voter qualifications. In *Oregon v. Mitchell*, the Court held that Congress could compel states to permit eighteen-year-olds to vote in federal elections based on federal authority under the U.S. Constitution.<sup>199</sup> Although the Court was fractured on the source of this power, with Justice Black finding Congress’s authority within the Elections Clause and four other Justices resting on the Equal Protection Clause,<sup>200</sup> the holding was clear: although states have the initial role of determining voter qualifications, the Constitution gives Congress the final authority to set minimum standards.

The enforcement provisions of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments also provide support for the notion that Congress can play a significant role in regulating state electoral processes. As Justice Douglas stated in *Oregon v. Mitchell*, “the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth—made vast inroads on the power of the States. Equal protection became a standard for state action and Congress was given authority to ‘enforce’ it.”<sup>201</sup> In addition, the enforcement provision of the Fourteenth Amendment allows Congress to “‘enforce’ equal protection by eliminating election inequalities,” which, according to Justice Douglas, “would seem quite broad.”<sup>202</sup> Similarly, the Court once declared that “§ 5 [of the Fourteenth Amendment] is a positive grant of legislative power authorizing Congress

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197. *Id.* at 832–33.

198. 531 U.S. 510, 525–26 (2001) (quoting *U.S. Term Limits*, 514 U.S. at 833–34).

199. 400 U.S. 112 (1970). Justice Black, announcing the judgments of the Court, stated, “In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations, if it deemed it advisable to do so.” *Id.* at 119.

200. *Id.* at 119–26; *id.* at 135 (Douglas, J., concurring in part and dissenting in part); *id.* at 240 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).

201. *Id.* at 143 (Douglas, J., concurring in part and dissenting in part).

202. *Id.*

to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”<sup>203</sup>

Scholars have also understood Congress’s enforcement powers under these provisions to be expansive.<sup>204</sup> As one commentator has explained, “[t]he phrase ‘Congress shall have power to enforce’ appears in seven of the first twenty-five amendments. In six of those amendments it has either been construed to give Congress far-reaching enforcement powers or is consistent with such a construction.”<sup>205</sup> Although the Court in *City of Boerne v. Flores* limited the scope of the Fourteenth Amendment’s enforcement provision to permit only laws that are “congruen[t] and proportional[]” to the problem Congress seeks to remedy,<sup>206</sup> this does not change the extensive nature of congressional authority so long as Congress compiles the requisite record. Moreover, the Court has recognized that “congressional remedial and prophylactic power is at its strongest when Congress acts to remedy or prevent the kinds of practices that the Court has subjected to heightened judicial scrutiny,”<sup>207</sup> which would include protecting the fundamental right to vote.<sup>208</sup>

Today’s Court, however, has a different understanding of the constitutional allocation of power between Congress and the states to run elections, limiting Congress’s role and elevating states’ authority. The Court has simultaneously claimed that Congress’s powers under the Elections Clause are “broad” while restricting the reach of Congress’s authority to regulate aspects of the election process.<sup>209</sup> Specifically, in *Arizona v. Inter Tribal Council*, Justice Scalia wrote for the majority that “the Elections Clause empowers Congress to regulate *how* federal

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203. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

204. See, e.g., Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 284 (2004) (“Congress and the courts have recognized authority far broader under the Fifteenth Amendment than can exist under Section 2 [of the Fourteenth Amendment].”); Karlan, *supra* note 188, at 927 n.55 (“Section 2 of the Twenty-Fourth Amendment also gives Congress broad enforcement powers with regard to the voting rights of older Americans.”). Cf. Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 400–01 (2014) (arguing that section 2 of the Fourteenth Amendment enhances Congress’s authority under its section 5 enforcement power).

205. Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1182 (2012).

206. 521 U.S. 507, 520 (1997).

207. Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 13 (2007); see also *id.* at 10–16 (explaining Congress’s broad enforcement powers under the Fifteenth Amendment).

208. For another discussion of the deference the Court used to show Congress, specifically with respect to the Voting Rights Act, see Charles & Fuentes-Rohwer, *supra* note 80, at 500–13.

209. *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247, 2253 (2013).



elections are held, but not *who* may vote in them.”<sup>210</sup> That is, the Court’s understanding of the Constitution’s federal-state allocation of authority gives Congress some control, but only in very limited areas.<sup>211</sup> The analysis takes away any role for Congress in determining voter qualifications.

The Court missed the other crucial component of the constitutional allocation of authority to regulate elections. Under *Oregon v. Mitchell*, Congress has the prerogative to supersede a state’s rules on voter qualifications under the Elections Clause, the Equal Protection Clause, or a voting-specific constitutional amendment.<sup>212</sup> That is, the Court failed to read the constitutional clauses relating to voting holistically and in concert with one another.<sup>213</sup> The Court in *Inter Tribal Council* dealt with *Oregon v. Mitchell* in a footnote by attempting to distinguish it, but in reality the Court overturned the case’s main premise.<sup>214</sup> Justice Scalia claimed that because five Justices in that case did not agree on a rationale for Congress’s authority to set the voting age for federal elections, the case was of “minimal precedential value.”<sup>215</sup> As an initial matter, Justice Scalia’s vote count in *Oregon v. Mitchell* is disingenuous, as Justice Douglas did *not* state explicitly that the Elections Clause did *not* confer this power; he instead simply rested his analysis on the Fourteenth Amendment.<sup>216</sup> Moreover, it is difficult to reconcile a statement that Congress may override a state’s voting age rules with a statement that Congress has no power whatsoever to dictate voter qualifications. *Arizona v. Inter Tribal Council* effectively overruled the rationale behind *Oregon v. Mitchell*, and thus limited the substantive reach of Congress’s authority under both the Elections Clause and the relevant constitutional amendments. In the process, the Court restricted congressional oversight and gave more power to the states to administer elections.

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210. *Id.* at 2257.

211. *Id.* This is why Justice Scalia determined that any time Congress acts pursuant to a valid area of federal regulation it necessarily preempts a competing state law. *Id.* at 2256–57.

212. See 400 U.S. 112, 119 (1970); see also *id.* 143 (Douglas, J., concurring in part and dissenting in part).

213. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999); see also Tolson, *supra* note 204, at 394–404 (making a similar argument with respect to the Fourteenth Amendment).

214. *Inter Tribal Council*, 133 S. Ct. at 2258 n.8.

215. *Id.*

216. Compare *id.* (citing *Mitchell*, 400 U.S. at 143) with *Mitchell*, 400 U.S. at 143 (Douglas, J., concurring in part and dissenting in part) (footnote omitted) (“Much is made of the fact that Art. I, § 4, of the Constitution gave Congress only the power to regulate the ‘Manner of holding Elections,’ not the power to fix qualifications for voting in elections. But the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth—made vast in-roads on the power of the States.”).

Similarly, the Court failed to examine Congress's constitutional authority for Section 5 of the Voting Rights Act in its recent decision gutting the preclearance mechanism.<sup>217</sup> Writing for the Court, Chief Justice Roberts held that “the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.”<sup>218</sup> Although the Court acknowledged that Congress retains “significant control over federal elections,”<sup>219</sup> it did not situate the Voting Rights Act within any of Congress's powers in the Constitution. But Congress surely has broad authority to “make or alter” state regulations under the Elections Clause and enforcement power under the Fifteenth Amendment—which was in fact the initial rationale for the Voting Rights Act.<sup>220</sup> The Court elevated a state's sovereignty in administering its voting process by sidestepping any meaningful discussion of Congress's role in regulating elections.

Professor Franita Tolson has cogently explained why this approach is constitutionally incorrect, showing how Congress's power under both the Elections Clause and the Equal Protection Clause means that Congress's authority to regulate elections is paramount over states:

[T]he Elections Clause serves as the baseline for the relationship between Congress and the states with respect to elections. And since the Elections Clause gives Congress final policymaking authority over federal elections and the Fourteenth and Fifteenth Amendments extend this authority to state elections, any judicially enforced federalism norm in favor of state power is illegitimate.<sup>221</sup>

It follows that there is a difference between a state's *autonomy* to prescribe election rules as an initial matter and Congress's absolute *sovereignty* to override those regulations.<sup>222</sup> Congress is the ultimate sovereign for elections.<sup>223</sup> Thus, in its election law decisions the Court improperly “ignores that the Elections Clause gives the states strong autonomy power over elections and leaves sovereignty with Congress. The organizational structure of the Clause itself is not really federalist, but reflects a decentralized organizational structure that is often confused with

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217. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

218. *Id.* at 2623 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991)).

219. *Id.*

220. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

221. Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1201 (2012).

222. *Id.* at 1248–49.

223. *See id.*

federalism.”<sup>224</sup> The Court’s recent decisions discussed above epitomize this faulty logic.

In sum, expansive deference to states, and a corresponding limitation placed on congressional authority, is contrary to the constitutional allocation of power between federal and state governments to regulate elections. Although states retain an important role in determining the “times, places and manner” of running elections and dictating voter qualifications as an initial matter, the Constitution explicitly limits this power if Congress chooses to act, either under the Elections Clause, the Equal Protection Clause, or a voting-specific constitutional amendment. The Court’s current approach is inconsistent with the plain reading of these provisions. The Court should revert to its prior understanding of Congress’s authority to regulate elections, ending its deference to states and thereby imposing more rigorous scrutiny on state voting laws.

*B. Consequences of the Court’s Current Approach: Partisan-Based State Voting Laws*

Many states, emboldened by the Court’s lax review of election regulations, have passed stringent, partisan-based election administration rules in recent years. Although a state might try to justify the laws based on a generalized interest in “election integrity,” the real motivation seems to be an effort to achieve partisan gain. Across the South, Republican-controlled legislatures have recently passed voter ID laws and other election-related bills, all in the name of “election integrity.” But the evidence shows that these laws are not targeted to root out any fraud that actually exists in our system. The Court’s failure to require a state to justify its laws with a more specific interest than election integrity, and its welcoming of piecemeal, as-applied litigation that allows state laws generally to stay on the books, has opened the door to strict voting regulations.<sup>225</sup>

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224. *Id.* at 1247.

225. The 2014 election cycle added another factor to the Supreme Court’s deference to state election processes: a desire not to change election rules too close to Election Day. Just weeks before the election, the Court issued stays in cases from Ohio, North Carolina, Wisconsin, and Texas, saying that the lower courts’ decisions came too close to the election and would cause confusion for election administration. In three of these cases—from Ohio, North Carolina, and Texas—the rulings had the result of allowing the state to implement a law that the lower courts had found unconstitutional. In the Wisconsin case, by contrast, the Court stayed the Seventh Circuit’s decision that had permitted the state to implement its new voter ID requirement. All four cases suggest that deference to a state’s current election process is the most important factor in a last-minute challenge to election rules. *See* Veasey v. Perry, 135 S. Ct. 9 (2014) (mem.) (Texas); Frank v. Walker, 135 S. Ct. 7 (2014) (mem.)

The actual underlying purpose of these laws is often an attempt to achieve partisan electoral advantage. Partisanship, however, is not a valid justification for rules about how our elections operate.<sup>226</sup> Election laws should be neutral, enacted without an attempt to achieve political advantage. Indeed, the Court has said that states may not seek to affect election outcomes through their election regulations.<sup>227</sup> These kinds of rules derogate the foundation of our democratic structure, as they call into question the validity of electoral results and create the appearance of bias or unfairness. The Court should respond by more rigorously and broadly testing the constitutionality of state voting regulations, especially when states can muster only generic justifications for the rules.

Recent election legislation demonstrates both the partisan nature of these rules and the failure of states to provide any meaningful justification for the laws. In the summer of 2013, for instance, North Carolina passed a comprehensive voter bill<sup>228</sup> shortly after the Court effectively invalidated the preclearance mechanism of the Voting Rights Act.<sup>229</sup> Professor Rick Hasen characterized this bill as the most restrictive voting law in the country since the Civil Rights movement:

It is a combination of cutbacks in early voting, restrictions on voter registration, imposition of new requirements on voters such as photo identification in voting, limitations on poll worker activity to help voters, and other actions which as a whole cannot be interpreted as anything other than an effort to make it harder for some people—and likely poor people, people of color, old people and others likely to ‘skew Democratic’—to vote.<sup>230</sup>

Governor Pat McCrory, who signed the bill, justified it based on concerns of election fraud. In an op-ed, he wrote:

The need for photo ID has been questioned by those who say voter fraud isn't a problem in North Carolina. However, assuming

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(Wisconsin); *North Carolina v. League of Women Voters*, 135 S. Ct. 6 (2014) (mem.) (North Carolina); *Husted v. NAACP*, 135 S. Ct. 42 (2014) (mem.) (Ohio).

226. See Ringhand, *supra* note 16, at 309.

227. See *Cook v. Gralike*, 531 U.S. 510, 525–26 (2001).

228. See Tom Foreman, Jr., *NC Governor Signs Measure Requiring Voter ID*, ASSOCIATED PRESS (Aug. 12, 2013, 11:17 PM), <http://bigstory.ap.org/article/mccrory-quietly-signs-sweeping-nc-elections-bill>, archived at <http://perma.cc/55M-NAT7>.

229. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

230. See Rick Hasen, *Thoughts on the Road Ahead in North Carolina*, ELECTION LAW BLOG, (Aug. 12, 2013, 9:19 PM), <http://electionlawblog.org/?p=54296>, archived at <http://perma.cc/AY29-CWF2>.

fraud isn't a threat when multimillion dollar campaigns are trying to win in a state where millions of votes are cast is like believing oversight isn't needed against Wall Street insider trading.<sup>231</sup>

But this glosses over the crucial question: Is there any actual evidence in North Carolina of any kind of attempted voter fraud that the new restrictive rules would address? The Supreme Court's current jurisprudence, which sanctions a general interest in "election integrity," does not require the state to answer that question. Indeed, the Fourth Circuit upheld most of North Carolina's 2013 voting law, issuing a preliminary injunction against the implementation of only two provisions: the rollback of same-day registration and the new rule that forbids the state from counting ballots cast out-of-precinct, thus leaving the voter ID law intact (although that portion of the law does not go into effect until 2016).<sup>232</sup> The Supreme Court then stayed the invalidation of those two provisions for the 2014 election, meaning that the state was allowed to implement its law in 2014.<sup>233</sup> Yet the evidence strongly suggests that North Carolina does not have a fraud problem that would justify its restrictive voting rules. As Colin Powell remarked, "You can say what you like, but there is no voter fraud . . . . How can it be widespread and undetected?"<sup>234</sup>

The story was similar in Texas. Within hours of the Court's decision in *Shelby County* to strike down a portion of the Voting Rights Act, the state's Attorney General announced that Texas would begin enforcing its new voter ID law that a federal court had previously blocked.<sup>235</sup> Other southern states, such as Mississippi and Alabama, followed suit in implementing their own voter ID laws.<sup>236</sup> Wisconsin, too, has been subject

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231. Pat McCrory, Op-Ed., *N.C. Governor: Protect Election Integrity*, USA TODAY (Aug. 29, 2013, 12:59 PM), <http://www.usatoday.com/story/opinion/2013/08/28/voter-photo-id-early-voting-north-carolina-gov-pat-mccrory/2724925/>, archived at <http://perma.cc/3FWR-9TCA>.

232. *League of Women Voters v. North Carolina*, 796 F.3d 224 (4th Cir. 2014).

233. *North Carolina v. League of Women Voters*, 135 S. Ct. 6 (2014) (mem.).

234. John Murawski & John Frank, *Colin Powell Slams NC's New Voting Law in Speech at Raleigh CEO Forum*, NEWS OBSERVER (Aug. 22, 2013), <http://www.newsobserver.com/2013/08/22/3127638/colin-powell-slams-ncs-new-voting.html>, archived at <http://perma.cc/594U-XGWY>.

235. See Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES (July 5, 2013), <http://www.nytimes.com/2013/07/06/us/politics/after-supreme-court-ruling-states-rush-to-enact-voting-laws.html?pagewanted=all>.

236. *Id.*

to the “voting wars,” adopting a voter ID law and debating rules on what documents the state will accept to verify a voter’s residence.<sup>237</sup>

The Court’s partial invalidation of the Voting Rights Act in *Shelby County* opened the door for many of these states to implement new voter laws, as several of the states could not have put these regulations into place previously without federal approval.<sup>238</sup> But it was not just *Shelby County* that led to this increase in strict voter ID requirements and other partisan-based restrictive voting laws. *Crawford*, the Supreme Court decision that deferred to Indiana’s general interest in election integrity even though there was little actual evidence of voter fraud, was the catalyst for widespread adoption of stringent voter ID requirements.<sup>239</sup> The Court’s overall deference to states in their election administration bolsters a state’s case for passing the laws. As the Washington Post lamented in an editorial, “[m]any of the [North Carolina] law’s reforms have little good justification.”<sup>240</sup> But current doctrine—including both *Crawford* and *Shelby County*—makes it difficult to mount a successful constitutional challenge to such a law.

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237. See Reid Wilson, *Voting Wars Coming to Wisconsin*, WASH. POST (Oct. 14, 2013), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/10/14/voting-wars-coming-to-wisconsin/>, archived at <http://perma.cc/Z2M-LYXD>.

238. Richard L. Hasen, *Will the GOP’s North Carolina End Run Backfire?*, THE DAILY BEAST (July 24, 2013), <http://www.thedailybeast.com/articles/2013/07/24/will-the-gop-s-north-carolina-end-run-backfire.html>, archived at <http://perma.cc/TYM7-LAUQ> (“Anyone wondering about the importance of the Supreme Court’s recent ruling hobbling a key part of the Voting Rights Act needs look no further than North Carolina, whose Republican legislature is poised to enact one of the strictest voting laws in the nation, one that will make it harder to register and vote, likely hurting minority voters most.”).

239. Judge Richard Posner of the Seventh Circuit recently admitted that he was “wrong” in upholding Indiana’s voter ID law when the case was before his court. See John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), <http://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html>. A lawyer familiar with the case responded,

“The consequences of this mistake were immense. Had Posner switched his vote, Judge Sykes may have as well, and the odds of [the Supreme Court] hearing this case decline exponentially. Indiana’s law would thus not have become a model for other voter suppression laws across the nation, and *Crawford*’s majority opinion [at the Seventh Circuit] may have been written by Judge Evans, striking down Indiana’s law. That would have dramatically altered the course of election law and set a completely different tone and direction, particularly in light of Posner’s prodigious reputation.”

*Ind. Decisions—Judge Posner Has Second Thoughts on His Voter ID Decision; Says He Didn’t Know Enough*, IND. LAW BLOG (Oct. 13, 2013, 1:50 PM), [http://indianalawblog.com/archives/2013/10/ind\\_decisions\\_j\\_120.html](http://indianalawblog.com/archives/2013/10/ind_decisions_j_120.html), archived at <http://perma.cc/DP4A-TA9T>.

240. Editorial, *Voting Rights Act Should Be Revived by Congress, Not by Justice Suing States*, WASH. POST (Oct. 6, 2013), [http://www.washingtonpost.com/opinions/voting-rights-act-should-be-revived-by-congress-not-by-justice-suing-states/2013/10/06/9d4fe01e-2c75-11e3-8ade-a1f23cda135e\\_story.html](http://www.washingtonpost.com/opinions/voting-rights-act-should-be-revived-by-congress-not-by-justice-suing-states/2013/10/06/9d4fe01e-2c75-11e3-8ade-a1f23cda135e_story.html), archived at <http://perma.cc/NNP7-K46R>.

These laws might have a tangible effect on election outcomes, especially in a close race, as they can alter the electorate by restricting who can vote. Partisan legislators understand this possibility, which is why the debate surrounding the laws has become so contentious in recent years. Thus, states are not really interested in just “election integrity” when passing these rules. This factor suggests that a careful court would allow broader facial challenges and likely invalidate the laws if the states were subject to a higher burden on the interest prong of the constitutional analysis.

In our current political climate, Democratic-affiliated voters are most likely to suffer the denial of their voting rights because of strict voter ID laws.<sup>241</sup> Indeed, a study that the North Carolina Secretary of State conducted about its new law demonstrated that the law would affect Democratic voters the most.<sup>242</sup> Republican legislators across the country have admitted that they support voter ID laws to suppress the Democratic vote totals.<sup>243</sup> Although it is unclear how many elections a voter ID law would impact, it could play a significant role in a close election when the number of voters that the law affects exceeds the margin of victory.<sup>244</sup> Moreover, it is inherently concerning to deny someone’s fundamental right to vote without a particularized justification.

Although criticizing Republican-led voting regulations might seem to be a partisan-laden argument itself, it simply follows from the practical effect of the Supreme Court’s current doctrine given that Republicans control more state legislatures. If Democratic majorities were passing onerous election laws for no good reason other than an attempt to gain partisan advantage, then those laws too should undergo more rigorous

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241. See *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

242. See Nate Cohn, *Finally, Real Numbers on Voter ID*, NEW REPUBLIC (July 22, 2013), <http://www.newrepublic.com/article/113986/voter-id-north-carolina-law-hurts-democrats>, archived at <http://perma.cc/N692-CP6N> (“The North Carolina data confirms what many suspected: Voter ID laws have a disparate impact on non-white and Democratic voters.”).

243. See Juliet Lapidus, *Yeah, Voter ID Hurts Democrats*, N.Y. TIMES TAKING NOTE BLOG (July 19, 2013, 1:48 PM), <http://takingnote.blogs.nytimes.com/2013/07/19/yeah-voter-id-hurts-democrats/>, archived at <http://perma.cc/LB4Q-G6SS> (reporting on voter ID in Pennsylvania); Jamelle Bouie, *Republicans Admit Voter-ID Laws Are Aimed at Democratic Voters*, THE DAILY BEAST (Aug. 28, 2013), <http://www.thedailybeast.com/articles/2013/08/28/republicans-admit-voter-id-laws-are-aimed-at-democratic-voters.html>, archived at <http://perma.cc/TKS2-PT3T>.

244. See Cohn, *supra* note 242 (noting that “despite a disproportionate impact on Democratic-leaning groups, the electoral consequences of voter ID seem relatively marginal” but recognizing that a voter ID law could alter a close election). See generally Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475 (2008) (gathering data on the number of voters who go to the polls on Election Day without a valid ID and cast a provisional ballot).

judicial scrutiny. Elections should be run without partisan considerations, and election administration should be politically neutral. For example, if a Democratic state legislature liberalized voter registration requirements so much that non-citizens could easily vote and thereby affect the election, then a court should scrutinize the true reason behind that new rule. If there is no evidence-based justification beyond partisanship, then a court should strike down the law. For instance, Democrats inappropriately sought to keep Ralph Nader off the 2004 presidential election ballot in many states for partisan advantage.<sup>245</sup> Had there been a challenge, a court would have been well suited to question the state's true reasons behind its ballot access requirements and invalidate the law.

Election rules should not be based on who would gain the most at the ballot box; they should instead focus primarily on opening the electoral process for the voter, with a concomitant acknowledgement of the state's need to administer a fair and fraud-free election. The Court's current deferral to states, combined with the partisan makeup of most state legislatures, has created an environment in which Republicans are emboldened to pass stricter voter access laws to achieve electoral advantage in the name of "election integrity." If the roles were reversed, however, the problem would be just as concerning.

The foregoing analysis demonstrates that the Court's current divergence of approaches between federal and state election rules is dangerous for the fair administration of elections. Unchecked, state legislators with one-party control are motivated to enact partisan-based voting rules to entrench themselves in power. Congress does not have this same incentive both because currently it has a sizeable number of members from each major political party (making partisan-infused election rules less likely to pass in today's political environment) and because the Court already scrutinizes carefully Congress's actual (or perceived) motivations for an election law. But the Court should analyze all election administration laws under the same inquiry: has the legislature provided specific, particularized, and articulable reasons to justify its law?

The Court should not blindly defer to a state's interest in election integrity. Instead, it must scrutinize a state voting law carefully to ensure

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245. See Rob Richie, *Let's Not Give Chris Christie a Pass for Election Chicanery*, SALON (Oct. 15, 2013, 9:30 AM), [http://www.salon.com/2013/10/15/lets\\_not\\_give\\_chris\\_christie\\_a\\_pass\\_for\\_election\\_chicanery/](http://www.salon.com/2013/10/15/lets_not_give_chris_christie_a_pass_for_election_chicanery/), archived at <http://perma.cc/PSF7-GX6F>, archived at <http://perma.cc/Q8G7-VUPN> ("Democrats resorted to every trick in the book to keep independent Ralph Nader off the ballot in key states in the 2004 presidential race, even as Republican backers tried to help Nader repeat the 'spoiler' role he played in 2000.").



that the state actually has a justified reason for imposing the regulation, in the same manner it now considers congressional election statutes. This more careful review would require the state to present evidence to support a law that burdens the right to vote.<sup>246</sup> It does not mean that states are powerless to enact rules for administering an election to prevent fraud. But it does require a state to justify its laws with “data that certain types of election fraud exist and affect the health and integrity of the electoral system.”<sup>247</sup>

The Court should treat congressional and state election regulations in the same manner. *Both* legislatures have the obligation to justify their election rules with specific, articulable rationales. Moreover, courts should require the legislature to rebut an inference of partisanship as the real motivation behind a law, particularly if there is one-party control in the state and the regulation hinders the ability of the minority party’s supporters to exercise their fundamental right to vote. This puts Congress and the states on the same footing, with Congress having the final authority to protect voting rights. This understanding of the federal-state balance is exactly what our constitutional structure envisions.

Indeed, sometimes Congress may be better suited than states to enact uniform rules for election administration, such as when it mandated improved voting machines across the country in the Help America Vote Act of 2002.<sup>248</sup> This is not to suggest that Congress should take over the day-to-day operation of our election system—even if it is constitutionally empowered to do so. There is significant room for states to experiment with election regulations, and this “laboratory” of the states is beneficial for learning what works and what does not.<sup>249</sup> But when Congress does choose to act, the Court should not subject its laws to higher scrutiny than state statutes receive. Put differently, the Court is unwarranted in deferring to states when it does not provide Congress with that same courtesy.

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246. See Joshua A. Douglas, *The Foundational Importance of Participation: A Response to Professor Flanders*, 66 OKLA. L. REV. 81, 99 (2013) (describing the importance of weighing states’ administrative needs with the citizens’ constitutional right to vote); Benson, *supra* note 26, at 32 (arguing that “in deferring to state efforts to address, or not to address, election fraud, courts should embrace an analysis that considers quantitative and qualitative evidence of the prevalence of the particular type of fraud, as well as the constitutional rights that are implicated by the furthering of the fraudulent act”).

247. Benson, *supra* note 26, at 32.

248. 52 U.S.C. § 20901–21145 (2014).

249. See Daniel P. Tokaji, *Laboratories of Election Freedom*, 8 ELECTION L.J. 267, 267 (2009) (reviewing *DEMOCRACY IN THE STATES: EXPERIMENTS IN ELECTION REFORM* (Bruce E. Cain et al. eds., 2008)).

To put Congress and state legislatures on the same footing, the Court could either ratchet up the level of scrutiny for both federal and state election laws, or give deference to both bodies. But lowering judicial scrutiny would be a mistake given the fundamental nature of voting rights to our entire democratic structure.<sup>250</sup> When a regulation impacts the ability of voters to exercise their fundamental right, *neither* legislature should enjoy blind deference; courts should require both federal and state legislatures to justify their laws with specific, articulable evidence regarding the actual governmental interests behind a law. This heightened scrutiny will best protect the fundamental right to vote under a uniform doctrine: the right to vote is paramount, subject only to regulations that a legislature can justify with specific evidence of the need for the law. Heightened judicial scrutiny helps courts root out partisanship as the basis for an election statute. Often a state will have a valid regulatory or economic need for an election law that ties directly to its ability to administer an election fairly and efficiently.<sup>251</sup> But a court should require a state to articulate that need with specificity, instead of resting on generalized and amorphous notions of “election integrity” without any evidence of the harm the state is actually trying to combat. The Court also should not narrow the scope of possible litigation to only as-applied challenges, as courts should invalidate onerous, partisan-motivated laws before they infringe voters’ rights in an actual election.

The test should be the same for both federal and state election regulations: Has the legislature compiled specific evidence regarding the harm it is trying to avoid or the particular reasons for the law it enacts?<sup>252</sup> Moreover, the Court should permit facial challenges when a law infringes an individual’s right to vote without a specific, permissible justification. Through the current unequal treatment, states are emboldened to enact restrictive election administration laws in the name of “election integrity,” even though the real purpose behind the law is partisanship. More meaningful judicial review will at least give states pause before passing

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250. See Douglas, *supra* note 246, at 84–85.

251. See *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”).

252. Professor Rick Hasen has suggested a similar formulation, stating that “courts should read the Fourteenth Amendment’s Equal Protection Clause to require the legislature to produce substantial evidence that it has a good reason for burdening voters and that its means are closely connected to achieving those ends.” Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 62 (2014).

such laws, because they will have to ensure they have a valid justification, beyond just political gain, for promulgating the rule. States will know that they will be subject to broader and more meaningful judicial oversight.

#### CONCLUSION

Current Supreme Court doctrine defers too readily to states to administer elections. In the process, the Court has removed Congress from the elections business. It has not done so explicitly, but rather through two judicial maneuvers that have the combined effect of placing tremendous trust in states: lowering the bar for the state interest prong of the constitutional analysis, and forbidding facial challenges to state rules on election administration. The Court has not treated Congress in the same manner. This is wrong. The U.S. Constitution gives the federal government significant scope to promulgate election regulations. Moreover, the current deferential approach emboldens states to pass partisan-based laws with an eye toward affecting elections, and a state may justify such laws simply by claiming that is trying to ensure “election integrity.” The Court should change this jurisprudence by requiring states to provide a more detailed justification for an election law and allowing broader use of facial challenges. Voting, as a fundamental right, deserves robust protection from the courts. Scrutinizing state election laws more closely will help to achieve this worthy goal.