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DISMANTLING THE UNITARY ELECTORAL SYSTEM? UNCOOPERATIVE FEDERALISM IN STATE AND LOCAL ELECTIONS

*Michael T. Morley**

INTRODUCTION

States generally conduct their elections, particularly general elections, in a “unitary” manner. Elections for Congress, the President, and many state and local offices are all held at the same time, on Election Day.¹ People typically can register to vote in all such elections by filling out a single registration form.² When someone shows up at his or her polling place to vote or receives an absentee ballot, all federal, state, and local offices are usually included.

For the most part, a person is either a “voter” eligible to fully participate in a general election, or a “nonvoter” who is ineligible to do so. With certain narrow exceptions, there is no such thing as a “partial voter” or “quasi-voter” who may vote only for certain offices in an election.³ Although the precinct in which a person lives determines the precise offices and candidates for whom he or she may vote, the manner in which elections are generally conducted conditions people to think of each election as a series of contests governed by the same set of rules and conducted as a single, unified whole.

For example, the National Voter Registration Act (NVRA) directs states to “accept and use” the voter registration form crafted by the U.S. Election Assistance Commission (EAC)⁴ to register people to vote in federal elections⁵ without requiring supporting evidence from such as proof of U.S. citizenship.⁶ Since the NVRA’s enactment, states have generally accepted the so-called “federal form” as sufficient to register people to vote in all types

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¹ See 2 U.S.C. § 1 (2011) (Senate elections) [<https://perma.cc/HH5W-N54W>]; *id.* § 7 (House elections) [<https://perma.cc/Q2DH-94GR>]; 3 U.S.C. § 1 (2015) (presidential elections) [<https://perma.cc/E6GW-PWBT>].

² See *infra* notes 7–8, 74.

³ Cf. 52 U.S.C. § 10502(e) (2015) (mandating that voters who move shortly before a presidential election and do not meet any state’s residency requirements for voting be permitted to cast ballots for President and Vice President) [<https://perma.cc/9722-3J5F>].

⁴ U.S. ELECTION ASSISTANCE COMM’N, VOTER REGISTRATION APPLICATION (last revised Mar. 1, 2006), http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1-25-16_ENG.pdf [<https://perma.cc/7Y4D-GTPY>].

⁵ 52 U.S.C. § 20505(a)(1) [<https://perma.cc/C565-8X9Q>].

⁶ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2260 (2013) (holding that the NVRA preempts Arizona’s proof-of-citizenship requirement and “precludes Arizona from requiring a[n] . . . applicant to submit information beyond that required by the form itself”) [<https://perma.cc/87RB-FUDA>].

of elections: federal, state, and local.⁷ Likewise, virtually every state (or each county or locality within the state) has typically maintained a single roster of voters, identifying people authorized to vote in elections for all levels of government.⁸

The unitary status of American elections has developed into a convention: a principle that is not constitutionally mandated, yet “guide[s] officials in how they exercise political discretion.”⁹ This willingness to maintain a unitary electoral system has begun to disintegrate, however. Kansas and Arizona, challenging convention, have begun engaging in what Jessica Bulman-Pozen and Heather Gerken call “uncooperative federalism.”¹⁰ While complying with federal laws governing elections for federal offices, these states have attempted to regulate state and local elections separately, such as by requiring applicants to provide proof of citizenship to register to vote in such elections.¹¹ They have sought to limit the impact of federal laws they believe hinder accurate election administration, undermine the integrity of the electoral process, and interfere with their constitutional prerogative to set voter qualifications.¹²

This Essay explores the prerogative of states to dismantle their unitary election systems. Although commentators have discussed some of the ongoing litigation that implicates this issue,¹³ few have explored the matter in any depth.¹⁴ Part I begins by excavating the legal underpinnings of the electoral system, demonstrating that neither the Constitution nor federal law contemplates a unitary structure. Part II reviews states’ attempts to dismantle their unitary systems. After surveying past efforts by states to establish multiple voter registration rolls, this Part focuses on recent efforts by Kansas and Arizona to ensure that noncitizens—who are ineligible to vote—are not inadvertently registered and permitted to cast ballots in state and local elections.

⁷ KRISTEN SULLIVAN & TERRANCE ADAMS, STATE OF CONN. OFFICE OF LEGIS. RESEARCH, RESEARCH REP. 2016-R-0104, THE NATIONAL VOTER REGISTRATION ACT (NVRA) AND AUTOMATIC VOTER REGISTRATION 1 (2016), <https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0104.pdf> [<https://perma.cc/ARW9-TN2L>].

⁸ See Otis H. King & Jonathan A. Weiss, *The Courts’ Failure to Re-Enfranchise “Felons” Requires Congressional Remediation*, 27 PACE L. REV. 407, 414–15 (2007) [<https://perma.cc/7PQ4-RLV3>]. Section II.A discusses the few previous exceptions to these generalizations from the modern era.

⁹ Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860 [<https://perma.cc/BGY5-7UCB>].

¹⁰ Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–60 (2009) [<https://perma.cc/5KZC-L2WC>].

¹¹ See *infra* Section II.B.

¹² See U.S. CONST. art. I, § 2, cl. 1 (establishing voter qualifications for U.S. House elections); *id.* amend. XVII, § 1 (same for U.S. Senate).

¹³ See, e.g., Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Voting Rights Law and Policy in Transition*, 127 HARV. L. REV. F. 243, 244–45 (2014) [<https://perma.cc/XTH3-ER22>].

¹⁴ For some leading pieces on this issue, see Chelsea A. Priest, *Dual Registration Voting Systems: Safer and Fairer?*, 67 STAN. L. REV. ONLINE 101, 101 (2015) (arguing that “dual registration systems” are likely constitutional, but “impose immense costs with little, if any, offsetting benefits”) [<https://perma.cc/Z888-CNSF>], and Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 211 (2015) (“Article I likely prohibits states from divorcing state and federal voter qualifications in order to impose more onerous requirements on those seeking to participate in state elections.” (footnote omitted)) [<https://perma.cc/4A46-DGGK>].

Part III demonstrates that states are entitled to dismantle their unitary electoral systems. It begins by explaining why states are not normatively obligated to adhere to conventions. Using Florida’s experience during the 2012 election cycle as a case study, this Part then shows that voting by noncitizens is a genuine problem. The threat of noncitizen voting gives states a strong incentive to engage in uncooperative federalism by abandoning the convention of unitary elections. This Part concludes by suggesting that the federal government bears at least some responsibility for undermining the unitary electoral system. The government has focused almost exclusively on enforcing the “affirmative” right to vote, by making it as easy as possible to register and vote, while minimizing the corollary “defensive” right to vote, impeding state efforts to confirm whether registrants are eligible to vote and ensure the accuracy of their voter registration rolls. Part IV briefly concludes.

I. THE STRUCTURE OF ELECTION REGULATION

Neither the Constitution nor federal law contemplates a unitary system of elections in which elections for federal, state, and local offices are all subject to the same procedures and legal requirements.

A. *The Constitution and Unitary Elections*

Although some scholars extol Congress’s supposedly broad authority over elections for offices at all levels of government,¹⁵ the Constitution distinguishes among different types of elections. It does not grant Congress power to impose a unitary system of elections, compelling states to apply uniform procedures and regulations to congressional, presidential, state, and local elections.

At one extreme, the Elections Clause expressly grants Congress power to “make or alter” laws regarding the “Times, Places and Manner” of House and Senate elections.¹⁶ The Supreme Court has explained that this provision grants Congress power to provide a “complete code for congressional elections.”¹⁷ Congress may exercise this authority “at any time, and to any extent which it deems expedient.”¹⁸ Congress also has power under the Necessary and Proper Clause¹⁹ to enact laws to “safeguard the right of choice”²⁰ of people entitled to vote in House and Senate elections under the

¹⁵ See, e.g., Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 594 (2015) (“[E]xpansive 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.”) [<https://perma.cc/Z9UC-QVQN>]; see also Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 113 (2013) (arguing that “federal power under the Elections Clause is sufficiently broad” to bring “under the ambit of federal regulation” numerous “contemporary voting controversies”) [<https://perma.cc/45T5-ABHM>].

¹⁶ U.S. CONST. art. I, § 4, cl. 1. See generally Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79 (2016) (outlining modern Elections Clause doctrine) [<https://perma.cc/48PV-DDBA>].

¹⁷ *Smiley v. Holm*, 285 U.S. 355, 366 (1932) [<https://perma.cc/N6SG-3FYR>].

¹⁸ *Ex parte Siebold*, 100 U.S. 371, 392 (1879) [<https://perma.cc/W9LK-8QM9>].

¹⁹ U.S. CONST. art. I, § 8, cl. 18.

²⁰ *United States v. Classic*, 313 U.S. 299, 320 (1941) [<https://perma.cc/XF3W-X6ZQ>].

Voter Qualifications Clauses.²¹ Given the sweeping breadth of Congress’s authority under the Elections Clause, however, it is unlikely that the Voter Qualifications Clauses or Necessary and Proper Clause add anything further to the scope of its power to regulate congressional elections.

Congress’s power over congressional elections is subject to three main limits. First, as with all constitutional powers, it may not be used in a manner that violates constitutional rights, including the right to vote. Second, Congress may not attempt to “dictate electoral outcomes, [or] to favor or disfavor a class of candidates.”²² Finally, Congress lacks authority to impose additional qualifications for voting or running for Congress.²³ Various provisions in the Constitution expressly identify the qualifications a person must possess to either vote²⁴ or run²⁵ in congressional elections, and neither Congress nor the states may supplement or modify those requirements. Apart from these restrictions, Congress’s power over congressional elections is virtually plenary.

At the other extreme, Congress lacks general authority over state and local elections. Alexander Hamilton explained in *The Federalist Papers* that a constitutional provision “empowering the United States to regulate the elections for the particular States” would have been “condemn[ed] . . . both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State Governments.”²⁶ Congress’s only power to regulate state and local elections comes from its ability to enforce the constitutional right to vote.²⁷ That right arises from the Fourteenth Amendment—including the Due Process Clause, Equal Protection Clause,²⁸ and Section Two²⁹—as well as other amendments’ prohibitions on certain

²¹ U.S. CONST. art. I, § 2, cl. 1 (providing that, to be eligible to vote for the U.S. House of Representatives, a person must possess “the Qualifications requisite for Electors of the most numerous Branch of [his or her] State Legislature”); *id.* amend. XVII, § 1 (same for U.S. Senators).

²² *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995) [<https://perma.cc/ZFT9-SHWF>] [<https://perma.cc/B7RM-MXZ9>]).

²³ *See, e.g., U.S. Term Limits*, 514 U.S. at 798 (“[T]he qualifications for service in Congress set forth in the text of the Constitution are ‘fixed,’ at least in the sense that they may not be supplemented by Congress.”).

²⁴ *See Cook*, 531 U.S. at 523; *supra* note 21 and accompanying text.

²⁵ U.S. CONST. art. I, § 2, cl. 2 (listing House candidate qualifications); *id.* art. I, § 3, cl. 3 (listing Senate candidate qualifications).

²⁶ THE FEDERALIST NO. 59, at 326 (Alexander Hamilton) (E.H. Scott ed., Chicago, Scott, Foresman & Co. 1898) [<https://perma.cc/F7BX-GJZK>].

²⁷ U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); *see also id.* amend. XV, § 2 (granting Congress authority to enact laws to enforce the constitutional prohibition against racial discrimination with regard to voting); *id.* amend. XIX, § 2 (same for sex-based discrimination with regard to voting); *id.* amend. XXVI, § 2 (same for age-based discrimination with regard to voting for people eighteen and older).

²⁸ U.S. CONST. amend. XIV, § 1; *see, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause . . .”) [<https://perma.cc/UJ8A-66G4>]; *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (declaring that voting is “a fundamental political right, because [it is] preservative of all rights”) [<https://perma.cc/3SLX-MUK2>].

²⁹ U.S. CONST. amend. XIV, § 2. For a discussion of the relationship between Sections 1 and 2 of the Fourteenth Amendment concerning the right to vote, see Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 297–98.

types of discrimination with regard to voting in elections for any level of government.³⁰ Because the Supreme Court has interpreted the Fourteenth Amendment broadly, Congress's authority to enforce that provision under Section 5 may very well subsume its power under the enforcement provisions of most other voting-related amendments.³¹

When Congress legislates under Section 5 of the Fourteenth Amendment or other provisions that empower it to enforce voting rights,³² it cannot redefine the scope of the underlying rights; rather, it may only attempt to protect and enforce those rights as the Supreme Court has defined them.³³ Moreover, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied" and the statute Congress enacts pursuant to its enforcement power.³⁴ Thus, Congress's authority to regulate state and local elections is far narrower than its power over congressional elections. It may legislate only as reasonably necessary to protect against verifiable threats to the fundamental constitutional right to vote, and may not go further to promote other goals such as administrative efficiency or broader notions of fairness.

Of course, Congress also may attempt to influence the conduct of state and local elections under the Spending Clause.³⁵ It may offer federal funds to subsidize state and local elections to states that agree to certain conditions, regardless of whether it could have imposed such mandates directly.³⁶ While

("Section 1's general language should not be read as implicitly creating a broader right to vote than the finely tuned provisions in § 2 that specifically and directly address the issue." (footnote omitted)) [<https://perma.cc/53EC-5G4Z>].

³⁰ U.S. CONST. amends. XV (race, color, or previous condition of servitude), XIX (gender), and XXVI (age, for people eighteen and older); *cf. id.* amend. XXIV (prohibiting poll taxes only in connection with federal elections).

³¹ The Equal Protection Clause has been interpreted to prohibit almost all forms of discrimination that subsequent amendments relating to voting rights also proscribe. The Clause prevents not only discrimination based on race, *Washington v. Davis*, 426 U.S. 229, 239 (1976) [<https://perma.cc/47W8-GXKF>], and sex, *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) [<https://perma.cc/G8DX-HCW5>], but also laws and practices that discriminate regarding the right to vote, *Bush v. Gore*, 531 U.S. 98, 106 (2000) (per curiam) (holding that the Equal Protection Clause requires election officials to apply "specific rules designed to ensure uniform treatment" of ballots) [<https://perma.cc/D2AV-9EJH>]; *Harper*, 383 U.S. at 666 (invalidating poll taxes because "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard").

The Twenty-Sixth Amendment, which prohibits states from denying the right to vote based on age to anyone who is at least eighteen years old, may be the only voting-related amendment that prohibits conduct that the Equal Protection Clause does not independently proscribe. *See Oregon v. Mitchell*, 400 U.S. 112, 130–31 (1970) (Black, J.) (plurality opinion) (holding that the Equal Protection Clause does not require states to extend the franchise to people under twenty-one) [<https://perma.cc/46CT-RWC4>].

³² *See supra* note 27.

³³ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what that right is.") [<https://perma.cc/6WVA-LD2K>]; *cf. Mitchell*, 400 U.S. at 128 (plurality opinion) ("Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.'").

³⁴ *Boerne*, 521 U.S. at 520.

³⁵ U.S. CONST. art. I, § 8, cl. 1.

³⁶ *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) [<https://perma.cc/97BC-6NPM>]; *see, e.g.*, 52 U.S.C. § 20902 (2015) (allowing states to apply for federal funding to replace punch card or lever

Congress may impose “restrictions on the use of those funds,” it cannot go further and use them “as a means of pressuring the States to accept policy changes” concerning unrelated matters.³⁷

In the middle lies Congress’s power over presidential elections. At a minimum, as with state and local elections, Congress may legislate pursuant to Section 5 of the Fourteenth Amendment and other rights-enforcement provisions to protect the fundamental right to vote in presidential elections, at least within states that allocate presidential electors based on popular election (as all states presently do).³⁸ It also may attempt to persuade states to adopt its preferred policies concerning the conduct of presidential elections by making grants available under the Spending Clause.³⁹ It is debatable whether Congress also has broader, plenary authority to regulate presidential elections, comparable to its power over congressional elections.

The Constitution’s provisions concerning congressional elections and presidential elections differ starkly from each other. As noted earlier, the Elections Clause specifies that Congress may “make or alter” laws concerning congressional elections.⁴⁰ The Presidential Electors Clause, in contrast, provides only that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.”⁴¹ It contains no corresponding grant of power to Congress to supersede state laws, or otherwise enact federal laws, relating to presidential elections. The absence of any express delegation of authority to Congress to regulate presidential elections, combined with the clear difference in language between the Elections Clause and Presidential Electors Clause, provides a strong textual basis for believing that Congress’s authority over presidential elections is limited to its powers to enforce the constitutional right to vote and under the Spending Clause.

Other methods of constitutional interpretation confirm this result. The Framers granted Congress authority to enact laws concerning congressional elections as a self-defense mechanism. They feared that the leaders of powerful states might attempt to cripple the national government and jeopardize the existence of the House by refusing to hold House elections.⁴² Such cabals pose far less of a threat to the presidency, which could be voted upon by other states and, in any event, filled in case of a vacancy without any states taking action.⁴³

Justice Joseph Story elaborated that, if power to regulate congressional elections were “lodged in any other than the legislative body itself,” then Congress’s “independence, its purity, and even its existence and action may

voting machines with more modern systems) [<https://perma.cc/NY76-AK7T>].

³⁷ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012) (plurality opinion) [<https://perma.cc/8M9E-K8P9>].

³⁸ Cf. Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam).

³⁹ See *supra* notes 35–37 and accompanying text.

⁴⁰ U.S. CONST. art. I, § 4, cl. 1.

⁴¹ *Id.* art. II, § 1, cl. 2.

⁴² THE FEDERALIST NO. 59, *supra* note 26, at 328 (Alexander Hamilton).

⁴³ See U.S. CONST. amend. XXV (discussing presidential succession); 3 U.S.C. § 19 (2016) (designating various federal officials who may act as President).

be destroyed or put into imminent danger. No other body but itself . . . can be so perpetually watchful to guard its own rights and privileges from infringement . . . and to preserve the rights and sustain the free choice of its constituents”⁴⁴ From this perspective, Congress necessarily needs greater control over its own elections than presidential elections.

Finally, it may be argued that it makes sense for Congress to have plenary authority to regulate constitutionally mandated elections, such as congressional elections. It might have less of an interest in overseeing elections, such as presidential elections, that states choose to hold as a matter of policy.⁴⁵ Congress’s interest in regulating such discretionary elections might be reasonably limited to enforcing the constitutional right to vote.

Notwithstanding such arguments, the Supreme Court has refused to recognize any difference between Congress’s power over congressional elections and its power over presidential elections. In *Burroughs v. United States*, the Court held, without further explanation or citation:

The importance of [the President’s] election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election . . . is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.⁴⁶

The Court later relied on this ruling to uphold contribution limits for federal elections, including presidential elections,⁴⁷ as well as a federal law lowering the minimum voting age for federal elections, including presidential elections, to eighteen.⁴⁸ Such reasoning, of course, flatly violates the fundamental principle that Congress may exercise only those powers that the Constitution expressly delegates to it.⁴⁹ While the Court identified excellent policy and prudential reasons why the Framers might have granted Congress constitutional authority to regulate presidential elections, such concerns should not trump the complete absence of any textual basis in the Constitution for doing so.

Even under current law, however, the Constitution does not impose a unitary electoral system. Congress’s power over congressional and presidential elections is near plenary, while its authority over state and local elections is tied to enforcing and protecting constitutional rights against demonstrable threats, supplemented by its ability to induce state and local cooperation through the Spending Clause.

⁴⁴ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 833, at 604–05 (Melville M. Bigelow ed., 5th ed. 1994) (1891) [<https://perma.cc/3YKU-9JSX>].

⁴⁵ See U.S. CONST. art. II, § 1, cl. 2 (granting each state legislature the power to establish a method for selecting that state’s presidential electors).

⁴⁶ 290 U.S. 534, 545 (1934) [<https://perma.cc/NHM2-LSTW>].

⁴⁷ *Buckley v. Valeo*, 424 U.S. 1, 13 & n.16 (1976) (per curiam) [<https://perma.cc/D36L-T5PM>].

⁴⁸ *Oregon v. Mitchell*, 400 U.S. 112, 124 n.7 (1970) (Black, J.) (plurality opinion).

⁴⁹ *Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991) [<https://perma.cc/V5NU-QU74>].

B. Federal Election Laws and Unitary Elections

Federal law reflects the differences in Congress's power over federal and state elections. For example, the Voting Rights Act of 1965 (VRA), which is aimed primarily at combating racial discrimination in voting, generally applies to elections at all levels.⁵⁰ Among other things, the Act prohibits states from imposing poll taxes,⁵¹ or using voting qualifications, requirements, or procedures to deny or abridge the right to vote in any election based on race or color.⁵² It also requires certain jurisdictions to obtain permission from the U.S. Department of Justice or a three-judge panel of a federal district court before changing their voting laws, to ensure the changes do not have a discriminatory purpose or effect.⁵³ Additionally, the VRA extends to all elections the voting-related provisions of the Civil Rights Act of 1964,⁵⁴ which previously applied solely to federal elections.⁵⁵

In contrast, other federal statutes that go beyond enforcing the constitutional right to vote and are aimed at improving the electoral process more broadly or facilitating greater participation apply only to federal elections. The NVRA⁵⁶ was enacted to make voter registration easier.⁵⁷ It generally requires states to allow people to register to vote in federal elections as part of their driver's license applications;⁵⁸ by mailing in the registration form created by the EAC⁵⁹ (without any supporting documentation to prove their eligibility),⁶⁰ and in person at certain government offices.⁶¹ The Act also limits the circumstances under which states may update or correct their voter rolls for federal elections.⁶²

The Help America Vote Act (HAVA)⁶³ seeks to enhance the efficiency and accuracy of federal elections. It establishes minimum standards for

⁵⁰ Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301–10314 (2015)).

⁵¹ 52 U.S.C. § 10306(a).

⁵² *Id.* § 10301.

⁵³ *Id.* § 10304(a) (allowing states to seek declaratory judgments to this effect in the District Court of the District of Columbia before enacting such a new voting prerequisite or procedure to ensure the change does not have this impact). In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) [<https://perma.cc/EG2C-7XTB>], the Supreme Court invalidated Section 4 of the Voting Rights Act, which identified the jurisdictions to which this preclearance requirement applied. Consequently, this provision is not presently being enforced.

⁵⁴ Pub. L. No. 88-352, § 101, 78 Stat. 241, 241–42 (1964). The Civil Rights Act, as amended, prohibits election officials from refusing to register a person to vote based on his or her failure to fulfill special requirements to which other voters are not subject. 52 U.S.C. § 10101(a)(2)(A). The Act further provides that people may not be prevented from voting based on immaterial errors in their registration applications. *Id.* § 10101(a)(2)(B).

⁵⁵ 79 Stat. at 445.

⁵⁶ Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified as amended at 52 U.S.C. §§ 20501–20511).

⁵⁷ 52 U.S.C. § 20501.

⁵⁸ *Id.* §§ 20503(a)(1), 20504(a)(1), (c)(1).

⁵⁹ *Id.* §§ 20503(a)(2), 20505(a)(1).

⁶⁰ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2260 (2013).

⁶¹ 52 U.S.C. §§ 20503(a)(3), 20506(a)(2), (a)(4), (c).

⁶² *Id.* § 20507(a)(3), (b)(2), (c)(2), (d)–(f).

⁶³ Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified as amended at 52 U.S.C. §§ 20901–21145) [<https://perma.cc/SLA9-RU2T>].

“voting systems” for federal elections⁶⁴ and requires that those systems generate a paper record of each vote that may be used in case of a recount.⁶⁵ HAVA also requires each state to establish a central “computerized statewide voter registration list” to “serve as the official voter registration list” for all “elections for Federal office.”⁶⁶ A person who claims to be eligible to vote in a federal election, but does not appear on the statewide registration list, must be permitted to cast a provisional ballot.⁶⁷

Finally, the Uniformed and Overseas Citizens Absentee Voting Act,⁶⁸ as amended by the Military and Overseas Voter Empowerment Act,⁶⁹ requires election officials to allow military and overseas voters to cast absentee ballots in federal elections.⁷⁰ States must send absentee ballots to such voters at least forty-five days before each federal election.⁷¹ The Act also gives military and overseas voters the right to use a special postcard application to register to vote in, and request absentee ballots for, federal elections.⁷² Thus, the wide range of federal election laws that apply only to federal elections sets the stage for a two-tier, nonunitary electoral system.

II. ATTEMPTS TO DISMANTLE THE UNITARY SYSTEM

Although Congress has enacted numerous laws that apply exclusively to federal elections,⁷³ states generally have chosen to establish unitary electoral systems by applying those standards and requirements to state and local elections, as well.⁷⁴ Section A explores the few past attempts to establish separate registration systems for various types of elections. Section B turns to states’ recent efforts to dismantle their unitary electoral systems.

A. Previous Efforts

The convention of unitary elections has been widely accepted and implemented since at least the middle of the twentieth century; exceptions have been rare. Virginia attempted to establish a dual registration scheme in the early 1960s “[i]n anticipation of the 24th Amendment to the United States

⁶⁴ 52 U.S.C. § 21081(a).

⁶⁵ *Id.* § 21081(a)(2)(B).

⁶⁶ *Id.* § 21083(a)(1)(A)(viii).

⁶⁷ *Id.* § 21082(a).

⁶⁸ Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 52 U.S.C. § 20301–20311).

⁶⁹ Pub. L. No. 111-84, §§ 575–589, 123 Stat. 2190, 2419–35 (2009) (comprising Section H of the National Defense Authorization Act for Fiscal Year 2010) [<https://perma.cc/MDF9-HW5H>].

⁷⁰ 52 U.S.C. § 20302(a)(1).

⁷¹ *Id.* § 20302(a)(8).

⁷² *Id.* § 20302(a)(4). Additionally, a military or overseas voter may vote in a federal election using a special federal write-in absentee ballot if they submit a timely request for a conventional absentee ballot but do not receive one. *Id.* §§ 20302(a)(3), 20303(a)(1), (b). Another statute, the Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1978) (codified as amended at 52 U.S.C. §§ 20102–20107), requires states to ensure that all polling locations for federal elections are accessible to the elderly and handicapped. 52 U.S.C. § 20102(a).

⁷³ See *supra* notes 56–72 and accompanying text.

⁷⁴ See, e.g., *Young v. Fordice*, 520 U.S. 273, 279 (1997) (declaring that, as of 1997, all states other than Mississippi “have modified their voter registration rules so that NVRA registration registers voters for both federal and state elections”) [<https://perma.cc/HSS8-ZB5H>]; see also *supra* notes 7–8.

Constitution,⁷⁵ which prohibits states from imposing poll taxes in connection with federal elections.⁷⁶ Virginia established two voter registration lists: one that required payment of a poll tax and authorized voting in all elections, and another that, consistent with the Twenty-Fourth Amendment, did not require such payments, but authorized voting only in federal elections.⁷⁷

After the Supreme Court held that the Equal Protection Clause prohibits states from imposing poll taxes in any elections,⁷⁸ no enforceable differences remained between the registration requirements for the two lists. A three-judge district court held that, because a rational basis no longer existed for distinguishing between the voters on the two lists, Virginia's "dual voter registration and qualification laws" were unconstitutional.⁷⁹

Following the NVRA's enactment in 1993, Illinois and Mississippi each adopted multiple voter registration systems: an NVRA-compliant system for federal elections, and a separate system for state and local elections.⁸⁰ Mississippi was a covered jurisdiction subject to Section 5 of the Voting Rights Act, however.⁸¹ Because Mississippi had not sought preclearance for those changes to its election laws, the Supreme Court enjoined enforcement of Mississippi's dual registration system until it was precleared.⁸²

On remand, the Department of Justice refused to preclear Mississippi's dual registration system.⁸³ It concluded that the system adversely affected African-Americans, who were disproportionately registered to vote only in federal elections.⁸⁴ The Governor nevertheless vetoed a bill that would have converted the dual registration system into a unitary one.⁸⁵ Because the state had adopted its dual registration system in violation of Section 5's preclearance requirements, the district court ordered it to allow everyone who had registered under the NVRA to vote in elections for all levels of

⁷⁵ *Haskins v. Davis*, 253 F. Supp. 642, 642 (E.D. Va. 1966) [<https://perma.cc/QWW9-RPZT>].

⁷⁶ U.S. CONST. amend. XXIV, § 1.

⁷⁷ *Haskins*, 253 F. Supp. at 642.

⁷⁸ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

⁷⁹ *Haskins*, 253 F. Supp. at 643.

⁸⁰ See *Young v. Fordice*, 520 U.S. 273, 278–79 (1997); *Orr v. Edgar*, 670 N.E.2d 1243, 1246 (Ill. App. Ct. 1996) [<https://perma.cc/9LH3-NL33>]. Mississippi had previously maintained a different dual registration system dating back to 1892. *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 402 (5th Cir. 1991) [<https://perma.cc/U2RU-NAHZ>]. Mississippi law had "required a citizen to register first with the county registrar (circuit clerk), to vote in federal, state, and county elections, and again with the municipal clerk to vote in municipal elections." *Id.* In 1984, after plaintiffs challenged that dual system under Section 2 of the Voting Rights Act, the legislature replaced it with a unitary system that remained in effect until the NVRA was enacted. *Id.* at 404. The Fifth Circuit held that Mississippi's former dual system violated Section 2 due to its racially disparate impact, but that the subsequent amendments cured the problem. *Id.* at 412–13.

⁸¹ See *Young*, 520 U.S. at 281.

⁸² *Id.* at 290–91.

⁸³ *Young v. Fordice*, Nos. 3:95-CV-197, 3:95-CV-198, 1998 U.S. Dist. LEXIS 24096, at *5 (S.D. Miss. Oct. 5, 1998).

⁸⁴ *Id.* at *6.

⁸⁵ *Id.* at *8–9.

government, until the state obtained preclearance for an alternate scheme.⁸⁶ Mississippi enacted a unitary registration system that satisfied both the NVRA and Section 5 in 2000.⁸⁷

Illinois's dual registration system was similarly short-lived. After the Seventh Circuit affirmed the NVRA's constitutionality,⁸⁸ Illinois established two sets of voter rolls: one just for federal elections, governed by the NVRA, and another just for state and local elections, to which additional requirements would apply.⁸⁹ The Illinois Court of Appeals held that the dual registration system violated the Illinois Constitution's guarantee of "free and equal" elections, which prevented the state from "mak[ing] it easier to register for some elections than for others."⁹⁰ The court also concluded that the two-tier system violated the state constitution's Equal Protection Clause, because the state could have complied with the NVRA in other ways that would have been less confusing and burdensome to voters.⁹¹ It ordered the state to allow people who had registered under the NVRA to vote in all elections.⁹² Illinois formally adopted a unitary voter registration system in 1996.⁹³

B. Recent and Ongoing Controversies

Arizona adopted Proposition 200 in 2004.⁹⁴ Kansas adopted the Secure and Fair Elections (SAFE) Act several years later, in 2011.⁹⁵ Both measures require people to provide proof of U.S. citizenship in order to register to vote.⁹⁶ In *Arizona v. Inter Tribal Council of Arizona, Inc.*, however, the Supreme Court held that the NVRA requires states to register anyone who submits the "federal" voter registration form created by the EAC to vote in

⁸⁶ *Id.* at *11–12.

⁸⁷ 2000 Miss. Laws 374, 374–78. A few other municipalities over the years have attempted to adopt dual registration schemes, but were similarly blocked by Section 5 of the Voting Rights Act due to lack of preclearance. Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 198 (1983) [<https://perma.cc/TBN9-B4FH>].

⁸⁸ *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 796 (7th Cir. 1995) [<https://perma.cc/C4SV-BJCB>].

⁸⁹ *See Orr v. Edgar*, 670 N.E.2d 1243, 1246 (Ill. App. Ct. 1996); *see also* *ACORN v. Edgar*, No. 95-C-174, 1995 U.S. Dist. LEXIS 12945, at *2 (N.D. Ill. Sept. 7, 1995).

⁹⁰ *Orr*, 670 N.E.2d at 1251–52 (citing ILL. CONST. art. III, § 3).

⁹¹ *Id.* at 1252–53.

⁹² *Id.* at 1254.

⁹³ *National Voter Registration Act (Motor Voter)*, ILL. STATE BD. OF ELECTIONS, <https://www.elections.il.gov/votinginformation/MotorVoter.aspx> (last visited Nov. 18, 2016) [<https://perma.cc/39A5-UJ8U>].

⁹⁴ ARIZ. REV. STAT. § 16-166(F) (2010) [<https://perma.cc/QA26-E37Y>]; Rebekah L. Sanders, *Supreme Court to Weigh Arizona's Voter-ID Law*, AZ CENTRAL (Mar. 17, 2013, 8:14 AM), <http://archive.azcentral.com/news/politics/articles/20130311arizona-voter-id-law-supreme-court.html> [<https://perma.cc/N4MB-S4KJ>].

⁹⁵ 2011 Kan. Sess. Laws 795, 809–10 (codified as amended at KAN. STAT. ANN. § 25-2309(I) (2015)) [<https://perma.cc/7FFQ-DMB4>].

⁹⁶ ARIZ. REV. STAT. § 16-166(F) (specifying that acceptable proof of citizenship includes a copy of a driver's license, birth certificate, passport, proof of naturalization, or Indian affairs card number); KAN. STAT. ANN. § 25-2309(I) (listing same examples in addition to adoption decrees and military records).

federal elections, even if they do not provide proof of citizenship.⁹⁷ The ruling leaves states free to engage in uncooperative federalism by dismantling their unitary election systems in a variety of ways.

I. Establishing Separate Voter Registration Systems

Consistent with *Inter Tribal Council*,⁹⁸ Kansas Secretary of State Kris Kobach and Arizona Secretary of State Ken Bennett implemented their respective states' registration restrictions by establishing two-tier registration systems.⁹⁹

Under Arizona's system, a person who submits a voter registration form along with proof of citizenship is registered to vote in all elections; a person who submits a form without such evidence is registered only for federal elections.¹⁰⁰ Kansas's system is more complicated. A person who provides proof of citizenship is registered to vote in all elections, regardless of which registration form he or she uses.¹⁰¹ If a person does not provide proof of citizenship, however, then he or she will be registered only for federal elections if he uses the federal registration form created by the EAC (as mandated by the NVRA) and will not be registered at all if he uses a state-created registration form.¹⁰²

In *Belenky v. Kobach*, a Kansas state trial court held that Secretary Kobach lacked legal authority to establish a two-tier registration system. It declared, "[t]here is no such thing as 'partial registration' to be found in the Kansas statute books. . . . [T]he Secretary is not empowered to . . . create a method of 'partial registration' only."¹⁰³ An appeal is currently pending before the Kansas Court of Appeals.¹⁰⁴

Belenky presents an interesting question of remedies. Kansas's SAFE Act provides, "an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship."¹⁰⁵ The NVRA,

⁹⁷ 133 S. Ct. 2247, 2257 (2013).

⁹⁸ See *Gonzalez v. Arizona*, 677 F.3d 383, 404 n.30 (9th Cir. 2012) (en banc) ("Congress's authority under the Elections Clause is limited to preempting state regulations as they relate to federal elections. Therefore, our holding invalidating Proposition 200's registration provision does not prevent Arizona from applying a proof of citizenship requirement to voter registrations for state elections.") [<https://perma.cc/6AVG-CLYZ>], *aff'd sub nom. Inter Tribal Council*, 133 S. Ct. 2247 [<https://perma.cc/AZL7-N5B5>]; cf. *Young v. Fordice*, 520 U.S. 273, 290 (1997) ("[T]he NVRA does not forbid two [registration] systems . . .").

⁹⁹ See Fernanda Santos & John Eligon, *2 States Plan 2-Tier System for Balloting*, N.Y. TIMES (Oct. 11, 2013), http://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html?_r=0 [<https://perma.cc/9WK9-GQHU>].

¹⁰⁰ *Register to Vote or Update Your Current Voter Information*, ARIZ. SEC'Y OF STATE, <http://www.azsos.gov/elections/voting-election/register-vote-or-update-your-current-voter-information> (last visited Nov. 16, 2016) [<https://perma.cc/EJT9-TZKQ>].

¹⁰¹ *Belenky v. Kobach*, No. 13-4150-EFM-KHM, 2014 U.S. Dist. LEXIS 48020, at *4 (D. Kan. Apr. 7, 2014).

¹⁰² *Id.*

¹⁰³ Memorandum Opinion and Order at 16–17, *Belenky v. Kobach*, No. 2013-CV-1331 (Kan. Dist. Ct. Jan. 15, 2016), <https://www.aclu.org/legal-document/belenky-v-kobach-summary-judgment> [<https://perma.cc/QFF5-B4JU>].

¹⁰⁴ See *Belenky v. Kobach*, No. 116332 (Kan. Ct. App. docketed Aug. 10, 2016) [<https://perma.cc/N77V-J2PH>].

¹⁰⁵ KAN. STAT. ANN. § 25-2309(l) (2015).

as interpreted in *Inter Tribal Council*, prevents states from imposing such requirements with regard to federal elections on applicants who submit the federal registration form. Thus, the issue is whether the SAFE Act should be treated as severable—a question the trial court entirely overlooked.

Applying traditional severability standards,¹⁰⁶ the Act can coherently be applied as a registration requirement for state and local elections, even if the NVRA precludes its application to federal elections. Further, the Kansas legislature likely would have wished to preserve its proof-of-citizenship requirement at least partially, by retaining it as a requirement to vote in state and local races. Thus, Secretary Kobach acted reasonably in severing the invalid applications of the SAFE Act from the valid ones, by treating people who submit the federal form without supporting documentation as registered to vote solely in federal elections.

A separate federal lawsuit, *Cromwell v. Kobach*,¹⁰⁷ challenges the regulation that Secretary Kobach promulgated to implement the dual registration system.¹⁰⁸ Under this regulation, if an applicant submits a state registration form without proof of citizenship, his voter registration record is designated suspended or “incomplete.”¹⁰⁹ The person has ninety days to complete his application by providing proof of citizenship or any other missing information, or else his or her registration will be redesignated as “canceled.”¹¹⁰

The district court dismissed the *Cromwell* plaintiffs’ NVRA claims because they failed to provide presuit notice to the defendants¹¹¹ as the NVRA requires.¹¹² Even on their merits, these claims would have failed. The NVRA requires a state to accept a state-created registration form only if it is “valid.”¹¹³ And the NVRA does not establish criteria for determining the validity of state-created registration forms. Since Kansas law provides that a voter’s registration is not complete until he or she provides proof of citizenship,¹¹⁴ Kobach was justified in refusing to accept state registration forms as valid or complete without such accompanying proof. Likewise, because applicants who submit state registration forms are not added to the statewide database as registered voters unless they provide proof of citizenship,¹¹⁵ the NVRA’s provisions restricting states’ ability to remove

¹⁰⁶ See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601–02, 2607 (2012); Gannon v. State, 372 P.3d 1181, 1199 (Kan. 2016) (holding that an invalid provision of a law is severable if “[1] the act would have been passed without the objectionable portion and [2] . . . the statute would operate effectively to carry out the intention of the legislature with such portion stricken” (citation omitted)) [https://perma.cc/6AUT-4NT4].

¹⁰⁷ No. 15-9300-JAR-JPO, 2016 U.S. Dist. LEXIS 99850 (D. Kan. July 29, 2016).

¹⁰⁸ KAN. ADMIN. REGS. § 7-23-15 (2015) [https://perma.cc/R9BB-8QZ3].

¹⁰⁹ *Id.* § 7-23-15(a).

¹¹⁰ *Id.* § 7-23-15(b)–(c).

¹¹¹ *Cromwell*, 2016 U.S. Dist. LEXIS 99850, at *39–41.

¹¹² 52 U.S.C. § 20510(b) (2015).

¹¹³ *Id.* § 20507(a)(1)(D).

¹¹⁴ KAN. STAT. ANN. § 25-2309(l) (2015).

¹¹⁵ See *Fish v. Kobach*, No. 16-2105-JAR-JPO, 2016 U.S. Dist. LEXIS 64873, at *90 (D. Kan. May 17, 2016), *aff’d*, 840 F.3d 710 (10th Cir. 2016) [https://perma.cc/L2N8-N4PP].

people from “the official list[] of eligible voters” are not implicated.¹¹⁶ The *Cromwell* plaintiffs’ constitutional challenges under the Due Process Clause and Privileges and Immunities Clause remain pending before the U.S. District Court for the District of Kansas.¹¹⁷

2. *Proof of Citizenship for Motor Voter Applicants*

Advocacy groups have been attempting to extend *Inter Tribal Council*’s reasoning to other provisions of the NVRA, despite their materially different language. In *Fish v. Kobach*, the Tenth Circuit affirmed a preliminary injunction requiring Secretary Kobach, under the NVRA’s “motor voter” provisions, to register people to vote for federal office when they submit registration applications without proof of citizenship as part of their driver’s license applications.¹¹⁸

The NVRA provision at issue in *Inter Tribal Council*, which requires states to “accept and use” the EAC’s federal voter registration form, did not govern *Fish* because it does not apply to the voter registration portion of state driver’s license applications.¹¹⁹ Instead, the NVRA provides that motor vehicle application forms may contain “only the minimum amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant” to vote.¹²⁰ The court held that requiring a person to make a written sworn affirmation on the registration form is sufficient to elicit the “minimum amount of information necessary” to confirm his or her citizenship.¹²¹ Additional proof of citizenship is not “necessary” to establish an applicant’s citizenship status.

This literal interpretation of the NVRA is unpersuasive. As the Tenth Circuit itself acknowledged,¹²² courts seldom construe the term “necessary” in statutes to mean absolutely required; rather, the word is typically interpreted as establishing a less demanding standard.¹²³ Other courts may reject the premise that it is unnecessary to request proof of a person’s citizenship because the state can just take their word for it and afford states greater leeway to engage in uncooperative federalism under the NVRA.

3. *Modifying the Federal Registration Form*

The *Inter Tribal Council* Court recognized that “it would raise serious

¹¹⁶ 52 U.S.C. § 20507(a)(3), (c)(2)(A).

¹¹⁷ *Cromwell v. Kobach*, No. 15-9300-JAR-JPO, 2016 U.S. Dist. LEXIS 99850, at *12, *50 (D. Kan. July 29, 2016) (denying motion to dismiss those claims).

¹¹⁸ *Fish*, 840 F.3d at 719, 756.

¹¹⁹ 52 U.S.C. § 20505(a)(1).

¹²⁰ *Id.* § 20504(c)(2)(B)(ii).

¹²¹ *Fish*, 840 F.3d at 738, 746–48.

¹²² *Id.* at 734–35.

¹²³ See, e.g., *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1134–35 (9th Cir. 2012) (defining “necessary” in the Americans with Disabilities Act to mean “reasonable”) [<https://perma.cc/2DBH-9SDC>]; *In re Mile Hi Metal Sys., Inc.*, 899 F.2d 887, 893 (10th Cir. 1990) (recognizing that the term “necessary” in a provision of the Bankruptcy Code “does not mean absolutely necessary”) [<https://perma.cc/GZM6-VEA9>]; cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413–14 (1819) (holding, in construing the Necessary and Proper Clause, that the word “necessary” often refers to “any means calculated to produce [an] end,” and is not “confined to those single means, without which the end would be entirely unattainable”) [<https://perma.cc/T3LA-8L87>].

constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.”¹²⁴ It noted, however, that the NVRA permits each state to “request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility and . . . challenge the EAC’s rejection of that request in a suit under the Administrative Procedure Act.”¹²⁵ The Court added that, if the EAC refused to alter its form to include the requested state-specific instructions, the state:

[W]ould have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include [its] concrete evidence requirement on the Federal Form. [A state] might also assert . . . that it would be arbitrary for the EAC to refuse to include [its] instruction when it has accepted a similar instruction requested by Louisiana.¹²⁶

Following this ruling, Arizona and Kansas (as well as Georgia) petitioned the EAC to modify the federal voter registration form to direct applicants from those states to submit documentary proof of citizenship.¹²⁷ On January 17, 2014, the EAC refused, holding that documentary proof of citizenship is unnecessary because the federal form already requires applicants to certify that they are United States citizens.¹²⁸ In the EAC’s view, the possible consequences for making fraudulent statements are “effective deterrent[s]” that render additional proof of applicants’ statements unnecessary.¹²⁹ Kansas, Arizona, and their Secretaries of State challenged this determination in court, but the U.S. Court of Appeals for the Tenth Circuit ultimately upheld the EAC’s determination,¹³⁰ and the Supreme Court unanimously denied certiorari without explanation.¹³¹

After that litigation concluded, in October 2015, Secretary Kobach adopted a new regulation governing proof of citizenship¹³²—the regulation challenged in *Cromwell v. Kobach*.¹³³ He then asked the EAC to modify the instructions accompanying the federal voter registration form to require applicants to provide proof of citizenship to register to vote for any office.¹³⁴

¹²⁴ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2258–59 (2013).

¹²⁵ *Id.* at 2259 (citations omitted).

¹²⁶ *Id.* at 2260 (citation omitted).

¹²⁷ Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form, No. EAC-2013-0004, at 1 (U.S. Election Assistance Comm’n Jan. 17, 2014) [<https://perma.cc/8Y8X-WDNZ>].

¹²⁸ *Id.* at 28–29 (describing an applicant’s written sworn assertion of citizenship as “reliable evidence”).

¹²⁹ *Id.* at 29–30.

¹³⁰ *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183, 1188 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015) [<https://perma.cc/A2JY-QNFD>].

¹³¹ *Kobach v. U.S. Election Assistance Comm’n*, 135 S. Ct. 2891 (2015).

¹³² *See* KAN. ADMIN. REGS. § 7-23-15 (2015).

¹³³ *See supra* Section II.B.1.

¹³⁴ *League of Women Voters of the U.S. v. Newby*, No. 16-236 (R.J.L.), 2016 U.S. Dist. LEXIS 84727, at *9–10 (D.D.C. June 29, 2016), *rev’d*, No. 16-5196, 2016 U.S. App. LEXIS 16835 (D.C. Cir. Sept. 9, 2016) (order) (*per curiam*) [<https://perma.cc/E5KA-AW9Y>].

Similar requests from Alabama and Georgia were also pending.¹³⁵ The EAC's Executive Director, Brian Newby, approved the requested changes in January 2016.¹³⁶

Numerous left-wing groups immediately sued in the U.S. District Court for the District of Columbia, arguing that Newby lacked authority to approve the changes, did not follow proper procedures, and violated the NVRA by "adding state-specific instructions that are not 'necessary.'"¹³⁷ They moved for a temporary restraining order and preliminary injunction to prevent the EAC from issuing the revised instructions.¹³⁸

Remarkably, the United States Department of Justice refused to even attempt to defend the EAC's actions.¹³⁹ Instead, it agreed with the plaintiffs' claims and asked the court to enter a preliminary injunction against the revised instructions.¹⁴⁰ The court allowed Secretary Kobach and a voting rights group, the Public Interest Legal Foundation, to intervene to defend Newby's actions.¹⁴¹ It then denied the plaintiffs' request for interim relief because they failed to establish irreparable injury.¹⁴²

In a two-to-one decision, however, the D.C. Circuit reversed the district court's ruling and entered a preliminary injunction barring the EAC from issuing the revised instructions.¹⁴³ The court held that Newby had violated the Administrative Procedures Act by modifying the instructions without actually considering whether the states' requested change was "necessary" (in any sense of the word).¹⁴⁴ Cross-motions for summary judgment remain pending in the district court, but the D.C. Circuit's ruling leaves little room for the trial court to uphold Newby's actions. And the EAC's democratic members are likely to block further attempts to change the instructions. In the future, for states to compel the EAC to modify the instructions accompanying the federal voter registration form, they must provide stronger evidence that such changes will help prevent noncitizen voting, and that refusal by the EAC to modify the instructions is therefore unreasonable or an abuse of discretion.

III. JUSTIFICATIONS FOR DISMANTLING THE UNITARY SYSTEM

State efforts to engage in uncooperative federalism by abandoning unitary election systems are defensible on a variety of grounds. Section A explains that states are not obligated to retain unitary systems simply because

¹³⁵ *Id.* at *10–11.

¹³⁶ *Id.* at *12–13.

¹³⁷ *Id.* at *16–17 (citation omitted).

¹³⁸ *Id.* at *17.

¹³⁹ *Id.* at *18.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at *35–36.

¹⁴³ *League of Women Voters of the U.S. v. Newby*, No. 16-5196, 2016 U.S. App. LEXIS 17463, at *31 (D.C. Cir. Sept. 26, 2016).

¹⁴⁴ *Id.* at *18–19 ("Because Newby expressly found that the criterion set by Congress—*i.e.*, whether the amendments were necessary to assess eligibility—was 'irrelevant' to his analysis it is difficult to imagine a more clear violation of the APA[]" (citation omitted)).

they have evolved into a convention. Section B discusses the risks of noncitizen voting that have led some states to abandon unitary elections, while Section C explains why the federal government must bear a substantial amount of the blame for undermining unitary elections.

A. *Against Convention*

States have generally treated local, state, and federal elections in the same manner largely for policy-related reasons such as efficiency, simplicity, and maximizing voter turnout.¹⁴⁵ While these decisions have given rise to a convention of unitary elections, adherence to convention is not inherently desirable. As Justice Blackmun, quoting Justice Holmes, wrote: “[I]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”¹⁴⁶

When a convention evolves from happenstance, there is no reason to believe that categorically adhering to it will be socially beneficial. Particularly if people have not substantially relied on the convention, society may be better served by replacing it with a focused, purposeful policy decision. In contrast, when a convention arises for a certain purpose, its desirability is primarily instrumental, hinging on its ability to continue promoting that underlying purpose, as well as the relative value of that purpose as compared to competing social goals. Thus, when a government official violates a convention, he should not always, as A.V. Dicey cautions, be subject to “blame or unpopularity.”¹⁴⁷

Moreover, at least some conventions arise from faulty assumptions or reasoning, based on a variation of the naturalistic fallacy.¹⁴⁸ When local, state, and federal elections are collectively treated as unitary affairs for years or decades, people may erroneously conclude that such policy-based decisions are constitutionally, legally, or morally required.¹⁴⁹ In reality, adherence to a convention of unitary elections frustrates the Constitution’s scheme, which affords Congress wider authority over federal elections than state or local ones.¹⁵⁰

A unitary system is likewise inconsistent with each state’s independent sovereign interest in determining, within federal constitutional bounds, the structure of its own government¹⁵¹—an interest which does not extend to federal offices. Moreover, recognizing the legitimacy of states’ innovations

¹⁴⁵ See *Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 837 (6th Cir. 1997) [<https://perma.cc/8CA4-PVKW>].

¹⁴⁶ *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citing Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) [<https://perma.cc/EHV3-D6T6>]) [<https://perma.cc/JPH5-E4P6>].

¹⁴⁷ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 26 n.1 (8th ed. 1915) [<https://archive.org/details/introductiontos04dicegoog>].

¹⁴⁸ Cf. Peter A. Alces, *Unintelligent Design in Contract*, 2008 U. ILL. L. REV. 505, 506 & n.5 [<https://perma.cc/UGU2-7VBD>].

¹⁴⁹ Cf. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1174–75 (2013) (observing that some administrative agencies are generally regarded as independent, despite the absence of any statutory basis for that characterization).

¹⁵⁰ See *supra* Section I.A.

¹⁵¹ See *Gregory v. Ashcroft*, 501 U.S. 452, 463–64 (1991).

concerning state and local elections allows voters to benefit from uncooperative federalism. States can promote both individual rights and democracy by drawing the balance between the affirmative right to vote and the defensive right to vote differently than the federal government.¹⁵²

B. Noncitizen Voting

One of main reasons states have sought to dismantle their unitary election systems is to combat the risk that legitimate voters' ballots will be diluted by votes from ineligible people, such as noncitizens. In *Bluman v. Federal Election Commission*, a three-judge panel of the U.S. District Court for the District of Columbia—in an opinion summarily affirmed by the Supreme Court—thoughtfully examined noncitizens' relationship to the American political community.¹⁵³ The panel held that “a State’s historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign’s obligation to preserve the basic conception of a political community.”¹⁵⁴ Noncitizens “do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government.”¹⁵⁵ The government also “has a compelling interest . . . [in] preventing foreign influence over the U.S. political process.”¹⁵⁶

Florida’s experience during the 2012 election cycle provides dramatic proof that the prospect of noncitizen voting poses a threat to the integrity of the electoral process. In February 2012, reporters identified nearly 100 noncitizens in two Florida counties who had submitted forms swearing they were ineligible for jury duty because they were not citizens, yet had also filed voter registration forms swearing they were citizens and were registered to vote.¹⁵⁷ Many of these people had voted in previous elections; one woman bragged, “I vote every year.”¹⁵⁸

In the wake of these news reports, Florida Secretary of State Ken Detzner reviewed the statewide voter registration database to identify other potential noncitizens who were ineligible to vote.¹⁵⁹ He compared the database to motor vehicle records to identify voters who previously had identified themselves as noncitizens.¹⁶⁰ He also attempted to compare the

¹⁵² See *infra* Section III.C.

¹⁵³ 800 F. Supp. 2d 281, 283–85 (D.D.C. 2011) [<https://perma.cc/5X3Z-J79T>], *aff'd*, 132 S. Ct. 1087 (2012) (mem.).

¹⁵⁴ *Id.* at 287 (alteration in original) (quoting *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978) [<https://perma.cc/WVD2-HLF4>]).

¹⁵⁵ *Id.* at 288.

¹⁵⁶ *Id.*

¹⁵⁷ *NBC2 Investigates: Voter Fraud—Part 2*, NBC2 (Feb. 2, 2012, 7:58 PM), <http://www.nbc-2.com/story/16666098/2012/02/02/nbc2-investigates-voter-fraud-part-2> [<https://perma.cc/R9WX-ZQTS>].

¹⁵⁸ *NBC2 Investigates: Voter Fraud*, NBC2 (Feb. 2, 2012, 1:34 PM), <http://www.nbc-2.com/story/16662854/2012/02/Thursday/nbc2-investigates-voter-fraud> [<https://perma.cc/9RG2-36YC>].

¹⁵⁹ Marc Caputo & Steve Bousquet, *Gov. Rick Scott: Voter Purge Lawful, Feds Are Wrong and Breaking the Law*, MIAMI HERALD (June 6, 2012, 5:00 AM), <http://www.miamiherald.com/news/politics-government/article1940398.html> [<https://perma.cc/P78P-GHDE>].

¹⁶⁰ Rachel Weiner, *Florida’s Voter Purge Explained*, WASH. POST (June 18, 2012),

voter registration rolls to the U.S. Citizenship and Immigration Services' database of aliens in the United States (the Systematic Alien Verification for Entitlements, or SAVE, database), as permitted by federal law,¹⁶¹ but the Obama Administration refused to confirm the citizenship status of any Florida voters.¹⁶²

Inconsistencies in state records may have existed for many innocuous reasons, such as mismatches, recordkeeping errors, and changes in citizenship status. No one was removed from the voter registration rolls, however, simply because another state record indicated they were a noncitizen. Rather, pursuant to state law,¹⁶³ potential noncitizens were notified that a question had arisen concerning their citizenship and asked to submit proof of citizenship to their county supervisors of elections within thirty days to avoid removal from the voter rolls.¹⁶⁴ Even if a person failed to timely respond, they could be re-added to the voter rolls simply by submitting a new voter registration form. Adequate proof of citizenship included a copy of a driver's license, passport, birth certificate, or certificate of naturalization, and the information could be submitted by mail, fax, or e-mail.¹⁶⁵ A voter without those papers could request a hearing.¹⁶⁶

Detzner's office identified approximately 2,700 people for whom confirmation of citizenship appeared necessary and forwarded their names to their respective county supervisor of elections offices for notices to be issued.¹⁶⁷ The Obama Administration and several left-wing groups immediately sued to enjoin Detzner's efforts, misleadingly condemning the notices as a "purge."¹⁶⁸ Critics argued that Florida's effort was racist because many people on the list had Hispanic surnames.¹⁶⁹ Detzner, in turn, sued the government to obtain access to the SAVE database.¹⁷⁰

https://www.washingtonpost.com/blogs/the-fix/post/floridas-voter-purge-explained/2012/06/18/gJQAhvNIV_blog.html [<https://perma.cc/47N4-PJS2>].

¹⁶¹ 8 U.S.C. § 1373(c) (2012) (directing the government to respond to any inquiry by a "Federal, State, or local government agency" to verify a person's citizenship status for any lawful purpose) [<https://perma.cc/59XQ-MJP3>].

¹⁶² Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Ken Detzner, Fla. Sec'y of State 2-3 (June 11, 2012), <http://thinkprogress.org/wp-content/uploads/2012/06/florida.pdf> [<https://perma.cc/3HXX-8E73>].

¹⁶³ FLA. STAT. § 98.075(7) (2016) (detailing the procedure for removing a person from the voter registration database) [<https://perma.cc/DU37-558E>].

¹⁶⁴ Sample Letter to Potential Noncitizen, Fla. Div. of Elections, <https://www.documentcloud.org/documents/366725-florida-sample-of-potential-noncitizen-letter.html> [<https://perma.cc/Q47Q-BLE9>].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Weiner, *supra* note 160.

¹⁶⁸ *United States v. Florida*, 870 F. Supp. 2d 1346, 1347 (N.D. Fla. 2012) [<https://perma.cc/C4YR-PY6F>]; *Arcia v. Detzner*, 908 F. Supp. 2d 1276, 1277 (S.D. Fla. 2012), *rev'd sub nom. Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014) [<https://perma.cc/KGY7-SPQ3>].

¹⁶⁹ *See, e.g., Complaint at 2, Arcia v. Detzner*, 908 F. Supp. 2d 1276 (S.D. Fla. 2012) (No. 1:12-CV-22282-ZLOCH) [<https://perma.cc/6WVX-RR53>]; *Complaint at 9, Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326 (M.D. Fla. 2012) (No. 8:12-CV-1294-T-27MAP) [<https://perma.cc/R2F5-HE2E>].

¹⁷⁰ *Complaint, Fla. Dep't of State v. U.S. Dep't of Homeland Sec.*, No. 1:12-CV-00960-JDB (D.D.C. June 11, 2012) [<https://perma.cc/48SJ-UYKW>].

The State eventually entered into a settlement agreement with the federal government, guaranteeing Florida access to the SAVE database.¹⁷¹ But a divided panel of the Eleventh Circuit held that the NVRA prohibited Detzner from “systematically” updating the rolls of people registered to vote in federal elections within ninety days of a federal primary or general election¹⁷²—the periods in which public interest in politics, and the likelihood of incorrect or fraudulent registration forms being filed, are greatest.¹⁷³ Thus, for nearly a quarter of the time—180 days during every two-year federal election cycle¹⁷⁴—states are prohibited from systematically reviewing the accuracy of their federal voter registration databases.

If states have an interest in ensuring that noncitizens do not vote—and the U.S. Constitution does not grant noncitizens that right¹⁷⁵—three implications follow. First, states must have some means of confirming that people registering to vote are U.S. citizens, beyond simply their affirmations on forms. Such confirmation is especially necessary when federal law forces states to accept as voter registration applications forms that noncitizens are permitted to file, such as driver’s license applications.¹⁷⁶ Even ignoring the potential for fraud, people might not see or read the citizenship restrictions on the form, non-English speakers might not understand the language, applicants might not appreciate its significance, or they might choose to ignore it.

Second, efforts to update voter registration lists to confirm voters’ citizenship status will almost inevitably have disproportionate effects on minority groups, but such disparate impact is not evidence of racism or discrimination. Nearly everyone for whom citizenship-related discrepancies arise in state records is likely to be an immigrant; the only reason a natural-born citizen would be flagged as a potential noncitizen is an indisputable mismatch or paperwork error. In recent years, immigrants have disproportionately tended to be nonwhite: according to Pew Research, twenty-eight percent of immigrants are from Mexico alone.¹⁷⁷ Thus, any effort to limit the voter registration rolls to U.S. citizens will invariably focus on immigrants, who are disproportionately nonwhite. It is virtually contradictory for states to retain citizenship restrictions on voting, yet be prohibited from enforcing such requirements due to racially disproportionate

¹⁷¹ Press Release, Fla. Dep’t of State, Florida Department of State Receives Commitment from U.S. Department of Homeland Security to Provide Access to Citizenship Database (July 14, 2012) [<https://perma.cc/PXB3-A4PS>].

¹⁷² *Arcia*, 772 F.3d at 1348 (citation omitted) [<https://perma.cc/ME38-HGFP>].

¹⁷³ See *Citizens United v. FEC*, 558 U.S. 310, 334 (2010) (“It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held.”) [<https://perma.cc/4L3U-TYJW>].

¹⁷⁴ This figure includes the ninety-day period before a federal primary election and separate ninety-day period before a federal general election.

¹⁷⁵ See U.S. CONST. amend. XIV, § 2.

¹⁷⁶ 52 U.S.C. § 20504(a)(1) (2015).

¹⁷⁷ Jens Manuel Krogstad & Michael Keegan, *From Germany to Mexico: How America’s Source of Immigrants Has Changed Over a Century*, PEW RESEARCH CTR. (Oct. 7, 2015), <http://www.pewresearch.org/fact-tank/2015/10/07/a-shift-from-germany-to-mexico-for-americas-immigrants/> [<https://perma.cc/V4NV-M4W7>].

impact.

Third, some qualified voters will inevitably be flagged as potential noncitizens in any effort to update voter registration rolls. Much was made of the fact that, during Florida's so-called "purge" in 2012, a ninety-one-year-old World War II veteran was identified as a potential noncitizen.¹⁷⁸ But the veteran was not "purged" from the voter rolls. Instead, the supervisor of elections notified him of the discrepancy in the state's records and asked him to mail, fax, or e-mail a copy of a document confirming his citizenship within thirty days.¹⁷⁹ The veteran complied; had he failed to do so, he would have only been required to complete a new one-page registration form to vote. This is exactly how government is supposed to work: if there is reason to believe someone might not be qualified to vote, rather than either ignoring the discrepancy or unilaterally removing that person from the voter rolls, the state notifies him or her of the potential issue and asks for clarification.

Critics such as Deirdre Macnab, former president of the League of Women Voters of Florida, argue that states should not cross-reference their voter registration records against the SAVE database because it "is not a foolproof means of verifying the voter rolls."¹⁸⁰ But "foolproof" is hardly a realistic standard for any governmental activity, including procedures concerning fundamental rights. The jury system, for example, is far from a "foolproof" method of determining a person's guilt, yet we accept a jury's verdict as a sufficient basis for incarcerating a person. Cross-referencing voter registration rolls against state or federal databases, such as the SAVE database, does not definitively establish that a person is ineligible to vote, but it provides adequate grounds for sending a postcard requesting confirmation of their eligibility.

C. Federal Policy

Though states such as Kansas and Arizona are typically blamed for abandoning their unitary electoral systems, the federal government must shoulder a substantial portion of the responsibility. Supreme Court precedent establishes that "[t]he right to vote is comprised of two complementary component rights: the 'affirmative' right to cast a ballot, and the 'defensive' right to have that ballot be counted and 'given full value and effect, without being diluted or distorted by the casting of fraudulent' or otherwise invalid ballots."¹⁸¹ Federal laws relating to federal elections place overwhelming emphasis on protecting the affirmative right to vote. They allow people to

¹⁷⁸ Greg Allen, *World War II Vet Caught Up in Florida's Voter Purge Controversy*, NPR (May 31, 2012, 3:39 AM), <http://www.npr.org/sections/itsallpolitics/2012/05/31/154020289/world-war-ii-vet-caught-up-in-floridas-voter-purge-controversy> [https://perma.cc/BTC3-F78F].

¹⁷⁹ *Id.*

¹⁸⁰ Amy Sherman, *Homeland Security Warned that the SAVE Database is Not Foolproof Way to Verify the Voter Rolls, LWV Says*, POLITIFACT FLA. (Oct. 30, 2013, 1:36 PM), <http://www.politifact.com/florida/statements/2013/oct/30/league-women-voters-florida/league-women-voters-says-homeland-security-warned/> [https://perma.cc/9QRB-9SPV].

¹⁸¹ Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 528 (2016) (footnote omitted) [https://perma.cc/PQ8B-DXRF].

register without providing proof of citizenship¹⁸² and impede state efforts to remove noncitizens from their voter registration rolls.¹⁸³

Moreover, the government has ignored federal laws allowing states to access information in the federal immigration database to confirm registrants' citizenship status,¹⁸⁴ and repeatedly opposed state efforts to have the federal registration form modified to request proof-of-citizenship information.¹⁸⁵ By prohibiting states from taking reasonable steps to enforce the defensive right to vote by excluding noncitizens from the voter rolls, the federal government has contributed to the dismantling of the unitary electoral system. States that wish to ensure greater balance between the competing components of the right to vote are forced to establish separate requirements, procedures, and even registration rolls for state and local elections.¹⁸⁶

CONCLUSION

The Supreme Court has recognized both the affirmative right to vote, which guarantees the right of eligible individuals to cast a ballot, and the defensive right to vote, which ensures that each valid ballot is counted and given full effect without being diluted or canceled out by votes from ineligible people, such as noncitizens. Federal laws governing federal elections, such as the NVRA, are tilted heavily in favor of protecting the affirmative right to vote by making it easy to register to vote in federal elections and difficult for states to remove people from the registration rolls for such elections.

States may legitimately choose to balance the competing components of the right to vote differently with regard to state and local elections by requiring people to provide confirmation of their citizenship to be added to, or remain on, the registration rolls for those elections. Such uncooperative federalism contributes to the disunity of the electoral system, in defiance of established convention. Such measures are constitutional, however, and states may reasonably conclude that they enhance both the actual and apparent reliability of the electoral process.

¹⁸² 52 U.S.C. § 20505(a)(1) (2015); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2260 (2013).

¹⁸³ 52 U.S.C. §§ 20507(a)(3), (b)(2), (c)(2), (d)–(f); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014).

¹⁸⁴ *See supra* notes 162, 170–171.

¹⁸⁵ *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1197–98 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015); *see also* *League of Women Voters of the U.S. v. Newby*, No. 16-236 (R.JL), 2016 U.S. Dist. LEXIS 84727, at *18 (D.D.C. June 29, 2016) (discussing position of Department of Justice), *rev'd*, No. 16-5196, 2016 U.S. App. LEXIS 17463 (D.C. Cir. Sept. 26, 2016).

¹⁸⁶ *See supra* Section II.B.