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An Untapped "Arsenal of Power": the Elections Clause, a Federal Election Administration Agency, and Federal Election Oversight

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AN UNTAPPED “ARSENAL OF POWER”:
THE ELECTIONS CLAUSE,
A FEDERAL ELECTION ADMINISTRATION AGENCY,
AND FEDERAL ELECTION OVERSIGHT

ZACHARY NEWKIRK*

“This is the only modern nation in the world that dares not control its own elections.”—W.E.B. Du Bois¹

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1. W.E.B. Du Bois, *The Negro Citizen*, in *THE NEGRO IN AMERICAN CIVILIZATION* 461, 469 (Charles S. Johnson ed., 1930).

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I. INTRODUCTION

In January 2019, Democratic members of the House of Representatives introduced H.R. 1—the For the People Act of 2019.² The sprawling 571-page bill introduces sweeping reforms to voting rights, campaign finance, and government ethics. Among the proposed reforms: automatic voter registration, online and same-day voter registration, requiring at least 15 consecutive days of early voting in locations near public transportation, requiring paper ballots, prohibiting states’ chief election officers from participating in federal political campaigns, promoting enhanced cybersecurity standards, requiring presidential candidates to release tax returns—the list goes on.³ The House passed H.R. 1 in March 2019, but the bill has stalled in the Senate.⁴ While unlikely to become law during the 116th Congress, H.R. 1 offers one roadmap for future electoral reform. More recently, presidential candidate Senator Elizabeth Warren unveiled an election reform plan that would create uniform federal standards for elections and implement reforms such as automatic voter registration and prohibiting voter purges.⁵

This Article envisions an alternative model for electoral reform to supplement bold reform efforts like H.R. 1 and Warren’s federal standards—expanded, citizen-initiated federal oversight of elections and a centralized federal election administration. Channeling deep, untapped power authorized under the Fifteenth Amendment, and especially the Elections Clause, Congress can establish a nonpartisan, independent Federal Election Administration Agency.⁶ Congress can also create an effective federal election oversight program. These two reforms would combat some well-known ills that hamper American elections—a hyper-decentralized patchwork of election administration that varies wildly nationwide, which, in many jurisdictions, partisan

2. H.R. 1, 116th Cong. (2019).

3. *Id.* Even the summary of the law is a hefty twenty-two pages. See *H.R. 1: The For the People Act of 2019*, https://democracyreform-sar-banes.house.gov/sites/democracyreformtaskforce.house.gov/files/H.R.%201%20Section-by-Section_FINAL.pdf.

4. Catie Edmondson, *House Passes Democrats’ Centerpiece Anti-Corruption and Voting Rights Bill*, N.Y. TIMES (Mar. 8, 2019), available at <https://www.nytimes.com/2019/03/08/us/politics/house-democrats-anticorruption-voting-rights.html> [https://perma.cc/R4JE-JCF9].

5. Elizabeth Warren, *My Plan to Strengthen Democracy*, MEDIUM (June 25, 2019), <https://medium.com/@teamwarren/my-plan-to-strengthen-our-democracy-6867ec1bcd3c> [https://perma.cc/6PZE-TCJB].

6. See, e.g., Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 113 (2013) (asserting “[i]nstead of the limited race-driven use of equal protection and the Fifteenth Amendment, there is untested room for expansion of congressional intervention under the Elections Clause”).

officials oversee; crippled federal oversight in the wake of *Shelby County v. Holder*⁷; and court-dependent (and sometimes untimely) remedies for election disputes. A nonpartisan, independent Federal Election Administration Agency would set nationwide standards for the “Times, Places, and Manner” of federal elections.⁸ It would independently adjudicate election disputes without burdening federal courts and risking the judiciary’s further politicization. And, at the initiative of voters, the federal government would oversee election administration in any jurisdiction—just as the federal government did across the South and the urban North in the late nineteenth century with the Enforcement Acts.⁹

The goal of this Article is to propose a model of election administration and adjudication that both insulates election law from partisanship and narrows the path for political actors to change the rules for their perceived benefit. A group of neutral and apolitical election professionals can exist at the federal level. Meanwhile, efforts to change the rules from political parties, activists, and legislators would have to operate within this administrative framework—through multiple layers of nonpartisan processes that aim to insulate election administrators from partisan influence. Ultimately, this Article argues that federal election administration is constitutional, has ample historical precedent rooted in the nineteenth century’s Enforcement Acts, and offers antidotes to this hyper-partisan era of election administration.

A federal election administrative agency has a natural place in recent scholarship. A group of election law scholars—the “New Institutionalists”¹⁰—has written extensively over the past decade on the role that nonjudicial institutions can play to improve election administration.¹¹ In “The Institutional Turn in Election Law Scholarship,” Heather Gerken and Michael Kang outline several “hard” and “soft”

7. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (invalidating Section 4(b)’s preclearance formula as a violation of the equal state sovereignty doctrine, thereby ending the requirement for some jurisdictions to seek federal preclearance for election law changes).

8. U.S. CONST. art. I, § 4, cl. 1.

9. See *infra* pp. 12–18.

10. Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CAL. L. REV. 1075, 1076 (2010) [hereinafter Hasen, *New Institutionalism*] (coining the moniker “New Institutionalists” to describe election law scholars advancing institutions as mechanisms for electoral reform).

11. See, e.g., Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POLY REV. 125, 128 (2009) [hereinafter Tokaji, *The Future of Election Reform*] (describing the “institutional turn” in election law scholarship and providing examples from leaders in the field). Some, for example, have advocated for advisory commissions. See Christopher S. Elmendorf, *Election Commissions and Electoral Reform*, 5 ELECTION L.J. 425 (2006). Others have advocated for a Democracy Index. See HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009).

reforms to advance changes to election administration “by redirecting the existing politics that control election law.”¹² “Hard” approaches reform the lawmaking institutions that create election law by seeking to “reconfigure existing lawmaking institutions or to create new institutions that produce new, better incentives for political leaders” to reform election administration.¹³ “Soft” approaches, on the other hand, involve ways to change elite incentives toward reform without changing lawmaking processes.¹⁴ This Article’s proposals, inspired in part by nineteenth century federal election practices, exist on the “hard” side of Gerken and Kang’s spectrum.

This Article contributes to institution-centered election law scholarship in two ways. First, it suggests that possible solutions for contemporary election administration woes exist in forgotten corners of American history. Election law scholars have looked to political science and economics to complement their analyses with varying results.¹⁵ Historical analysis can—and should—inform the present. Examining the successes and failures of now-gone federal institutions can provide some novel ideas for those riding the institutional wave in election law scholarship.¹⁶

Second, an administrative model for nonpartisan election administration aims to be a “breath of fresh air from earlier juricentric thinking about reform”—that is, a turn away from court-centered reforms.¹⁷ Even as some scholars assert that it is “critical that courts play an active role in supervising the administration of elections,”¹⁸ history

12. Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship* in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86, 90 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011) (internal quotation marks omitted) [hereinafter Gerken & Kang, *The Institutional Turn*].

13. *Id.*

14. *Id.* at 91.

15. David Schleicher, *Overview: Mapping Election Law’s Interior* in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 75, 79 (Guy-Uriel E. Charles, Heather K. Gerken & Michael S. Kang eds., 2011).

16. In the fields of federalism, voter qualifications, and the Elections Clause, Professor Franita Tolson has time and again masterfully examined historical practices. *See, e.g.*, Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171, 171–84 (2019); Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 341–67 (2019) [hereinafter Tolson, *Spectrum of Congressional Authority*]; Franita Tolson, *Protecting Political Participation through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 186–204 (2015); Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1219–41 (2012) [hereinafter Tolson, *Reinventing Sovereignty?*].

17. Hasen, *New Institutionalism*, *supra* note 10, at 1098. *But see* Daniel P. Tokaji & Owen Wolfe, *Baker, Bush, and Ballot Boards: The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 969, 971 (2012) (praising the increased role of federal judges as impartial arbiters in election-related litigation).

18. Tokaji, *The Future of Election Reform*, *supra* note 11, at 129.

suggests that election administration litigation has the risk of overwhelming the federal courts.¹⁹ Contemporary scholars note that judge-centered reforms risk judges falling back on their personal preferences or ending in “highly formalistic” opinions.²⁰ What is more, the injection of election litigation into the courts risks further politicizing the judiciary.²¹

Thus, a turn toward a new institution in the federal administrative state is sensible. Commentators over the last decade have proposed turning to administrative law fundamentals in approaching election law topics (particularly redistricting), but to date, there has been little advocacy for a federal election administration entity.²² This gap in election law scholarship is notable, considering how an administrative agency could remedy election administration ills like partisanship and decentralization—symptoms that are well known and increasingly apparent during election seasons.²³

The point of this Article is not whether a neutral federal agency is the ideal mechanism for effective election administration.²⁴ Instead, it tackles the fundamental building blocks necessary to bring such an agency into being and envisions what it might look like. A decade ago, for example, Daniel Tokaji cautiously wrote that robust election administration reform should occur at the state level “[u]ntil such time as the United States develops an effective federal agency for

19. See *infra* text accompanying notes 200–06 (detailing burdens Enforcement Acts placed on federal judges).

20. Gerken & Kang, *The Institutional Turn*, *supra* note 12, at 89; see also Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629, 629 & 634 (2018) [hereinafter Hasen, *From Bad to Worse*] (noting that the “judiciary itself often divides along partisan lines” in deciding election law cases and “[t]here is every reason to believe the partisan divide in voting wars cases endures on the Supreme Court”).

21. Hasen, *From Bad to Worse*, *supra* note 20, at 635 (observing how party-line judicial decisions threaten “the legitimacy of the election system and respect for courts and the rule of law”).

22. See generally Saul Zipkin, *Administering Election Law*, 95 MARQ. L. REV. 641 (2012); Joseph A. Peters, *The Meaningful Vote Commission: Restraining Gerrymanders with a Federal Agency*, 78 GEO. WASH. L. REV. 1051 (2010); Note, *A Federal Administrative Approach to Redistricting Reform*, 121 HARV. L. REV. 1842 (2008).

23. See generally Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POLY 57 (2017) [hereinafter Gaughan, *Illiberal Democracy*]; Tokaji, *The Future of Election Reform*, *supra* note 11, at 129–38; Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 944 (2005) [hereinafter Hasen, *Beyond the Margin*].

24. See, e.g., Tokaji, *The Future of Election Reform*, *supra* note 11, at 146 (cautioning that “[t]here exists no federal administrative agency that can be trusted to implement new federal mandates, and it is far from clear that one can be created in the foreseeable future”); see also Hasen, *Beyond the Margin*, *supra* note 23, at 973–91 (proposing creation of “cadre” of election professionals at the state level).

overseeing election administration.”²⁵ Intervening events—including the Supreme Court’s reaffirmation of Congress’s paramount federal election authority,²⁶ *Shelby County*, the 2016 election, and the introduction and passage of H.R. 1—suggest both the appeal of and legislative interest in increased federal election administration. Accordingly, this Article details such an agency’s historical antecedents, its constitutionality, and its potential structure and powers.

In short, this Article advances institution-based proposals to centralize federal election administration, and, drawing upon historical lessons, create a robust system of federal election oversight. In doing so, the federal election administration agency would dramatically cut partisanship in election administration. Moreover, citizen-initiated federal election oversight would rectify some of the blows *Shelby County* inflicted.²⁷ As H.R. 1’s detail and scope indicate, there is no shortage of legislative enthusiasm for electoral reform. Legislators can draw from historical lessons to take additional bold action at the federal level.

Part I examines the original Enforcement Acts—taking account of their origin, contents, and operations—and evaluates their effectiveness. Part II describes Congress’s authority over federal, state, and local elections under the Elections Clause and several constitutional amendments. Part III couples the preceding historical analysis of the Enforcement Acts and legal, constitutional analysis of Congress’s broad electoral authority to offer two election administration reforms through a Modern Enforcement Act (“MEA”)—a nonpartisan Federal Election Administration Agency (“FEAA”) and citizen-initiated federal election oversight.

II. THE ENFORCEMENT ACTS OF 1870–71

Federal marshals, deputies, and election supervisors were common sights at polling places throughout the South and urban North between 1870 and 1894, when Congress repealed the Enforcement Acts.²⁸ Through enforcing the Fifteenth Amendment and activating deep powers in the Elections Clause, Congress established a complex federal administrative infrastructure to regulate elections for a generation.

25. Tokaji, *The Future of Election Reform*, *supra* note 11, at 149; *see also id.* at 144–49 (comparing benefits of state-level versus federal-level election administration reforms).

26. *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013).

27. *See, e.g.*, Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2145–46 (2015) (identifying examples of “new, restrictive voting laws” passed soon after *Shelby County*).

28. David Quigley, *Constitutional Revision and the City: The Enforcement Acts and Urban America, 1870–1894*, 20 J. OF POL’Y HIST. 64, 65 (2008).

A. *The Enforcement Acts' Context*

Not long after the Fifteenth Amendment's ratification in 1870, Mississippi Senator Hiram Revels "appeal[ed] for protection from the strong arm of the Government for her loyal children, irrespective of color and race, who are citizens of the southern States."²⁹ Senator John Sherman of Ohio urged his colleagues to fulfill their "imperative duty" to "pass suitable laws" to enforce the Fifteenth Amendment since neither the Fourteenth nor the Fifteenth Amendments were enforceable "by the simple operation of their own force."³⁰ Both amendments, he reported, were "violated repeatedly" despite being the supreme law of the land.³¹ Meanwhile, congressional Republicans sought enforcement measures to combat blatant election fraud in urban centers, particularly New York City. As Ulysses S. Grant, the Republican candidate, comfortably won the state of New York (and the presidential election), Democratic victories in Manhattan came under suspicion of election fraud.³² The *New York Times* estimated between 50,000 and 75,000 illegal votes were cast in New York City.³³

Responding to these concerns, Congress passed three Enforcement Acts between May 1870 and April 1871. The first Enforcement Act was officially titled "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes."³⁴ The detailed Senate proposal contained seventeen sections and was "far more perceptive" to voting barriers in the South as compared to other proposals originating from the House.³⁵ First, it criminalized any interference with prerequisites for voting, declaring that "it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote."³⁶ The

29. CONG. GLOBE, 41st Cong., 2d Sess. 1987 (1870).

30. CONG. GLOBE, 41st Cong., 2d Sess. 3568 (1870).

31. *Id.* For example, voters in Circleville, Ohio had been prevented from voting "notwithstanding the fifteenth amendment" and sought for an enforcement law to assist in exercising their rights. QUINCY DAILY WHIG, Apr. 11, 1870.

32. Albie Burke, *Federal Regulation of Congressional Elections in Northern Cities, 1871–1894*, at 36–38 (Mar. 1968) (unpublished Ph.D. dissertation, University of Chicago) [hereinafter Burke, Ph.D. diss.].

33. N.Y. TIMES, Jan. 10, 1869. According to Albie Burke, *The Nation's* estimate of 50,000 "was the most objective and probably the most accurate." Albie Burke, *Federal Regulation of Congressional Elections in Northern Cities, 1871–94*, 14 AM. J. LEGAL HIST. 17, 23 (1970) [hereinafter Burke, 14 AM. J. LEGAL HIST.].

34. See Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870); CONG. GLOBE, 41st Cong., 2d Sess. 3561–62 (reprinting text of Senate bill in full).

35. XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860–1910*, at 59 (1997); see also CONG. GLOBE, 41st Cong., 2d Sess. 3503–04 (1870) (for text of House bill).

36. CONG. GLOBE, 41st Cong., 2d Sess. 3561 (1870).

House bill, on the other hand, only criminalized interference with the act of voting.³⁷ The Senate bill, like its House counterpart, reiterated that citizens “shall be entitled and allowed to vote *at all such elections*.”³⁸ It similarly gave original jurisdiction to the federal courts, while also stating that any crimes committed under the act could be prosecuted by grand jury indictment.³⁹ Under the Senate version, the federal government gained significantly more authority over the registration *and* voting processes.

Most significantly for this Article, the Senate bill provided extensive enforcement machinery to the federal government. It gave district attorneys, federal marshals, and deputy marshals the power to arrest and imprison any violators of the law. In fact, the bill *required* federal officers to “institute proceedings against all and every person” who violated the act and mandated federal courts to, as necessary, “increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination” of the act’s violators.⁴⁰ The act afforded steep, \$1,000 fines for federal officers who refused their duties. It empowered them to “summon and call to their aid the bystanders or *posse comitatus*” to “insure a faithful observance of the fifteenth amendment.”⁴¹ The bill also permitted the president to use the land, naval, or militia forces “as shall be deemed necessary” to enforce the law.⁴²

There was little doubt that the bill would pass. At the time of its passage, the Republicans commanded lopsided majorities in the House and Senate.⁴³ After a lengthy debate that lasted early into the morning of May 21, 1870, the Senate passed the legislation.⁴⁴ According to one senator, the bill supported the intent of the Fifteenth Amendment: “to secure to the colored man, and to the white man also, having the right to vote, the opportunity to go to the polls and quietly deposit his vote.”⁴⁵ On May 31, 1870, President Grant approved the legislation and it became law.⁴⁶

37. *Id.* at 3504.

38. *Id.* at 3479 (emphasis added).

39. *Id.* at 3480.

40. *Id.*

41. *Id.*

42. *Id.* at 3562.

43. Historian Xi Wang calculates that at the time the measures were debated during the second session of the 41st Congress, there were sixty-one Republican senators, nine Democrat senators, and two senators of the Conservative Party. “[I]n the House, Republicans outnumbered the sixty-four Democrats by nearly a hundred.” WANG, *supra* note 35, at 57.

44. CONG. GLOBE, 41st Cong., 2d Sess. 3690 (1870). The vote was forty-three in favor, eight against, and twenty-one abstaining. Only one Republican voted against the bill. *Id.*

45. *Id.* at 3655.

46. WANG, *supra* note 35, at 65.

Congressional Republicans sought to strengthen the first Enforcement Act after Democratic electoral victories in 1870].⁴⁷ The second Enforcement Act amended the first Enforcement Act and became law on February 28, 1871.⁴⁸ What became the second Enforcement Act added 19 sections to the first act and “obviously targeted the states’ power to regulate elections.”⁴⁹

The third Enforcement Act—known as the Ku Klux Klan Act—passed in April 1871.⁵⁰ The Ku Klux Klan Act criminalized conspiracies to violate federal laws, as well as nefarious actions that aimed to prevent individuals from exercising their civil rights, by use of “force, intimidation, or threat[s].”⁵¹ A major purpose of the Act was to outlaw the Ku Klux Klan and other terrorist groups that worked to deprive individuals of rights guaranteed by the Reconstruction Amendments and the 1866 Civil Rights Act.⁵² According to one historian, the prosecutions that followed the act “had broken the back” of the Klan by 1872.⁵³

B. *The Enforcement Acts’ Provisions*

The three Enforcement Acts were the nation’s first robust federal election laws, and expanded federal power to an unprecedented degree. The first Act focused primarily on African American voters in the South.⁵⁴ Throughout its 23 sections, the law defined voting-related crimes—chiefly aimed at combatting voter intimidation tactics that Southern whites had adopted. The Act required election officers to give “the same and equal opportunity” for any individual to perform any voting-related prerequisites, or face stiff fines or possible jail time.⁵⁵ It criminalized any acts “by force, bribery, threats, intimidation, or other unlawful means” to “hinder, delay, prevent, or obstruct” voting.⁵⁶ It prohibited employers, landlords, or contractors from preventing voting through threats of termination, ejection, or refusals to renew leases or contracts.⁵⁷ In an especially broad measure, the Act barred two or more

47. *Id.* at 78–80.

48. *Id.* at 82.

49. *Id.* at 81.

50. *Id.* at 83.

51. Act of April 20, 1871, § 2, 17 Stat. 13.

52. WANG, *supra* note 35, at 83.

53. ROBERT M. GOLDMAN, “A FREE BALLOT AND A FAIR COUNT”: THE DEPARTMENT OF JUSTICE AND THE ENFORCEMENT OF VOTING RIGHTS IN THE SOUTH, 1877–1893 9 (2001).

54. See WANG, *supra* note 35, at 65 (“[T]he focus was on black suffrage.”).

55. Enforcement Act of 1870, ch. 114, § 2, 3, 16 Stat. 140, 140–41 (1870).

56. § 4, 16 Stat. at 141.

57. § 5, 16 Stat. at 141.

people from conspiring “or go[ing] in disguise upon the public highway . . . with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate” anyone from voting.⁵⁸

Other sections detailed enforcement mechanisms. Federal courts had original jurisdiction for any violations of the Act.⁵⁹ Federal courts also had the ability to increase the number of election supervisors to “afford a speedy and convenient” manner for charging the law’s violators.⁶⁰ The Act granted specific causes of action for allegedly defeated candidates to sue in federal court “by reason of the denial to any citizen . . . of the right to vote.”⁶¹ District attorneys, marshals, and deputy marshals had “powers of arresting, imprisoning, or bailing offenders;”⁶² marshals and deputy marshals were also required to “obey and execute all warrants and precepts” issued against the law’s offenders.⁶³ Perhaps most controversially, the president of the United States could deploy any land, naval, or militia forces as “necessary to aid in the execution of judicial process[es]” the law laid out.⁶⁴

The first Act also addressed election fraud common in urban areas. For instance, the Act criminalized anyone knowingly registering or attempting to register “in the name of any other person, whether living, dead, or fictitious,” or bribing, threatening, or compelling any such fraudulent registration.⁶⁵ The law also detailed numerous crimes that election officers could be prosecuted for if they, among other things, violated any duties, took bribes, falsely reported election totals, or aided any voter in committing voter fraud.⁶⁶ Violating these sections would result in a \$500 maximum penalty or a prison term of no greater than three years, or both, in addition to paying the costs of prosecution.⁶⁷

Building on the first Act, the second Enforcement Act made enforcement processes more complex by “providing technical details regarding enforcement machinery.”⁶⁸ Two citizens in a city with a population of at least 20,000 inhabitants could petition a federal judge to appoint two election supervisors in a given precinct.⁶⁹ The judge could then appoint the two supervisors—one from each party—to oversee these

58. § 6, 16 Stat. at 141.

59. § 8, 16 Stat. at 142.

60. § 9, 16 Stat. at 142.

61. § 23, 16 Stat. at 146.

62. § 9, 16 Stat. at 142.

63. § 10, 16 Stat. at 142.

64. § 13, 16 Stat. at 143.

65. § 20, 16 Stat. at 145.

66. § 22, 16 Stat. 145–46.

67. § 19, 16 Stat. at 144–45.

68. WANG, *supra* note 35, at 80.

69. *Id.*; see also Act of February 28, 1871, § 2, ch. 99, § 2, 16 Stat. 433 (1871).

elections.⁷⁰ The two requesting citizens could also request certain parameters for federal supervision.⁷¹ For example, they could request supervision only for specific parts of a given city or for supervision only on Election Day.⁷²

Chief election supervisors were required to "discharge the duties in this act" in a "faithful and capable" manner.⁷³ These duties included a wide range of managerial tasks—for example, to provide materials such as lists of potential voters and registrations to election supervisors in the district to ensure such voters' veracity and to "receive, preserve, and file all oaths of office" of election supervisors and deputy marshals.⁷⁴ The chiefs' subordinates, termed "supervisors of election," also had important responsibilities. They were to "attend at all times and places for holding elections of representatives or delegates in Congress," to count the votes, to challenge any vote that they doubt, "to be and remain where the ballot-boxes are kept at all times after the polls are open" and the count completed, and to "personally inspect and scrutinize . . . the manner in which the voting is done."⁷⁵ The supervisors also had extensive regulatory power over the registration process. One provision required them to attend "at all times and places fixed for the registration of voters" and to ensure the process was running smoothly by "personally inspect[ing] and scrutiniz[ing]" the registry and voter lists.⁷⁶ The federal law also specified the supervisors' physical placement in polling and registration places. They were to be present as to "best enable them or him to see each person offering himself for registration" or voting.⁷⁷ The Act further detailed the penalties and punishments should election supervisors neglect their duties, or any individual interfere with the Act's provisions.⁷⁸

C. *The Enforcement Acts in Action*

The first Enforcement Act's implementation began during the 1870 elections. U.S. attorneys initiated the bulk of enforcement activities through the newly created Department of Justice and, accordingly, the

70. § 2, 16 Stat. at 433–34.

71. Burke, Ph.D. diss., *supra* note 31, at 167–68.

72. *Id.* at 4.

73. § 13, 16 Stat. at 437–38.

74. *Id.*

75. § 5, 16 Stat. at 434–35.

76. § 4, 16 Stat. at 434.

77. § 6, 16 Stat. at 435.

78. §§ 7, 9, 10, 11, 16 Stat. at 435–37.

prosecutions ended up in federal court.⁷⁹ In 1870, federal prosecutors brought forty-three cases under the Act, resulting in thirty-two convictions.⁸⁰ They had a one-hundred percent success rate in the Northern states and seventy-four percent success rate nationally, although no alleged violator in the Southern states was convicted.⁸¹ The next year, prosecutors brought 314 cases and convicted 128 violators of the Acts, 108 of whom were in Southern states.⁸² Prosecutions peaked in 1873 with 1,304 cases brought in federal courts, though only thirty-six percent—469 violators total—were convicted.⁸³ After 1873, the number of prosecutions declined.⁸⁴ Even so, some districts remained active sites for election law prosecutions. Northern Mississippi was the site of 1,072 prosecutions between 1871 and 1884—more than any other region—and accounted for approximately one-third of all Enforcement Act convictions during these years.⁸⁵ More than half of the cases there resulted in convictions, compared to a twenty-eight percent success rate nationally.⁸⁶

The disenfranchisement of African American voters in Delaware illustrates the laws' operation. There, Democratic officials prevented African Americans from paying the then-legal poll taxes to qualify as voters.⁸⁷ On Election Day 1872, mobs across the state physically blocked African Americans from voting, beat them, and, in two localities, drove federal deputy marshals from the scene.⁸⁸ A Democratic landslide victory followed.⁸⁹ Federal officials charged New Castle County tax collector, Archibald Given, for failing to qualify voting prerequisites impartially as required by the second section of the first Enforcement Act.⁹⁰ He was found guilty in the trial court and appealed, challenging the section's constitutionality.⁹¹

79. WANG, *supra* note 35, at 96 ("But from the vantage point of enforcement, this new addition to the federal government helped institutionalize enforcement of the Fourteenth and Fifteenth Amendment in the early 1870s.").

80. WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION, 1869–1879* 43 (1979).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870–1890*, 53 J. S. HIST. 421, 422 (1987).

86. *Id.* According to Cresswell's tallies, only 1,529 out of 5,386 prosecutions nation-wide resulted in convictions. However, 585 out of the 1,529 convictions were from Northern Mississippi, a stunning fifty-five percent success rate. *Id.*

87. GILLETTE, *supra* note 80, at 38.

88. *Id.* at 38–39.

89. *Id.* at 39 ("Without their black support, the Republicans had been robbed of victory.").

90. *United States v. Given*, 25 F. Cas. 1324, 1327 (C.C.D. Del. 1873) (No. 15,210).

91. *Id.* at 1324.

In *United States v. Given*, U.S. Supreme Court Justice William Strong (writing for the lower federal court) explained that Given’s tax-collecting duties were clearly outlined in Delaware’s statute.⁹² By failing to collect the taxes from African Americans, Given breached his duty. Because this breach occurred over a racially discriminatory purpose, Strong had “no doubt” that Given was liable under the Enforcement Act.⁹³ Justice Strong admitted that the Enforcement Acts had been met with “great disfavor” from “many quarters,” particularly private individuals and minor officers like Given.⁹⁴ He observed, however, Congress’s remedy for state officials’ inaction was the Enforcement Acts—evidence of Congress’s intent not to leave voting rights “without full and adequate protection.”⁹⁵ Echoing other courts of the 1870s, Strong upheld the constitutionality of the Enforcement Act’s second section. The Fifteenth Amendment “expressly conferred upon congress to enforce” the right to vote and therefore “must be so construed as to confer some effective power.”⁹⁶ Before 1876, every court that received challenges to the Enforcement Acts upheld their constitutionality.⁹⁷

In total, between 1870 and 1877, federal prosecutors charged 3,384 individuals in the South with violating the Enforcement Acts, convicting 1,143.⁹⁸ But by 1874, the Enforcement Acts’ focus turned northward.⁹⁹ This pivot represented a shift from the “protection of black suffrage to the purity of the northern ballot.”¹⁰⁰ The February 1871 Enforcement Act targeted only cities with populations greater than 20,000, which, as historian William Gillette observed, were largely in the North.¹⁰¹

92. *Id.* at 1327.

93. *Id.* at 1327–28.

94. *Id.* at 1327.

95. *Id.* (stating that although Delaware did not actively discriminate against black voters but rather “neglect[ed] to impose penalties upon its election officers for making discriminations on account of race or color” the federal government may get involved—“I think such intervention was contemplated and expressly authorized”).

96. *Id.* at 1326.

97. WANG, *supra* note 35, at 120 (“[F]ederal district and circuit judges universally upheld the constitutionality of the enforcement laws”).

98. GILLETTE, *supra* note 81, at 43.

99. *See id.* at 49 (“[T]he bulk of enforcement expenditures had been made in the North, not the South.”) “In truth, earlier federal election enforcement had become increasingly ineffective and irrelevant as far as Negro voting in the South was concerned.” *Id.* at 355.

100. Scott C. James & Brian L. Lawson, *The Political Economy of Voting Rights Enforcement in America’s Gilded Age: Electoral College Competition, Partisan Commitment, and the Federal Election Law*, 93 AM. POL. SCI. REV. 115, 115 (1999).

101. GILLETTE, *supra* note 80, at 48–49 (“Since real power under enforcement was granted only to election supervisors in cities with a population of twenty thousand, and since

Starting in the 1872 elections, federal election supervisors and marshals were ubiquitous in New York City, Brooklyn, Jersey City, Baltimore, Philadelphia, and San Francisco. In 1876, Chicago and Boston joined the list of regulated cities.¹⁰² Through the 1880s and into the 1890s, the number of federal supervisors increased, peaking in 1892.¹⁰³ For the average voter in Manhattan or any urban precinct during this era, “the state was most abundantly visible—in the form of armed, uniformed United States deputy marshals—every two years on Election Day.”¹⁰⁴

As outlined in the Enforcement Act provisions, any two (or more) citizens could request election supervisors in their precinct by petitioning a federal judge. A typical request was succinct. An 1878 petition from Philadelphia, for example, identified the two citizens, their home election district, their desire “to have said registration or election [in said district] both guarded and scrutinized,” and their request for “the appointment of two supervisors in each election division of said Congressional district.”¹⁰⁵

The supervisors were chosen from lists of individuals provided by the political parties, subject to approval by the federal judge who received the petition and the chief election supervisor.¹⁰⁶ Approval was not automatic. The New York City chief election supervisor, John Davenport, recounted in 1876 that federal judge Lewis Woodruff opined that local political organizations—“indorsed by the chairmen of the State or State and national committees”—should present the

all but five of those sixty-eight cities were in the northern and border states, the political intent and practical effects were obvious.”).

102. Burke, Ph.D. diss., *supra* note 31, at 25.

103. *Id.* at 26.

104. David Quigley, *Constitutional Revision and the City: The Enforcement Acts and Urban America, 1870-1894*, 20 J. OF POL'Y HIST. 64, 65 (2008).

105. WANG, *supra* note 35, at 292. In full, the petition read:

To the honorable William McKennan, judge of the United States circuit court for the eastern district of Pennsylvania: The petition of John Keegen and John McCauley respectfully represents: That they are citizens of the city of Philadelphia and reside in the third Congressional district of the State of Pennsylvania, within the eastern district of Pennsylvania; that they do hereby make known to your honor their desire to have the registration and election in said district guarded and scrutinized, and for that purpose they ask for the appointment of two supervisors in each election division of said Congressional district, to guard and scrutinize the registration of voters to be made in said election divisions on the third day of June next, and the election that takes place in said district for Representative in the Congress of the United States on the fifth day of November next. And they will ever pray & c.

John Keegen

John McCauley

S. REP. No. 916, at 18-19 (1881).

106. Burke, Ph.D. diss., *supra* note 31, at 169.

lists of potential supervisors.¹⁰⁷ Davenport rejected more than one hundred names from each parties' list—an action the judge recognized—allowing the parties to “send in other names in their stead, which they did.”¹⁰⁸ The *New York Times* reported that members on the Democratic list, who were supporters of the Tammany Hall machine, were rejected for “incapacity, moral unfitness and inability to read the English language.”¹⁰⁹

Literacy was certainly an important qualification. The duties of the supervisors and their chiefs involved meticulous recordkeeping. In New York City, supervisors would be present at each registration site. In 1872, there were 569 election districts with approximately 1,138 total election supervisors.¹¹⁰ Every day during the registration period, both the Democratic and Republican supervisors sent the registry to Davenport.¹¹¹ The books contained detailed information about each voter, including his address, party, race, time of residence, his naturalization status, his election districts, and whether he was a qualified voter.¹¹² Davenport explained in a congressional hearing, “[t]hose books are compared so that I may be able to know whether they agree and whether the same number of names are contained in the one book that are found in the other.”¹¹³ “A force of clerks [were] put at once at work upon the books” late into the evening hours to compare them; any discrepancy higher than a “mere technical” one would result immediately in the supervisor’s removal.¹¹⁴

While election supervisors were judicially appointed, the executive branch appointed marshals. Marshals and election supervisors “were under no statutory compulsion to work together in a coordinated effort.”¹¹⁵ A marshal served as an official law enforcement officer and could appoint deputy marshals without running through the citizen-petition process.¹¹⁶ Marshals generally worked to keep the peace during the registration period and on election day.¹¹⁷ They also checked the registration books and, ideally, worked in conjunction with the

107. H.R. REP. No. 44–218, at 34 (1877)

108. *Id.*

109. Burke, Ph.D. diss., *supra* note 31, at 170.

110. H.R. REP. No. 44–218, at 2 (1877) (“[I]n the whole five hundred and sixty-nine electoral districts two supervisors of different parties were on hand to supervise the registry and aid the local or State officials.”).

111. *Id.* at 37.

112. *Id.* at 34.

113. *Id.*

114. *Id.* at 36–37.

115. Burke, Ph.D. diss., *supra* note 31, at 173.

116. *Id.* at 170 (“The final judgment rested with him.”).

117. H.R. REP. No. 44–218, at 15 (1877).

election supervisors.¹¹⁸The chief election supervisor in Massachusetts, Henry L. Hallett, testified before Congress that when he and a marshal disagreed, it ended when the marshal “acquiesced in my construction of the law.”¹¹⁹ If they had not agreed, “I had no power to do anything in the matter.”¹²⁰ Hallett suggested that a single responsible individual ought to have been “at the head of the whole machinery.”¹²¹

U.S. marshals and deputy marshals were more prone to partisan bias because of their executive appointment status. One Democratic election supervisor testified before the Senate that the Republican-appointed federal marshal at his Philadelphia district was drunk on election day and combative toward Democrats.¹²² “He was insulting voters all day,” R.C. Howell described.¹²³ The marshal told Democratic voters to put their proof of voting, a tax receipt, back in their pockets and, on one occasion grabbed a voter, pulled him away from the polling place, and threatened to arrest him.¹²⁴ New York City supervisor Davenport testified that he strongly preferred election supervisors over marshals “for the reason that they are generally men of greater intelligence . . . [t]heir handwriting and spelling is better and they are more particular about the examination of the names.”¹²⁵ Continuing, that “[i]n other words, they understand the importance and delicacy of the work better than the marshals.”¹²⁶ Additionally, marshals were not explicitly required under the law to be literate whereas supervisors were required to be able to read and write in English.

Of course, not all of the federal supervisors and marshals were drunken partisans picking fights with voters. On the contrary, they were generally successful in combatting rampant fraud like repeat voting, ballot-box stuffing, and registration inconsistencies. Davenport and his team in New York City methodically created registration lists that involved four primary stages of preparation. First, the federal officials had detailed maps of the city that were corrected every thirty days, which made known “[a]ll the doubtful or suspected or bad houses” of possible voter registration violators.¹²⁷ Second, they created “block books” that contained all the voters on a particular block.¹²⁸

118. *Id.* at 14–15.

119. S. REP. No. 46–497, pt. 5, at 27 (1880) (testimony of Henry Hallett).

120. *Id.*

121. *Id.*

122. S. REP. No. 46–916, pt. 2, at 27–28. (1881).

123. *Id.* at 23.

124. *Id.* at 23–24. Another party recounted that the drunken marshal “said he wanted to cut that big bugger—to cut the son of a bitch’s guts out.” *Id.* at 28.

125. H.R. Rep. No. 44–218, at 37 (1877).

126. *Id.*

127. 46 CONG. REC. H823 (1879).

128. Burke, Ph.D. diss., *supra* note 31, at 181.

Third, the names from these block books were alphabetically sorted into a final list of registrants for the city, containing not just a voter’s address but his party, naturalization status, the court that naturalized him, and other pertinent information.¹²⁹ The fourth stage involved crosschecking a voter’s information against the existing registry.¹³⁰ Davenport’s scrupulous efforts were undoubtedly successful in combatting registration fraud, though they resulted in predictable partisan ire against him.¹³¹

Even more, federal election regulation was costly. One scholar estimated the regulatory programs cost more than \$4.6 million between 1871 and 1894.¹³² In New York City, for example, the federal program incurred significant expenses between staff salaries, supplies, office rentals, and general expenses. Enforcement-related expenses did not fall equally between the parties. In one able analysis, political scientists Scott C. James and Brian L. Lawson concluded that discretionary federal election enforcement expenditures generally benefitted Republican candidates.¹³³ Expenditures for the judicially appointed election supervisors were roughly comparable in Democratic New York and Republican Pennsylvania.¹³⁴ There was wide divergence, however, in regional expenses for the marshals, who were appointed by the more partisan executive branch: roughly \$28 per thousand people in New York versus \$3.52 per thousand people in Pennsylvania.¹³⁵

D. *Evaluating the Enforcement Acts*

Congress repealed the Enforcement Acts in 1894 along a party-line vote.¹³⁶ Democrats supported the laws’ repeal, believing they were unconstitutional extensions of federal power—a contrast with then-recent Supreme Court opinions.¹³⁷ A committee report by the repeal effort’s primary sponsor reasoned that the Elections Clause placed primary authority for election regulation with the states. Congress had ultimate authority, he conceded, but the nation’s history and tradition

129. *Id.* at 181–82.

130. *Id.*

131. *See id.*

132. Burke, 14 AM. J. LEGAL HIST., *supra* note 33, at 27. In 2018 dollars, \$4.6 million in 1894 was approximately \$134 million.

133. James & Lawson, *supra* note 100, at 120.

134. *Id.* at 121.

135. *Id.* at 120.

136. The repeal bill passed the Senate 39 to 28 and the House 201 to 102. *See* WANG, *supra* note 35, at 254–59 (detailing the procedures and oratory of politicians for and against repeal).

137. *See infra* notes 218 to 231 and accompanying text (discussing *Siebold* and *Yarborough* decisions); *see also* WANG, *supra* note 35, at 244 & 253 (discussing Democratic support for repeal and belief that laws violated the Constitution).

limited congressional authority to only certain circumstances.¹³⁸ Such a view permeated national memory of the laws almost immediately. The *New York Times* editorialized that the Acts were:

[I]n no sense employed as a means of purifying the suffrage or protecting the rights of voters or repressing and punishing offenses against the suffrage, but that, on the contrary, [they] degenerated into a device for supplying patronage to the party in power and to some extent for annoying and intimidating the opposing party.¹³⁹

From the outset, then, it is difficult to evaluate the Enforcement Acts without considering their fierce partisan valance.

The Acts existed during a still nascent federal administrative state.¹⁴⁰ Political scientist Stephen Skowronek has characterized the nineteenth century administrative state as a “patchwork” system.¹⁴¹ While steamship travel, trade with Native American tribes, the Post Office, and the Fugitive Slave Act offered complex federal laws and regulations, national regulations were “quite limited” when compared to state and local regulations.¹⁴² In policy areas regulated by the federal government, administration was developing, expanding, and “becoming more professionalized.”¹⁴³ At the same time, the responsibilities of the federal courts were growing. According to Skowronek, the judiciary’s dockets were “stretched to their limits” as the courts’ jurisdictions expanded and judges “assume[d] the role of stern policeman for the new national economy.”¹⁴⁴

Tucked into the ever-increasing numbers of federal regulations, developing administrative agencies, and expanding federal jurisdiction, were the Enforcement Acts and accompanying administrative aspects—including legal and administrative problems. The section below discusses each of these two realms of problems.

1. *The Enforcement Acts’ Problems of Law*

First, questions swirled around the Enforcement Acts’ constitutionality soon after their implementation. The Acts’ legal limitations were unclear since they were often enforced piecemeal. In some respects,

138. See H.R. Rep. No. 53–18, at 2–6 (1893) (analyzing the Elections Clause’s text and its interpreted primary grant of power to the states).

139. *The Close of a Chapter*, N.Y. TIMES, Feb. 9, 1894, at 4.

140. Legal scholar Jerry Mashaw has meticulously refuted the notion that administrative law developed out of the Interstate Commerce Act of 1887 and explored the pre-twentieth century versions of administrative law. Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1366 n.9 (2010).

141. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 37 (1982).

142. Mashaw, *supra* note 140, at 1380.

143. *Id.* at 1461.

144. SKOWRONEK, *supra* note 141, at 41.

the laws did not go far enough in combatting racial discrimination in the South but still were thought of as “exceed[ing] the prevailing constitutional norms by circumscribing state authority.”¹⁴⁵ As a result, federal prosecutors were instructed to act cautiously in this new extension of federal power. One of President Grant’s Attorneys General, Amos Akerman, warned his subordinates to execute their responsibilities carefully by acting “in no unnecessary harshness” and “in a decent and gentlemanly manner.”¹⁴⁶

Second, the Acts’ rapid passage resulted in overambitious, expansive, and unclear language. Historian William Gillette speculated that Republicans quickly passed the Acts “expecting [they] would somehow enforce [themselves].”¹⁴⁷ To their detriment, he argued, “certain ends had been encouraged without marshaling the necessary means.”¹⁴⁸ Specifically, the laws gave extensive powers to federal courts, which applied those powers inconsistently across the country. The laws also left relatively unclear “under what circumstances federal jurisdiction applied to private individuals.”¹⁴⁹ The Acts’ lack of clarity presented difficulties for legislators as well. Republican Senator George Williams, for example, described the first Enforcement Act as a “conglomerated mass of incongruities and uncertainties” and a “sort of moral essay that has been thrown into something like the shape of legislation.”¹⁵⁰

Third, the Acts imposed geographic limitations on their reach. While ostensibly enacted to combat voter suppression in the South, the disproportionate focus on Northern cities often came at the expense of any federal regulation in, say, the rural North or West.¹⁵¹ The provisions that extended enforcement to cities with populations greater than 20,000 applied almost exclusively to urban areas in the North and the border states.¹⁵² Admittedly, these boundaries were

145. GILLETTE, *supra* note 80, at 34.

146. WANG, *supra* note 35, at 96, 101 (internal quotation marks omitted).

147. GILLETTE, *supra* note 80, at 45.

148. *Id.*

149. *Id.* at 34.

150. CONG. GLOBE 41st Cong., 2d Sess., 3656 (1870).

151. GILLETTE, *supra* note 80, at 49 (“In contrast, federal election officials serving in rural areas had not received any compensation and had lacked the power to arrest.”).

152. Zachary Newkirk, *Unequal State Sovereignty: Considering the Equal State Sovereignty Principle Through Nineteenth-Century Election Laws*, U. CHI. L. REV. ONLINE (2019), <https://lawreviewblog.uchicago.edu/2019/06/06/unequal-state-sovereignty-considering-the-equal-state-sovereignty-principle-through-nineteenth-century-election-laws-by-zachary-newkirk%E2%80%A0/> [https://perma.cc/SK28-U8G3] (“New York and Massachusetts each had ten cities that met this [20,000 population] threshold, Pennsylvania had seven, New Jersey had six, and Ohio had five. Meanwhile, among non-Southern states, Iowa, Minnesota, Wisconsin, Maine, and New Hampshire only had one city that met this threshold while Vermont, Oregon, Nevada, Kansas, Nebraska, and West Virginia had none.”)

self-imposed by the Republicans, undoubtedly for partisan benefit.¹⁵³ Nevertheless, they resulted in a slow decline in enforcement in the Southern states.¹⁵⁴

Fourth, the Enforcement Acts addressed discrimination at the polls but did not combat less blatant forms of discrimination that became more notorious in later decades. Through the 1870s, conservative Democrats in Virginia implemented gerrymandering schemes in cities, instituted poll taxes, and disenfranchised African Americans for petit larceny and other minor crimes.¹⁵⁵ Tennessee's 1870 Constitution, meanwhile, required voters to pay a poll tax and provide proof of payment.¹⁵⁶ North Carolina followed suit six years later.¹⁵⁷ Georgia already had a poll tax implemented by statute in 1866 and added to the state constitution in 1868.¹⁵⁸ Delaware's poll tax followed its Democratic Party's statement that their state was not "morally bound" to the Reconstruction Amendments, a position, historian Eric Foner notes, that suggested a return to slavery.¹⁵⁹ Maryland's constitution reallocated legislative representation to favor rural white regions over largely African American Baltimore.¹⁶⁰

Finally, federal courts arguably undermined the Enforcement Acts just as they were succeeding in the South.¹⁶¹ Early federal court decisions in the lower courts were unanimously favorable to the Enforcement Acts.¹⁶² But, as substantive challenges to the statutes made

153. GILLETTE, *supra* note 80, at 48 (noting that Republicans sought "to enact enforcement laws so as to reduce or limit the northern Democratic city vote by eliminating Democratic fraud and thus carry[] marginal states in presidential elections.").

154. GOLDMAN, *supra* note 53, at xxv–xxix.

155. James T. Moore, *Black Militancy in Readjuster Virginia, 1879–1883*, 41 J. S. HIST. 167, 168–69 (1975).

156. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 335 (2000) (listing states that imposed taxpaying requirements between 1870 and 1921).

157. *Id.*

158. *Id.* at 334–35 (listing states that imposed taxpaying requirements between 1870 and 1921).

159. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877* 422 (1988).

160. *Id.*

161. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876* xiii–xiv (2004) (Supreme Court decisions "were made at the very moment when federal officers believed they were winning their struggle against Southern terrorism.").

162. See WANG, *supra* note 35, at 120 ("[B]efore the Supreme Court's decisions on *Reese* and *Cruikshank* in 1876, federal district and circuit judges universally upheld the constitutionality of the enforcement laws, especially the first enforcement act."); Burke, Ph.D. diss., *supra* note 30, at 156 ("In court encounters, both at the lower and the appellate levels, [the federal election laws] terms and its constitutionality were not only sustained but sustained broadly."); see also *supra* notes 92–97 and accompanying text (discussing *United States v. Given*, 25 F.Cas. 1324 (C.C.D. Del. 1873)).

their way through the appellate courts, enforcement declined due to the laws’ uncertain future, exacerbated by the *Slaughterhouse Cases*, which severely constrained the Fourteenth Amendment’s “privileges and immunities” language.¹⁶³ Then-Attorney General George Williams wrote to district attorneys in 1875 that “criminal prosecution[s] under these [Enforcement A]cts ought to be suspended until it is known whether the Supreme Court will hold them constitutional or otherwise.”¹⁶⁴

Even while the Enforcement Acts largely survived constitutional challenges in *Reese* and *Cruikshank* in 1876,¹⁶⁵ the Supreme Court’s decisions brought the laws “under a shadow.”¹⁶⁶ Historian Everette Swinney may have exaggerated when he claimed that *Reese* and *Cruikshank* ended the federal government’s enforcement of the Fifteenth Amendment,¹⁶⁷ but there is plentiful data indicating enforcement was declining by 1876 and continued on a downward trajectory—at least in the Southern states.¹⁶⁸ In 1874, for example, federal prosecutors brought 793 election violations from Southern states into federal court.¹⁶⁹ The next year, as the Supreme Court deliberated over *Reese* and *Cruikshank*, prosecutors brought 205 cases.¹⁷⁰ In 1876, as Reconstruction was coming to an end, federal attorneys only brought 106 cases from Southern states, which resulted in just two convictions.¹⁷¹ Enforcement measures never entirely dissipated, though they never again reached pre-*Reese* and *Cruikshank* levels.¹⁷²

163. KACZOROWSKI, *supra* note 161, at 173 (“While the *Slaughterhouse* decision was generally perceived as a revitalization of states rights and a corresponding diminution in national authority, it left unanswered many questions relating to national civil rights enforcement authority.”); *see generally* *Slaughterhouse Cases*, 83 U.S. 36 (1873).

164. Everette Swinney, *Enforcing the Fifteenth Amendment, 1870–1877*, 28 J. S. HIST. 202, 208 (1962) (internal quotation marks omitted).

165. *See infra* text accompanying notes 273–277 (discussing contours of *Reese* and *Cruikshank* decisions).

166. Swinney, *supra* note 164, at 209.

167. *Id.* (“The effect of the decisions was to bring to a close the active policy of the government to enforce the Fifteenth Amendment.”).

168. WANG, *supra* note 35, at 130 (“The Court’s decisions clearly jeopardized and discouraged enforcement.”); *see generally* James & Lawson, *supra* note 100 (outlining decline of enforcement expenditures).

169. GILLETTE, *supra* note 80, at 43.

170. *Id.*

171. *Id.*

172. GOLDMAN, *supra* note 53 at 199–200 (“Between 1877 and 1893 the Justice Department instituted 1,264 cases in the eleven states of the Confederacy based on the federal election statutes of 1870-73.”).

2. *The Enforcement Acts' Problems of Administration*

An array of administrative problems hampered the Enforcement Acts' effectiveness, even while the Acts survived constitutional challenges. First, federal election supervisors of less-than-stellar quality and motivation disadvantaged many jurisdictions. Some federal officials were unskilled in the complex Acts' provisions and were oblivious to the indictment process.¹⁷³ Others were charged with "[d]runkenness, arbitrary use of power, and blackmail."¹⁷⁴ Still, others were too apprehensive in the eyes of their superiors. As one Virginia supervisor wrote to the Attorney General in 1876, "*timidity* is the bane of Southern Republican officials." He continued, "[t]hey are so peaceable that they submit to wrong, some wink at it, to pacify their own every day life with the enemy."¹⁷⁵ Weak election regulators existed not from lack of trying. Attorney General Williams exhorted his subordinates to "delegate . . . power to none but careful and responsible persons" who should exhibit "prudent and fearless" qualities.¹⁷⁶ But, more commonly, it was "sheer ignorance and lethargy" that damned federal officials to ineffectiveness.¹⁷⁷

The moral character of many federal election officials regularly came under fire. An 1874 letter to Congress claimed:

The[] laws are regarded by the masses of the white people in the state as odious and oppressive.... They study and assail the weak points and infirmities which any officer of the United States may possess. If he is convivial, they "wine and dine" him; if he is more avaricious or impecunious than honest, they bribe him; if he is timid, they frighten and bully him.¹⁷⁸

An 1880 editorial in *The Nation* claimed there was proof that many election supervisors were men of the "worst character, who [did] the dirty work of ward politics—keepers of grog-shops and of houses of prostitution, pugilists, gamblers, and in many instances discharged convicts and drunkards."¹⁷⁹ This charge was not new in 1880. Congressional Democrats gleefully cited nationwide examples of federal election officials' crimes at the time of the laws' passage.¹⁸⁰

173. GILLETTE, *supra* note 80, at 31–32.

174. Swinney, *supra* note 164, at 217.

175. GILLETTE, *supra* note 80, at 32 (internal quotation marks omitted).

176. Swinney, *supra* note 164, at 217 (internal quotation marks omitted).

177. GILLETTE, *supra* note 80, at 32.

178. H. EXEC. DOC. No. 46, *Memorial, Civil Rights in Alabama*, 43d Cong., 2d Sess. (1874).

179. THE NATION, Apr. 8, 1880.

180. CONG. GLOBE, 41st Cong., 3d Sess. 1636 (1870) (quoting newspaper article listing the crimes and sentences of various federal election officials).

Another problem of administration was perceived—or actual—partisanship. Many officials obtained their positions from political patronage and therefore had direct stakes in the election outcomes they were appointed to impartially supervise.¹⁸¹ As *The Nation* observed, “[i]t is simply preposterous” for one party to “accept calmly the doctrine that elections are sure to be pure if watched by functionaries . . . who . . . are dependent for their places on the result of the election.”¹⁸² While federal election regulations were still new, Grant’s Justice Department dissuaded any spread of partisan bickering. Attorney General Akerman wrote, “I suggest the expediency of taking great care to keep the administration of the law unconnected with mere party feuds,” adding that both parties should be treated equally under the law “both for the moral and legal effect of the prosecution.”¹⁸³ His successor, George Williams, warned federal prosecutors in the South “no interference whatever with any political or party action not in violation of the law’ should be undertaken.”¹⁸⁴ On the other hand, some federal officials were staunchly in opposition to the election regulation program. For example, federal marshals in Mississippi and Texas connived to select Democratic juries so as to thwart convictions under the Enforcement Acts; one federal prosecutor in Georgia barred victims of the Ku Klux Klan from testifying, illustrative of another example of such opposition.¹⁸⁵

A major administrative problem facing the Acts’ implementers was the sheer amount of work that burdened even the most outstanding and uncorrupted federal election regulators. The federal programs rarely staffed enough men for effective administration.¹⁸⁶ Various federal officers were assigned election law violations to investigate or prosecute on top of their regular responsibilities.¹⁸⁷ In some jurisdictions, during the height of federal enforcement activity, federal officials alone were working to arrest Klan members.¹⁸⁸ The low

181. Burke, Ph.D. diss., *supra* note 30, at 171–73.

182. THE NATION, Apr. 8, 1880; *see also* Burke, Ph.D. diss., *supra* note 30, at 257 (“Over the years, deputy marshal appointments had gone to the faithful of the Republican party . . . Numerous arrests had been made, but few convictions secured—the purpose being only to prevent eligible electors from voting.”).

183. Swinney, *supra* note 164, at 214.

184. *Id.* at 215.

185. *Id.* at 216; *see also id.* at 215–16 (“Some marshals and district attorneys were either sensitive to Southern public opinion or in substantial agreement with it.”).

186. GOLDMAN, *supra* note 53, at xxviii.

187. WANG, *supra* note 35, at 100.

188. Cresswell, *supra* note 85, at 425 (“[I]n northern Mississippi all arrests were made by Justice Department officers.”).

number of U.S. Army troops in some areas shifted more law enforcement responsibilities to federal attorneys and marshals.¹⁸⁹

Moreover, when prosecutions progressed toward trials, unreliable witnesses and uncooperative juries obstructed them. Examples abound of threatened, murdered, or undependable witnesses and defendants. In South Carolina, a series of accused violators of the Acts fled the state, leading the Attorney General to conclude that “flight was confession.”¹⁹⁰ Worse still was the fate of government witnesses. In Mississippi, for example, U.S. Attorney G. Wiley Wells sought federal protection after four of his witnesses were “cruelly murdered” following testimony in front of a grand jury.¹⁹¹ During the 1874 elections in Tennessee, a group of African Americans traded shots with masked men. Local authorities arrested 16 black men who were then taken by a lynch mob from the jail, marched “to a nearby riverbank, and riddled them with bullets, killing five and severely wounding the rest.”¹⁹² The federal government attempted to try fifty-three white men, but African American witnesses were “ignorant and afraid and easily bec[a]me confused” and were “so terrified that some of them in tears and piteous tones besought the court to allow them to be excused from testifying,” wrote one federal prosecutor.¹⁹³ A pervasive belief among many Southern whites that the Enforcement Acts were “not a law, but a mere legal nullity,” as one defendant in Georgia declared, grounded their lack of cooperation and compliance.¹⁹⁴

Sometimes local authorities obstructed prosecutions under the Enforcement Acts through a variety of questionable mechanisms. One tactic was simply to ignore the federal officials. A U.S. marshal in northern Mississippi wrote to Attorney General Alphonso Taft that even though he appointed 239 deputies to monitor the 1876 elections, their enforcement authority “was utterly ignored by local officials.”¹⁹⁵ Other tactics were more sinister. State and local authorities would prosecute federal officials on trumped-up charges of false arrest, assault, or even murder.¹⁹⁶ Local authorities would also prosecute African Americans who served as witnesses for perjury.¹⁹⁷ To combat

189. *Id.* at 425 (“In their correspondence with the attorney general in the early 1870s the U.S. attorneys and marshals constantly pushed for continued military support.”).

190. U.S. Department of Justice, *Annual Report of the Attorney General of the United States*, in THE EXECUTIVE DOCUMENTS 5 (1872).

191. Cresswell, *supra* note 85, at 432.

192. GILLETTE, *supra* note 80, at 29.

193. *Id.* at 29–30 (internal quotation marks omitted).

194. Swinney, *supra* note 164, at 208.

195. Cresswell, *supra* note 85, at 429 (internal quotation marks omitted).

196. Swinney, *supra* note 164, at 210.

197. *Id.*

these devices, the federal government was sometimes able to remove these charges to federal court, though this was an “exceedingly difficult” process.¹⁹⁸

The primary arbiters of these prosecutions were federal judges—sometimes antagonistic to the laws but almost always swamped with heavy caseloads.¹⁹⁹ Put simply, “there were not enough judges and judicial districts.”²⁰⁰ Prosecutions were long, dockets crowded, and court sessions “abbreviated and erratic.”²⁰¹ For example, 472 violators were charged in South Carolina in 1871, with 420 indicted, but only five fully tried and found guilty.²⁰² Attorney General Akerman was unimpressed by the federal court’s creaky machinery: “If it takes a court over one month to try five offenders, how long will it take to try four hundred, already indicted, and many hundreds more who deserve to be indicted?”²⁰³ As a result, Akerman instructed federal prosecutors to charge only conspiracy leaders under the Enforcement Acts.²⁰⁴ The Acts demanded more time from federal judges by requiring them to appoint federal election supervisors.²⁰⁵ All of these knotty issues led one scholar of the Acts to conclude, “[t]he administration of the elections law should not have been placed in the hands of the federal judiciary.”²⁰⁶

Finally, the Department of Justice was inadequately resourced. At the time, the Department was still brand new, having been created in 1870 and having a small staff.²⁰⁷ The 1870 Act to Establish a Department of Justice provided the Attorney General with sweeping powers over federal attorneys across the country.²⁰⁸ The scattered federal attorneys and marshals were a “potential network of agencies with which to enforce the drastic provisions” of the Enforcement Acts.²⁰⁹ But according to Department historians, it faced struggles in supervising

198. *Id.*

199. *Id.* at 212 (“The Enforcement Acts imposed an unmanageable extra burden on an antiquated judicial structure.”).

200. GILLETTE, *supra* note 80, at 32.

201. *Id.*

202. Swinney, *supra* note 164, at 212. There were also twenty-five guilty plea deals.

203. *Id.*

204. *Id.* at 213.

205. *See supra* notes 69–72 and accompanying text (explaining election supervisor appointment).

206. Burke, Ph.D. diss., *supra* note 30, at 264.

207. HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 225–26 (1937)

208. An Act to establish the Department of Justice, Pub. L. No. 91–190, 16 Stat. 162 (1870); *see also* CUMMINGS & MCFARLAND, *supra* note 207, at 225–26 (describing the new powers and duties under the Attorney General).

209. CUMMINGS & MCFARLAND, *supra* note 207, at 231.

field forces and developing a central organization.²¹⁰ The Department's nascence was also a barrier to effective administration. Local federal authorities had never answered to a single centralized agency in Washington; thus, attorneys general of this period spent significant time overcoming inefficiency and "simple inertia" from local federal personnel.²¹¹ William Gillette offers an unflattering image to describe the apparatus implementing the Enforcement Acts: "[T]he Department of Justice, the court system, and the military establishment were comparable to a dinosaur—slow, cumbersome, and monumental in inefficiency."²¹²

Overall, the Enforcement Acts targeted real problems—urban election and voter fraud and racially motivated voter suppression. They were an unprecedented expansion of federal authority into election administration. But ineffective implementation, perceptions of partisanship, and reliance on the federal judiciary stymied their effective implementation.

III. CONGRESS'S AUTHORITY IN A MODERN ENFORCEMENT ACT

Though Congress passed the Enforcement Acts to breathe life into the Fifteenth Amendment, the Acts unquestionably regulated elections' times, places, and manner—an area over which the Elections Clause grants Congress expansive authority.²¹³ Congress's direct authority in regulating state and local elections alone is generally recognized as less extensive, though Congress's role is substantial under the Fourteenth and Fifteenth Amendments.²¹⁴ The federal superstructure over all elections has the potential to be far-reaching—much more so than it is today, or even as proposed in H.R. 1.

A. Congress's Authority Over Federal Elections

Congress has vast authority over elections for its members. The Constitution's Elections Clause states:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.²¹⁵

210. *Id.* at 487.

211. GOLDMAN, *supra* note 53, at 37.

212. GILLETTE, *supra* note 80, at 33.

213. Tolson, *Spectrum of Congressional Authority*, *supra* note 16, at 322 ("It is uncontroversial that federal power is at its highest ebb when Congress seeks to regulate federal elections....").

214. See *infra* Section II.B (discussing Congress's authority over state and local elections).

215. U.S. CONST. art I, § 4.

The Supreme Court has held in multiple decisions spanning three different centuries that Congress’s power over congressional elections is “paramount.”²¹⁶ Most recently, in 2013, the Court reiterated that the “‘Times, Places and Manner’ of congressional elections ‘is paramount, and may be exercised at any time, and to any extent which it deems expedient.’”²¹⁷

The Supreme Court first upheld broad congressional authority to regulate federal elections in the states in 1879.²¹⁸ In *Ex parte Siebold*, a group of Maryland election judges challenged the Enforcement Acts’ constitutionality after they were indicted “for the offence commonly known as ‘stuffing the ballot-box.’”²¹⁹ Justice Bradley rejected their argument that congressional authority ended when Maryland’s election law was in force.²²⁰ Nevertheless, Bradley stressed the “harmonious” relationship that should exist between the state and federal governments.²²¹ “There is nothing in the Constitution to forbid such co-operation,” he wrote.²²² Though Bradley sang the praises of federalist cooperation, there was never any doubt as to the supremacy of Congress. “Congress may, if it sees fit, assume the entire control and regulation of the election of representatives.”²²³

Five years later, in *Ex parte Yarbrough*,²²⁴ the Supreme Court again strongly endorsed Congress’s election regulation supremacy under the Elections Clause.²²⁵ A group of Klan members were indicted for beating an African American man to prevent him from voting.²²⁶ In responding to their challenge of the law, Justice Miller penned a rousing endorsement of federal authority in protecting elections. “If [the federal government] has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious

216. See *Ex parte Siebold*, 100 U.S. 371, 384 (1879) (“[T]he power of Congress over the subject is paramount.”); *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932) (explaining that Congress may “supplement these state regulations or may substitute its own”).

217. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. at 9 (quoting *Siebold*, 100 U.S. at 392).

218. See generally *Siebold*, 100 U.S. at 371.

219. *Id.* at 379.

220. *Id.* at 386 (“The paramount character of those [election laws] made by Congress has the effect to supersede those made by the State.”).

221. *Id.* at 387; see also *id.* at 392 (“[I]t is no doubt expedient and wise that the operations of the State and national governments should as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power.”).

222. *Id.* at 392.

223. *Id.* at 396.

224. *Ex Parte Yarbrough*, 110 U.S. 651 (1884).

225. See generally Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2389–91 (2003).

226. *Yarbrough*, 110 U.S. at 656.

corruption,” the opinion began.²²⁷ The argument that Congress lacked this regulatory power is an “old argument often heard, often repeated, and in this Court never assented to.”²²⁸ It was only “through long habit and long years of forbearance” that Congress had not enacted substantive regulations under the Elections Clause.²²⁹ In the face of blatant voter fraud and intimidation, Congress passed federal election laws pursuant to its express powers to do so.²³⁰ Justice Miller ended the opinion in a full-throated defense of federal authority to protect the franchise:

If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.²³¹

Nearly fifty years later, in *Smiley v. Holm*,²³² the Supreme Court again confirmed expansive congressional authority over elections of its members. The Election Clause’s words are “comprehensive words” that “provide a complete code for congressional elections.”²³³ In addition to times and places, Congress has authority over:

[N]otices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments.²³⁴

Together, this description of Congress’s “manner” power is vast and encompasses the most granular of election administration processes. Even more, in *United States v. Classic*,²³⁵ the Court held that Congress

227. *Id.* at 658.

228. *Id.*

229. *Id.* at 662.

230. *Id.* at 661 (characterizing the Enforcement Acts as a “remedy [to] more than one evil arising from the election of members of Congress”).

231. *Id.* at 667.

232. *Smiley v. Holm*, 285 U.S. 355 (1932).

233. *Id.* at 366.

234. *Id.*

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

has the power to regulate primary elections.²³⁶ It dismissed the argument that the right to vote for members of Congress is a state right. Justice Stone unequivocally stated that such arguments would be “true only in the sense that the states are authorized by the Constitution . . . to the extent that Congress has not restricted state action by the exercise of its powers.”²³⁷ The Elections Clause, coupled with the Necessary and Proper Clause, “leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution.”²³⁸ Justice William O. Douglas, dissenting on other grounds, described the Elections Clause and the Necessary and Proper Clause as an “arsenal of power ample to protect Congressional elections from any and all forms of pollution.”²³⁹

Reaffirmation of expansive federal authority continues into the twenty-first century. In *Arizona v. Inter Tribal Council of Arizona*, the Court struck down a state law requiring voter registrants to provide proof of citizenship.²⁴⁰ Arizona’s regulation conflicted with a federal law requiring only an affidavit swearing proof of citizenship.²⁴¹ Writing for a seven-member majority, Justice Antonin Scalia conceded that states’ interests in regulating congressional elections are “weighty and worthy of respect”—but they “terminate[] according to federal law.”²⁴² Indeed, the Elections Clause “necessarily displaces” some state election regulations—such as a state law directing county recorders to reject the federal registration form.²⁴³

Federal authority over presidential elections also has sound constitutional footing. Under Article II, Section 1, Congress has the power to “determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”²⁴⁴ Though arguably more limited than the Elections Clause, courts have interpreted congressional authority over presidential elections as more than merely choosing a day and time. First, in *Ex Parte Yarbrough*, Justice Miller exhorted that the federal government’s election duties are to ensure that voting generally “shall be free from the adverse influence of force and fraud practised on its

236. *Id.* at 317.

237. *Id.* at 315.

238. *Id.* at 320.

239. *Id.* at 330 (Douglas, J., dissenting).

240. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 20 (2013).

241. *Id.* at 6.

242. *Id.* at 15 (internal quotation marks omitted).

243. *Id.* at 14.

244. U.S. CONST. art. II, § 1, cl. 4.

agents” and that the federal government’s votes “by which its members of Congress and its President [are selected] . . . shall be the *free* votes of the electors.”²⁴⁵

In the twentieth century, the Court continued to endorse Congress’s authority in regulating presidential elections. In *Burroughs v. United States*, the Supreme Court faced a challenge to the Federal Corrupt Practices Act’s constitutionality.²⁴⁶ The Act required political committees created to influence presidential elections to keep bookkeeping accounts of all contributions made to the committee.²⁴⁷ The committee treasurer, in turn, would have to file contributors’ information with the House of Representatives’ clerk.²⁴⁸ The Act also imposed fines and jail time for violators.²⁴⁹ Addressing the Act’s constitutionality, the majority opinion recognized Congress’s important role in regulating presidential elections. Examining the critical office of the President and the “vital character” of the office to the “welfare and safety of the whole people,” Justice Sutherland left no doubt that Congress “undoubtedly” has the power to safeguard presidential elections.²⁵⁰ To do so would be “to deny to the nation in a vital particular the power of self protection [sic].”²⁵¹ Citing extensively from *Ex parte Yarbrough*, Sutherland explained that congressional power to protect presidential elections was “clear” and that it was a matter of congressional prerogative to legislate on those limits.²⁵² Requiring disclosure of political contributions under the Foreign Corrupt Practices Act fell easily within this prerogative.²⁵³

The *Burroughs* decision addressed congressional regulation of third-party actors—political committees—but later decisions have relied on Sutherland’s broad endorsement of congressional authority over presidential elections. In *Buckley v. Valeo*,²⁵⁴ the majority stated that Congress “has power to regulate Presidential elections and primaries” and cited its precedent in *Classic* and *Burroughs*.²⁵⁵ Additionally, the Court in *Oregon v. Mitchell*²⁵⁶ upheld minimum residency requirements for registration and absentee voting in presidential

245. *Ex Parte Yarbrough*, 110 U.S. 651, 662 (1884).

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

247. *Id.* at 540 n.1.

248. *Id.* at 541–42.

249. *Id.* at 542.

250. *Id.* at 545.

251. *Id.*

252. *Id.* at 547.

253. *Id.* at 548.

254. *Buckley v. Valeo*, 424 U.S. 1 (1976).

255. *Id.* at 90.

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

elections that the Voting Rights Act required.²⁵⁷ The justices split on the rationale, however, and only Justice Black—relying on *Burroughs*—wrote that Congress has regulatory power over presidential elections by way of the Times, Place, and Manner Clause.²⁵⁸

Lower courts have also spoken on Congress’s broad power over presidential elections. In *Voting Rights Coalition v. Wilson*,²⁵⁹ the U.S. Court of Appeals for the Ninth Circuit addressed California’s attempt to enjoin implementation of the National Voter Registration Act.²⁶⁰ Addressing the National Voter Registration Act’s constitutionality, the court flatly stated that Congress’s broad power over congressional elections “has been extended to presidential elections.”²⁶¹ The Seventh Circuit Court of Appeals, meanwhile, characterized the authority granted by Article II, Section I as “coextensive with that which Article I section 4 grants [Congress] over congressional elections.”²⁶²

B. Congress’s Authority Over State and Local Elections

Several constitutional amendments have expanded Congress’s ability to regulate significant portions of state and local elections. The Fifteenth Amendment prohibits any discrimination in voting on the basis of race, color, or previous condition of servitude.²⁶³ Other amendments prohibit voting discrimination on the basis of sex,²⁶⁴ age,²⁶⁵ or payment of taxes.²⁶⁶ Under the Fourteenth Amendment, a state shall not “deny to any person within its jurisdiction the equal protection of the laws.”²⁶⁷

257. *Id.* at 118–19.

258. *Id.* at 124. Reasoning that:

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

Id.

259. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995).

260. *Id.* at 1412–13.

261. *Id.* at 1414.

262. *Ass’n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F. 3d 791, 793 (7th Cir. 1995).

263. U.S. CONST. amend. XV. *See also* Tolson, *Spectrum of Congressional Authority*, *supra* note 16, at 337 (“Unlike the Fourteenth Amendment, the Fifteenth Amendment creates a right to vote free of racial discrimination and can serve as the predicate for far reaching congressional legislation designed to ferret out such discrimination.”).

264. U.S. CONST. amend. XIX.

265. U.S. CONST. amend. XXVI.

266. U.S. CONST. amend. XXIV.

267. U.S. CONST. amend. XIV.

One arguably recent limitation on congressional authority over state and local elections is the equal state sovereignty principle, which “requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”²⁶⁸ Thus, any geographic variation in a federal law’s application presumably would be scrutinized to determine “sufficient relation” to the voting ills it targets. However, when Congress passed the first federal election laws in 1870-71, the equal state sovereignty doctrine was evidently not on the minds of the legislators nor on those of the judges reviewing those laws. Instead, when the federal judiciary first scrutinized the Enforcement Acts’ parameters in the nineteenth century, the focus was on federalism.²⁶⁹ These nineteenth century federal court decisions both determined these laws’ constitutionality and helped shape the parameters of federal supervisory authority over state and local elections.

The earliest cases unanimously upheld the Enforcement Acts’ constitutionality, with two exceptions.²⁷⁰ In *United States v. Reese*, the Supreme Court invalidated two provisions of the first Enforcement Act for vagueness.²⁷¹ Chief Justice Waite explained how the Fifteenth Amendment granted only the right for citizens to be free from discrimination in voting.²⁷² In reading the statute’s words, he wrote, “we find there no words of limitation, or reference even, that can be construed as manifesting any intention to confine its provisions to the terms of the Fifteenth Amendment.”²⁷³ The sections, then, were too broad to be “appropriate legislation” under Section 2 of the Fifteenth Amendment. Meanwhile, in *United States v. Cruikshank*, the Court reversed the convictions of defendants indicted for involvement in the bloody 1873 Colfax Massacre.²⁷⁴ The indictments failed to allege that the defendants’ violence was racially motivated— “[w]e may suspect that race was the cause of the hostility; but it is not so averred.”²⁷⁵ Therefore, the

268. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) [hereinafter *Northwest Austin*].

269. The federalism framework may not be the optimal strategy to consider federal election administration questions. Recent scholarship has acknowledged the limits of this “anti-discrimination framework” under the Reconstruction Amendments in conjunction with broad congressional authority in the Elections Clause. See generally Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211 (2018) [hereinafter Tolson, *Limits of the Antidiscrimination Framework*]; see also Tolson, *Spectrum of Congressional Authority*, *supra* note 16, at 364–388 (delineating when Congress may, in some circumstances, regulate voter qualifications under the Elections Clause despite the limiting federalism framework of the Fourteenth and Fifteenth Amendments).

270. See *supra* note 162.

271. *United States v. Reese*, 92 U.S. 214, 221–22 (1875).

272. *Id.* at 218.

273. *Id.* at 220.

274. *United States v. Cruikshank*, 92 U.S. 542, 559 (1875).

275. *Id.* at 556.

indictments against the defendants were deemed defective because they were “too vague and general.”²⁷⁶ In *Cruikshank*, the Court did not strike down any provision of the Enforcement Acts. Overall, judicial scrutiny of the Acts tinkered with some vague wording. Shortly after the two decisions, Congress amended the laws to provide clarity and essentially reinstated the unconstitutionally vague sections; in doing so, “Congress ignored the Court’s decisions and passed a virtual fourth enforcement act.”²⁷⁷

In the late 1870s and 1880s, the Supreme Court strongly upheld the federal government’s supervisory power over federal elections in two cases.²⁷⁸ In *Ex parte Siebold*, Justice Bradley went out of his way to limit the Court’s opinion to federal elections.²⁷⁹ Even so, he presaged a later Supreme Court decision confirming federal authority over elections involving *both* federal and state candidates.²⁸⁰ As most candidates—federal *and* state—were printed on a single ballot, the question arose: where did the Enforcement Acts’ reach over federal elections end and the states’ authority begin?²⁸¹ Bradley answered: “If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress *will not be thereby deprived* of the right to make regulations in reference to the latter.”²⁸² In other words, a state could not—and still cannot—schedule its elections to coincide with federal elections to block congressional authority over the whole election.²⁸³

The Supreme Court’s decision in *Ex parte Coy* helped to clear any remaining confusion by recognizing federal authority over any election for both state and federal races.²⁸⁴ In that case, a group of defendants were charged with violating provisions of the federal election laws including both conspiracy to commit election fraud and actual election

276. *Id.* at 559.

277. GOLDMAN, *supra* note 53, at 17; *see also* PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 87–129 (2011) (detailing robust federal rights enforcement post-*Cruikshank*).

278. *See supra* Section II-A.

279. *Ex Parte Siebold*, 100 U.S. 371, 393 (1880) (“[I]t must be remembered that we are dealing only with the subject of elections of representatives to Congress.”).

280. *Ex Parte Coy*, 127 U.S. 731, 752 (1888).

281. *See, e.g., id.* at 751–52 (“The votes for members of Congress are generally put into the same box with those cast for the various state and municipal officers.”).

282. 100 U.S. at 393 (emphasis added).

283. Later, in *Ex parte Yarbrough*, Justice Miller explained that the Fifteenth Amendment “clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States.” *Ex Parte Yarbrough*, 110 U.S. 651, 664 (1884). These cases stand for the proposition that even many local elections fell within Congress’s purview.

284. 127 U.S. at 752.

fraud on the part of the election inspectors.²⁸⁵ The “essence of [the] indictment” was that although election inspectors were bound by Indiana law to safely keep election returns with them, the defendant election inspectors delivered the “certificates, poll lists, and tally papers to other persons who had no authority.”²⁸⁶ The defendants asserted that the federal court had no jurisdiction over them because they only violated Indiana state law by intending to tamper with state election returns.²⁸⁷ The Court disagreed. The federal government’s power to “secure the fair and honest conduct of a[] [congressional] election . . . whatever is necessary to an honest and fair certification of such election, cannot be questioned.”²⁸⁸ The Court analogized the defendants’ position to that of a man who fires into a crowd meaning to shoot one person but harming another. The shooter should not be excused simply because he missed his target.²⁸⁹ Consequently, whenever election tampering involves state *and* federal candidates, federal jurisdiction is permitted.

Congressional authority over elections involving both state and federal candidates continues to the modern era, following the reasoning of *Coy*.²⁹⁰ If a state truly wished to completely insulate its state elections from Congress’s broad Elections Clause authority, it could run wholly separate elections. On Monday, the state could have elections for federal candidates on their own ballot. On Tuesday, state and local candidates would be chosen on their separate ballot. But, as legal scholar Pamela Karlan has explained, Congress’s power over mixed elections essentially gives it “leverage over the electoral process as a whole, since few jurisdictions can afford to run dual election systems.”²⁹¹ The Elections Clause does not reach local elections when they

285. *Id.* at 743–48 (listing the charges against the defendants and concluding that the indictment, in sum, was the omission of the state inspectors’ duty as imposed by Indiana law).

286. *Id.* at 748.

287. *Id.* at 732 (alleging that indictment did not present charges against the United States “and that the federal district court and the grand jury thereof had no jurisdiction in the premises”).

288. *Id.* at 752.

289. *Id.* at 753–54.

290. *See, e.g.*, *United States v. McCranie*, 169 F.3d 723, 727 (11th Cir. 1999) (“[T]he Constitution’s Necessary and Proper Clause, . . . along with Art. I, § 4, empowers Congress to regulate mixed elections even if the federal candidate is unopposed.”); *United States v. Mason*, 673 F.2d 737, 739 (4th Cir. 1982) (explaining that congressional power to regulate federal elections “clearly includes the power to regulate conduct which, although directed at non-federal elections, also has an impact on the federal races”); *United States v. Bowman*, 636 F.2d 1003, 1010 (5th Cir. Unit A 1981) (“[T]he fact that a state decides to hold its elections on the same day as federal elections does not deprive Congress of the right to legislate on matters affecting the federal races.”).

291. Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 927 (2007).

do not coincide with federal elections.²⁹² But federal authority remains paramount when local voting practices are discriminatory on the basis of race, gender, age, or payment of taxes.

Put simply, congressional authority over federal, state, and local elections is expansive. It is broadest in regulating federal and federal-state elections, but congressional authority is still potent in excising discriminatory conduct from state and local elections. The next section details what an enhanced federal role in election administration looks like based on the original Enforcement Acts.

IV. FEDERAL ELECTION ADMINISTRATION LEGISLATION

A Modern Enforcement Act (“MEA”) would be on firm constitutional and historical ground.²⁹³ Moreover, the MEA could address several identified weak points in the United States’ election administration system. First, unlike the original Enforcement Acts, the MEA would, through an insulated and nonpartisan agency, provide uniform time, place, and manner election regulations. Currently, the United States has a diverse patchwork of election laws that morph from election cycle to election cycle, sometimes depending on which political party controls the levers of power. A central Federal Election Administration Agency (“FEAA”) could reverse trends toward hyper-decentralization, cycle-to-cycle whiplash, and partisan election administration.²⁹⁴ Second, like the original Enforcement Acts, the MEA could oversee elections at the request of voters. Such federal officers could repair some of the damage *Shelby County* has left in its wake. Meanwhile, this oversight infrastructure avoids the equal sovereignty issue that the Supreme Court found problematic in the Voting Rights Act’s Section 4(b).

292. Ellen Katz, *Congressional Power to Extend Preclearance: A Response to Professor Karlan*, 44 HOUSTON L. REV. 33, 46 (2007) (explaining that the Elections Clause “does not reach purely local elections, the very elections where section 5 [of the VRA] appears to be most important”) (footnote omitted).

293. I refer to the hypothetical legislation simply as the Modern Enforcement Act (“MEA”) as shorthand, though this name should not obscure its source of authority as more than simply the Fifteenth Amendment. Instead, the MEA draws significant authority from the Elections Clause. Such a bill can take a variety of names, from the generic—the Democracy Reform Act, or the Federal Elections and Administration Act—to the acronym-friendly—the Federal Integrity in Voting and Elections Act (FIVE Act), the More Voting and Participation in Elections Act (More VAPE Act), or the Federal Election and Democratic Uniformity Promotion Act (FED UP Act).

294. Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752–53 (2016) (outlining “hyperfederalized” nature of the American election administration system).

A. *Toward Neutrality and Uniformity:
The Federal Election Administration Agency*

The original Enforcement Acts did not have a central federal election administration unit. An unpassed 1890 bill proposed a three-member United States Board of Canvassers, appointed by a federal court, to certify election results directly to Congress when an entire congressional district was petitioned for federal supervision.²⁹⁵ The proposed Board would have acted more or less as a district court for election disputes.²⁹⁶

Meanwhile, the Enforcement Acts of 1870 and 1871 were paradoxically detailed but vague and underinclusive. They listed election-related crimes and federal oversight procedures explicitly but left enforcement mechanisms and federal court jurisdictional boundaries unclear.²⁹⁷ Federal officials were sometimes too reliant on overburdened federal courts for clarification and enforcement.²⁹⁸ Moreover, by focusing primarily on blatant racial discrimination or obvious fraud like ballot stuffing, the laws failed to address less flagrant types of election-related problems, like barriers to ballot access, ineffective administration, or identifying and removing biased election officials.

An FEAA could constitutionally do much more. It could avoid the problems of under-inclusivity and vagueness that hindered the judicially focused original Enforcement Acts. An FEAA would serve to empower a team of neutral election administration professionals to promulgate precise rules and regulations detailing the times, place, and manner of federal elections, as well as election adjudicators to resolve many election-related disputes.

1. *The Agency's Structure: Embracing Neutrality, Avoiding Gridlock.*

The crown jewel of an FEAA should be maximum insulation from partisan influence. After all, “[a]n election is only fair if it is administered in a neutral, unbiased way.”²⁹⁹ Looking back in time again, the

295. Henry Cabot Lodge & T.V. Powderly, *The Federal Election Bill*, 151 N. AM. REV. 257, 258 (1890) (statement by T.V. Powderly).

296. Among other things, the Board could call for parties to produce relevant documents and certifications as well as summon and compel attendance of supervisors of elections. *See id.* (describing Board’s duties); *see also* 51 CONG. REC. 6538 (1st Sess. 1890); 51 CONG. REC. 24 (1d Sess. 1890). The members of the federal board would serve for two years and no more than two of them could be a member of the same political party. 51 CONG. REC. 24 (1d Sess. 1890).

297. *See generally supra* Section I-D(1)–(2).

298. Swinney, *supra* note 164, at 212 (“The Enforcement Acts imposed an unmanageable extra burden on an antiquated judicial structure.”); *see also supra* notes 200–06 (detailing burden Enforcement Acts placed on federal courts).

299. Gaughan, *Illiberal Democracy*, *supra* note 23, at 119.

original Enforcement Acts contained some elements of neutrality. Election supervisors were judicially appointed, though their vetting and appointments attracted grumbles from overburdened federal judges.³⁰⁰ Even so, the Acts were deeply unpopular with Democrats who viewed the laws as a partisan cudgel on the part of Republicans.³⁰¹ Their antipathy was not baseless. U.S. marshals and deputy marshals, who were tasked with significant election regulation duties, were in fact executive—partisan—appointments.³⁰² Not to mention, Republicans controlled the executive branch for all but six years between 1870 and 1894.

Partisan election administration exists to the current day.³⁰³ Thirty-three states’ chief elections officers are partisan officials; with many appointed by a partisan governor in the eighteen other states.³⁰⁴ In one comprehensive study, political scientists Martha Kropf and David Kimball summarized how partisan election administration can manifest itself. They found that election officials may impart their views on the government’s role in elections in how effectively they implement election laws; if elected, these officials may feel “ beholden to their party for help in their own elections” and “ may feel the need to act as representatives or agents of their [own] political party.”³⁰⁵

Even more, some state’s chief elections officers have overseen elections while simultaneously seeking another statewide office like governor or U.S. senator. In 2018, for example, Kansas Secretary of State Kris Kobach agreed to recuse himself from a very narrow recount in the Republican gubernatorial primary, in which he was a candidate, only after tremendous public pressure.³⁰⁶ In Georgia, the Republican Secretary of State resigned shortly before a hearing in federal court over a lawsuit seeking, among other things, his recusal from the vote tabulation of a very close and controversial election in which he was

300. See *supra* notes 200–06 (detailing burdens Enforcement Acts placed on federal judges).

301. See *supra* notes 124–25 and accompanying text (discussing partisan nature of some federal marshals in the election regulation space).

302. *Id.*

303. Gaughan, *Illiberal Democracy*, *supra* note 23, at 83 (“Unusual among leading democracies, the United States entrusts the administration of elections to partisan political operators.”); see also Hasen, *Beyond the Margin*, *supra* note 23, at 974 (describing chief election officers’ selection and partisan status).

304. Gaughan, *Illiberal Democracy*, *supra* note 23, at 83 (citing MICHAEL R. DIMINO, SR., BRADLEY A. SMITH & MICHAEL E. SOLIMINE, UNDERSTANDING ELECTION LAW AND VOTING RIGHTS 215 (2017)).

305. MARTHA KROPF & DAVID C. KIMBALL, HELPING AMERICA VOTE: THE LIMITS OF ELECTION REFORM 97–98 (2012).

306. Mitch Smith, *Kobach Says He Will Recuse Himself From Kansas Primary Vote Count*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/politics/kansas-kobach-colyer-votes.html> [<https://perma.cc/BZA5-USZ2>].

the putative winner of the governor's race.³⁰⁷ And, in Florida, Governor Rick Scott faced a federal lawsuit seeking his recusal during the recount in his race against the incumbent Democratic senator.³⁰⁸ "Grave problems arise when an individual involved in the electoral process uses his official powers to influence the outcome. Unconstitutionality can follow," the federal judge wrote.³⁰⁹ Though the court declined to order Scott's recusal, the judge warned Scott that he was "sometimes careening perilously close to a due process violation."³¹⁰

Unsurprisingly, partisan election administration is not popular with the public. One recent report indicated that, based on surveys, "election officials will continue to retain high levels of public approval *if they are viewed as nonpartisan experts*."³¹¹ Only twenty percent of survey respondents indicate support for choosing election officials in partisan contests.³¹² These results are similar to older studies. One study revealed that sixty-six percent of respondents favored nonpartisan local or state officials running elections.³¹³

While partisan election administration is unpopular and potentially problematic, nonpartisan administration can take on various beneficial forms.³¹⁴ Relevant here, the original Enforcement Acts tasked busy federal judges with appointing election supervisors on a jurisdiction-by-jurisdiction basis.³¹⁵ The MEA could thread the needle between partisan election oversight and constant intervention from the federal judiciary—through a neutral, independent agency comprised of election professionals.³¹⁶

307. Alan Blinder, *Brian Kemp Resigns as Georgia Secretary of State, With Governor's Race Still Disputed*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/georgia-brian-kemp-resign-stacey-abrams.html> [<https://perma.cc/4PJS-BVPQ>].

308. *League of Women Voters of Fla. v. Scott*, 366 F. Supp. 3d 1311 (N.D. Fla. Nov. 15, 2018).

309. *Id.* at 1315.

310. *Id.* at 1317.

311. Natalie Adona & Paul Gronke, *Understanding the Voter Experience: The Public's View of Election Administration and Reform*, DEMOCRACY FUND (Oct. 2018), https://www.democracyfund.org/media/uploaded/2018_CCESReport_vFinal.pdf [<https://perma.cc/VD4E-8BRT>] (emphasis added).

312. *Id.* at 22.

313. Tokaji, *The Future of Election Reform*, *supra* note 11, at 132, (citing R. MICHAEL ALVAREZ & THAD E. HALL, PUBLIC ATTITUDES ABOUT ELECTION GOVERNANCE 6 (2005)).

314. *See, e.g.*, Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. IRVINE L. REV. 575 (2013) (outlining benefits of now-dismantled nonpartisan election administration agency).

315. *See supra* notes 69–72 and accompanying text (explaining election supervisor appointment); *see also supra* notes 200–06 (detailing burdens Enforcement Acts placed on federal judges).

316. This sort of entity would be novel in the United States, to be sure. But not elsewhere among leading democracies. Canada, for example, has an independent Chief Electoral Officer. *See* Gaughan, *Illiberal Democracy*, *supra* note 23, at 120–22; *see also* Hasen, *Beyond*

The FEAA would need an effective structure. It should be comprised of an odd number of members—say, five individuals. Each member would be appointed by the President and confirmed by the Senate. Their terms would last longer than a presidential term—say, six or ten years. No single political party could have a majority of members. H.R. 1 proposes reforming the Federal Election Commission along a similar membership structure.³¹⁷ This “tri-partisan”—or, even better, nonpartisan—structure offers two benefits. First, no single political party can form a majority of the Agency’s leadership. In effect, this leadership structure would likely result in two Democratic members, two Republican members, and an independent member, if the agency was comprised of five members. That independent member could act as a bridge between the two parties or, less optimistically, serve as this body’s swing vote.

This structure is not new. In January 1877, Congress passed the Electoral Commission Act in response to the still-unresolved 1876 presidential election.³¹⁸ Disputes over election results in several Southern states had prevented a winner from emerging, and, with Inauguration Day looming, the United States careened toward a constitutional crisis. The Act created a fifteen-member Commission to properly tally the electoral votes, with five members chosen each by the House, Senate, and Supreme Court.³¹⁹ The majority party in each house of Congress received three seats, and the minority party was allowed two—a purposeful arrangement since Democrats controlled the House and Republicans had a Senate majority.³²⁰ The Supreme Court selected two Democrats, two Republicans, and one “avowed Independent,” Justice David Davis.³²¹ The Commission seemed to result in a seven-seven-one split. Davis, however, never served because the Illinois legislature elected him senator.³²² His replacement was a Republican justice and, ultimately, Republican Rutherford B. Hayes became president.³²³ The brief presence of a truly independent fifteenth member gave the Commission a semblance of impartiality and legitimacy.

The Agency’s odd number of members would serve another rationale: avoiding gridlock. The Federal Election Commission (FEC),

the Margin, *supra* note 23, at 985–86 (discussing Canadian and Australian election administration).

317. See H.R. 1, 116th Cong. (2019).

318. C. VANN WOODWARD, REUNION AND REACTION 161 (1956).

319. *Id.*

320. *Id.* at 162.

321. *Id.*

322. *Id.* at 165.

323. *Id.* at 161–66 (describing the formation and members of the 1877 Electoral Commission).

which regulates another area of particular partisan interest—campaign finance—is required by statute to have six members, three from each major political party.³²⁴ The deadlock on the FEC is well known.³²⁵ With its poor employee morale, commissioners’ public antipathy to each other,³²⁶ and even some commissioners suing (in their private capacity) to force the agency to act,³²⁷ the FEC serves as a model of what *not* to look for in a federal agency. It is little surprise that reforming the FEC is one feature of H.R. 1.³²⁸ Simply put, an odd-numbered agency is far less likely to result in gridlock.

Who could serve in the role of a federal election administrator, supervisor, or observer is also important. Identifying and selecting qualified administrators would serve as a further insulator from partisanship. Congress could limit potential administrators, supervisors, or observers from a wider pool of individuals on the basis of their professional qualifications, relevant achievements, public reputation, and experience in election administration. Alternatively, Congress could designate another body of qualified experts, such as academics, judges, and civil servants, to identify and endorse potential federal election administrators, supervisors, and observers.

2. *The Federal Election Administration Agency’s Rulemaking*

The FEAA would possess rulemaking authority to promulgate uniform, nationwide election administration standards and regulations. Such rulemaking authority would flow directly from its organic statute, the hypothetical MEA and the law’s constitutional foundations, the Elections Clause, and the Fifteenth Amendment. An Elections Clause based agency would fit squarely within the set of agencies “with substantive rulemaking authority [that] should be viewed as having

324. 52 U.S.C. § 30106(a)(1) (“No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.”).

325. Ann M. Ravel, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017) (departing commissioner writing “that the agency remains dysfunctional” because the three Republican members are “ideologically opposed to the F.E.C.’s purpose” and “have been enabled by the commission’s very structure”).

326. See Dave Levinthal, *Report: FEC Leaders, Managers Share Blame for Horrid Morale*, CENTER FOR PUBLIC INTEGRITY (July 26, 2016), <https://www.publicintegrity.org/2016/07/26/20006/report-fec-leaders-managers-share-blame-horrid-morale> [<https://perma.cc/D3GG-JLUP>].

327. See Colby Itkowitz, *Corporations are people. But are FEC commissioners people too?*, WASH. POST (June 18, 2015), <https://www.washingtonpost.com/news/powerpost/wp/2015/06/18/corporations-are-people-but-are-fec-commissioners-people-too/> [<https://perma.cc/3NPB-PSLE>].

328. See, e.g., Paul Smith, *H.R.1 Would Fix—and Protect—Democracy in the U.S.*, U.S. NEWS (Jan. 29, 2019), <https://www.usnews.com/news/best-countries/articles/2019-01-29/commentary-hr-1-would-fix-and-protect-democracy-in-the-us> [<https://perma.cc/HGS5-SYH6>] (“H.R. 1 fixes the FEC by ending the gridlock that has plagued it over the last decade.”).

the power to preempt state law without either their organic statutes explicitly providing for this preemption or Congress explicitly delegating preemptive discretion to the agencies.”³²⁹ Indeed, the FEAA exercising Congress’s delegation of its “paramount” authority to “make or alter” state laws “at any time”³³⁰ would—more than any other agency executing any other law based on any other constitutional provision—preempt state laws, regulations, and rules over most elections.³³¹ As Justice Scalia wrote not long ago, “[b]ecause the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text [flowing from that power] accurately communicates the scope of Congress’s pre-emptive intent.”³³²

That federal election regulations would originate from the FEAA rather than Congress, is a feature, rather than a bug, of the MEA. Congress has hardly been a model of electoral reform activity in recent memory. It last passed a major election law in 2006 when it reauthorized the Voting Rights Act.³³³ Since then, countless new issues have come up necessitating congressional action—a revitalized Voting Rights Act, campaign finance reform in the wake of *Citizens United*, gaps in election-related cybersecurity, to name just a few. While Congress has come close on rare occasions,³³⁴ no action has been taken. This inactivity, particularly in the field of election administration, makes sense considering that members of Congress have a vested interest in the outcome of election-related legislation—reelection, for example. Not so for Agency members.

329. Joshua Hawkes & Mark Seidenfeld, *A Positive Defense of Administrative Preemption*, 22 GEO. MASON L. REV. 63, 64 (2014).

330. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013).

331. The Elections Clause’s federal supremacy would give the MEA preemptive authority. Any regulations promulgated under the MEA, therefore, would necessarily have preemptive weight over the states. Tolson, *Reinventing Sovereignty?*, *supra* note 16, at 1200 (“The [Clause’s] text explicitly rejects the notion of shared power by depriving the states of final authority and allowing for the possibility of federal preemption.”); *see also* Michael T. Morley, *Reverse Nullification and Executive Discretion*, 17 U. PA. J. CONST. L. 1283, 1317 n. 265 (2010) (explaining how Congress can preempt state law under the Elections Clause and displace state law independent of the Supremacy Clause).

332. 570 U.S. at 14.

333. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, §§ 4–5, 120 Stat. 577, 580–81 (2006) (codified as amended at 42 U.S.C. § 1973c).

334. *See, e.g.*, Democracy Is Strengthened by Casting Light on Spending in Elections Act of 2012 (DISCLOSE), S. 3369, 112th Cong. (2012).

Administrative rulemaking also has certain benefits. Some scholars have argued that agency action is more transparent,³³⁵ deliberative,³³⁶ and accountable³³⁷ than legislation. In the election administration context, rulemaking would have even more pronounced benefits. Most obviously, FEAA rules would come from a neutral, nonpartisan body—not Congress and not from a state-level politician turned chief elections officer. Hypothetically, the public could view an otherwise controversial rule with more confidence and legitimacy if originating from a neutral agency rather than if decreed by partisan state officer or passed through partisan legislation.³³⁸

Implementing the FEAA rules would create a significantly greater degree of nationwide uniformity in election administration than currently exists. “The first glaring institutional feature evident [to even the most casual observer of the U.S. electoral system is the extreme decentralization of administrative responsibilities and policymaking.]”³³⁹ Uniformity in election rules offers: predictability, decreased opportunities for political gamesmanship, and decreased odds that some voters are left out. As legal scholar Richard Hasen explains,

[T]he more that can be done to assure that the laws, rules of interpretation, machinery, and practices are uniform, the more there will be a common understanding of the rules of the game. Such a common understanding can work to forge consensus against lawlessness and toward quick resolution of election disputes.³⁴⁰

335. See Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1954–61 (2008); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781 (1999) (“The agency is often a more meaningful site for public participation than Congress, because the policy stakes for individuals and interest groups are most immediate, transparent, and well-defined at the agency level.”); *id.* at 781–82 (detailing transparency of agency vis-à-vis the public).

336. See Galle & Seidenfeld, *supra* note 337, at 1971–79; see also Thomas Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755 (2008) (“[G]iven their ability to undertake wide-ranging investigations of industry structure and other types of relevant legislative facts, agencies have factfinding abilities that surpass those of either Congress or the courts.”).

337. See Galle & Seidenfeld, *supra* note 337, at 1981–83; see also Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1274 (1999) (“[T]he democratic features of the bureaucracy are often overlooked. The bureaucratic process is permeable to citizens as well as interest groups.”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1554–62 (1992) (noting some agency “procedures . . . facilitate access and public interest oriented discourse”).

338. See, e.g., Hasen, *From Bad to Worse*, *supra* note 20, at 653 (“Already, public confidence in the fairness of the election process is largely driven by who wins and who loses elections.”); see also Tokaji, *supra* note 316, at 576–77.

339. Nathaniel Persily, “Celebrating” the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States, 44 IND. L. REV. 85, 85 (2010).

340. Richard L. Hasen, *Bush v. Gore and the Lawlessness Principle: A Comment on Professor Amar*, 61 FLA. L. REV. 979, 988 (2009) [hereinafter Hasen, *Lawlessness Principle*].

Predictability would be a main feature of uniform election administration. As of now, the decentralized nature of election administration “leads to a variety of decisions in machinery purchases, vote-counting rules, ballot security procedures, training of poll workers, and in other areas.”³⁴¹ Take, for example, early voting. In 2016, there was an eclectic variation across states and localities in terms of in-person early voting and absentee voting.³⁴² Voters in Wisconsin Rapids, Wisconsin could vote as early as September 19, 2016—a full *fifty* days before Election Day—while voters in Connecticut, Delaware, New York, and Pennsylvania, among others, could only vote early with an absentee ballot *and* only if they met a state-approved excuse.³⁴³

Uniform federal election regulations would also diminish the need for troubling lame-duck “power grabs” that have occurred in recent years. After Republicans lost gubernatorial races in North Carolina in 2016 and Wisconsin and Michigan in 2018, Republican legislatures passed lame-duck laws, ostensibly aiming to limit the incoming Democratic governors’ powers.³⁴⁴ Many of these limiting moves focused on election laws. In North Carolina, for example, county election boards were transformed from being run by the governor’s party to evenly split compositions with Republicans chairing the boards in election years.³⁴⁵ In Wisconsin, a lame-duck law drastically cut early voting.³⁴⁶

Election law whiplash from administration to administration would decrease in a world of uniform election rules. One federal judge in Florida observed:

[N]ationwide trends in which the spigot to access the United States’ most “precious” and “fundamental” right, the right to vote, depends on who controls the levers of power That spigot is turned on or off depending on whether politicians perceive they will benefit from the expansion or contraction of the electorate.³⁴⁷

341. Hasen, *Beyond the Margin*, *supra* note 23, at 952.

342. Brent Griffiths, *When Does Early Voting Start in Every State?* POLITICO (Sept. 21, 2016), <http://www.politico.com/story/2016/09/early-voting-states-228435> [<https://perma.cc/P7L2-NHBV>].

343. *Id.*

344. Michael Wines, *A Power Grab? Politics as Usual? Michigan’s Governor Will Decide*, N.Y. TIMES, (Dec. 17, 2018), <https://www.nytimes.com/2018/12/17/us/rick-snyder-bill-whitmer.html> [<https://perma.cc/US42-TFB6>].

345. See *Cooper v. Berger*, 809 S.E.2d 98, 101–02 (N.C. 2018) (detailing law).

346. Among other things, the lame-duck law limited time for in-person absentee voting, restricted the use of student identification cards for voting, and placed a time limit on the validity of temporary identification cards issued under a petition process. One Wisconsin Inst., Inc. v. Thomsen, 15-cv-324-jdp, 2019 WL 254093, at *1 351 F. Supp. 3d 1160, 1160 (W.D. Wis. Jan. 17, 2019). A federal judge enjoined these provisions, stating “[t]his is not a close question.” *Id.*

347. *Hand v. Scott*, 285 F. Supp. 1289, 1310 (N.D. Fla. 2018).

The judge addressed the sharp changes in Florida's felony re-enfranchisement methods, though felons' voting rights is a voter qualification issue.³⁴⁸ Examples arise in procedural rules abound. After North Carolinians elected a Republican governor in 2012, the legislature slashed early voting from seventeen to ten days and eliminated same-day registration.³⁴⁹ With the FEAA as the rulemaking body, partisan actors seeking to massage the rules for their perceived benefit would have to work *only* through a neutral, nonpartisan agency.

Uniform election administration would also lessen the risk that states treat some voters unequally, either-through discriminatory conduct or incompetence. Consider also the location of polling places. The FEAA could promulgate neutral guidelines to ease insufficient numbers of voting locations in some places, particularly during early voting. For example, it could require an early voting site for every 10,000 registered voters in a county or parish. Such requirements would aim to prevent the long lines that plagued some counties during 2016's early voting period, such as in Gwinnett County, Georgia³⁵⁰ and many counties in North Carolina.³⁵¹ Alternatively, or in addition, Congress could set state-neutral guidelines requiring polling locations within a certain square mileage. These requirements would ease the travel burdens that many voters face in getting to polling locations. For example, nine Native American tribes in Nevada were denied their own early voting locations in 2016, which led many of them to take a "roughly 200 mile round-trip drive" to vote.³⁵² These problems are also endemic in South Dakota, where Native American voters typically travel long distances to get to the polls.³⁵³

Finally, uniform election administration would conform to the equal state sovereignty principle. In *Northwest Austin*, the Court identified "our historic tradition that all the States enjoy 'equal

348. *Id.* During the last gubernatorial administration's four years in office, approximately 154,000 former felons had their voting rights restored; the following eight years under Governor Rick Scott saw approximately 3,000 former felons regain those rights. *Id.*

349. North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 216–17 (4th Cir. 2016).

350. Tyler Estep, *Early Voting Off to a Roaring Start in Gwinnett*, ATLANTA JOURNAL-CONSTITUTION (Oct. 17, 2016), <http://www.ajc.com/news/local/early-voting-off-roaring-start-gwinnett/h1FM4D19D7dsHWyMmdVk1I/> [<https://perma.cc/MRB2-LZRL>].

351. Jim Morrill, *Early Voting Opens to Long Lines Across NC*, CHARLOTTE OBSERVER (Oct. 20, 2016), <http://www.charlotteobserver.com/news/politics-government/article109369072.html> (last visited Mar. 19, 2020).

352. Kira Lerner, *Nevada Elections Chief Refuses to Accommodate Native Americans Who Have to Drive 200 Miles to Vote*, THINKPROGRESS (Oct. 27, 2016), <https://thinkprogress.org/native-tribes-denial-7e0315de3810#.cqsfljxd0> [<https://perma.cc/5YGN-CWAB>].

353. See, e.g., Kira Lerner, *How A South Dakota County Is Suppressing The Native American Vote*, THINKPROGRESS (Oct. 24, 2014), <https://thinkprogress.org/how-a-south-dakota-county-is-suppressing-the-native-american-vote-233655d3b345#.duvb98cyw> [<https://perma.cc/7H4X-UE36>] (highlighting a 50-mile round trip to the polls).

sovereignty.”³⁵⁴ The Voting Rights Act’s coverage formula “raise[d] serious constitutional questions” because it seemed to encroach on “the fundamental principle of equal sovereignty” that “requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”³⁵⁵ Chief Justice Roberts noted that the Act “imposes current burdens and must be justified by current needs.”³⁵⁶ While the equal state sovereignty principle’s contours remain imprecise, nationwide uniformity in election laws would result in minimal disparate geographic coverage. Any variation would be “sufficiently related to the problem that it targets.”³⁵⁷

The “sufficient relation” standard seems to complement one arguable benefit of the current decentralized system of election administration—that state and local bodies can experiment, innovate, or tailor election practices to the unique needs and circumstances of a particular place.³⁵⁸ Part of that tailoring and experimentation could involve local citizen engagement and input. Under the MEA, if the FEAA is a distant body in Washington, D.C. passing down rules on federal elections’ times, place, and manner, does that stifle any sort of citizen engagement on the question of times, places, and manner? It need not. For one, the MEA could permit the FEAA to engage in informal rulemaking, which requires notice and comment procedures under the Administrative Procedure Act.³⁵⁹ Ideally, the “interested persons” engaging in commenting on proposed rules would include significant citizen input on best election practices, such as the importance of early voting or a sensible ballot design.³⁶⁰

Even more, uniform regulations do not have to be one size fits all. That is, FEAA regulations could bake in state and local flexibility. The Agency can promulgate minimum standards—rather than exact formulas or rules—that leave implementation power to state or local entities to conduct federal elections within certain broad parameters, parameters that do not currently exist. These federal guideposts could relate to voting machinery, times to conduct early voting, or polling place locations under some sort of population and geographic calculation, among other issues. For example, an FEAA regulation requiring

354. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009), 129 S. Ct. at 2512 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)).

355. *Id.* at 203–04.

356. *Id.* at 203.

357. *Id.* at 203.

358. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (observing how states can be laboratories of democracy).

359. 5 U.S.C. § 553(b)–(c)(2012); *see also supra* notes 337–39 and accompanying text (highlighting scholarship on accessibility and transparency of administrative rulemaking).

360. 5 U.S.C. § 553(c) (2012).

fifteen days of early voting at sites convenient to public transportation (as H.R. 1 proposes)³⁶¹ would not prohibit a state or locality from requiring twenty days of early voting at sites both near *and* far from public transportation. In short, the FEAA can identify broad floors and ceilings that are uniform across the country but also include a significant amount of flexibility for jurisdiction-specific needs.

3. *Adjudication*

Courts regularly hear and resolve complex disputes over local and state voting laws. Since 2000, election litigation has exploded with no signs of slowing down.³⁶² “[T]he pace of litigation has remained at more than double the pre-2000 rate, and litigation in the 2016 election period is up twenty-three percent compared to the 2012 election period,” summarizes Richard Hasen.³⁶³ Some scholars argue that “increased federal court involvement in election administration is a good thing, given that federal judges are insulated from partisan politics.”³⁶⁴

However, reliance on the courts for resolving election disputes is not a silver bullet. One overarching concern with the nineteenth-century Enforcement Acts was the immense burden they placed on the federal judiciary.³⁶⁵ With election litigation steadily increasing, often at the eleventh hour, some federal courts risk similar straining of limited resources.³⁶⁶

Further, judicial decisions are not insulated from partisanship.³⁶⁷ An increased judicial role in election litigation can undermine public confidence in the judiciary. Many scholars have traced judges’ political

361. H.R. 1, 116th Cong. (2019).

362. Tokaji & Wolfe, *supra* note 17, at 970 (“While election administration is still *mostly* a matter of state law and local practice, the federal government—especially its courts—plays a more significant role today than was the case in the last century.”); *see also* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 89–91 (2009) (describing the increase in election law litigation since 2000).

363. Hasen, *From Bad to Worse*, *supra* note 20, at 629.

364. Tokaji & Wolfe, *supra* note 17, at 971. *See also* Tokaji, *The Future of Election Reform*, *supra* note 11, at 149–53; *Id.* at 149 (“Federal judges are, however, more insulated from partisan politics than any other institution of the federal government.”).

365. *See supra* notes 200–06 (detailing burdens Enforcement Acts placed on federal judges).

366. For one extreme example that occurred in Florida shortly after the 2018 elections when a single federal judge heard more than eight election disputes, *see* Dan Merica, “*Star Trek*” and *Godzilla*: Meet the colorful judge at the center of Florida’s recount lawsuits, CNN (Nov. 16, 2018), <https://www.cnn.com/2018/11/16/politics/florida-recount-judge-mark-walker-lawsuits/index.html> [<https://perma.cc/K2TS-KF8K>].

367. This Article does not even broach the subject of judicial nominations and confirmations, a white-hot issue in recent years.

preferences and their effects on election disputes in the courts.³⁶⁸ When judges are perceived to be partisan actors, public approval of them shifts along predictable partisan lines.³⁶⁹ This undermines confidence in the judiciary as a whole—particularly in election disputes.³⁷⁰ With judicial appointments as a key component of the Republican Party’s support³⁷¹ and an increasing proportion of the federal judiciary blessed by the controversial conservative Federalist Society,³⁷² moderates may want to seek alternatives to the courts for election litigation.

The MEA could create one alternative. A system of administrative election courts could go further than the federal judiciary to insulate election disputes’ resolutions from partisanship. These tribunals would adjudicate garden-variety election disputes arising under the MEA and any FEAA regulations. Election court judges could come

368. See, e.g., Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. OF POL. SCI. 261, 269 (2019) [hereinafter Hasen, *Polarization & Judiciary*] (“Judges may behave most like partisans in cases involving the rules for elections, where the party’s future power may be at stake. Thus, scholars have found that in cases involving election issues . . . judges often vote for the result that would help their political party.”); Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1417–18 (2016) (finding state judges—particularly Republicans—decide candidate-litigated election disputes in favor of their political party); Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1831–32 (2014) (“There is plentiful room within these bounds for judges elected in partisan contests to systematically and routinely favor or punish Republican or Democratic litigants, depending on their personal partisan proclivities and their jurisdiction’s political composition.”); Mark Jonathan McKenzie, *The Influence of Partisanship, Ideology, and the Law on Redistricting Decisions in the Federal Courts*, 65 POL. RES. Q., 799, 808 (2012) (finding “striking evidence” of partisan judicial decision making in redistricting cases that become more pronounced when law is ambiguous); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 18–29 (2008) (finding a federal judge’s vote in a Voting Rights Act dispute strongly predictive by ideology).

369. Hasen, *Polarization & Judiciary*, *supra* note 370, at 270–71.

370. See, e.g., Ben Klein, *A Vote for Clarity: Establishing A Federal Test for Intervention in Election-Related Disputes*, 86 FORDHAM L. REV. 1361, 1389 (2017) (arguing that clear standards for judicial intervention in election disputes can help protect public confidence in the judiciary); Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 440 (2011) (noting the “inherent tension” between a court’s legitimacy and a court’s necessity to “decide[] a hotly contested election law case [that] will open itself up to criticism of partisanship and overreaching simply based on the subject matter involved”); Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1060 (2010) (observing that “[c]ourts that lack the public’s confidence [in election cases] may not be able to resolve election disputes authoritatively”); Hasen, *Beyond the Margin*, *supra* note 23, at 993 (“Putting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts.”).

371. Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks—and It Paid Off*, WASH. POST (June 26, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off/?utm_term=.61e390a89ff4 [<https://perma.cc/MDC2-NEUV>].

372. Hasen, *Polarization & Judiciary*, *supra* note 370, at 264; see also Peter Baker, *A Conservative Court Push Decades in the Making, With Effects for Decades to Come*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/supreme-court-conservatives-trump.html> [<https://perma.cc/YB97-NFQD>].

from a finite pool of pre-approved election professionals. Review of these courts' decisions could go to a federal appellate court. Accordingly, federal district courts may see a lightened load of election-season disputes over arguably minor technicalities, while litigants would still enjoy the benefits of an impartial tribunal.

On the other hand, an administrative court system may not be parties' first choice to weigh in on substantial constitutional matters like the fundamental right to vote. Instead, a magistrate-like election judge could add another layer to federal election adjudication, one focused on fact-finding. Such a process would be similar to existing federal magistrate judges and their reports and recommendations to district court judges.³⁷³ Federal law grants district judges broad discretion to provide magistrate judges the authority to conduct evidentiary hearings, propose findings of fact, and recommend outcomes.³⁷⁴ Congress could limit the original jurisdiction of MEA disputes to a specialized magistrate and statutorily require some degree of deference to the election magistrate judge's recommendation, such as a clear error standard of review.

B. Federal Election Oversight

Federal election oversight can take on various forms.³⁷⁵ This Article envisions an actual—or threatened—federal presence in particular spaces, such as registration, polling, and vote-tabulation places. Such oversight would not be new. Modern federal election oversight or observation has existed in some form since the Voting Rights Act created federal election observer and examiner positions.³⁷⁶ And, as detailed above, federal election supervision existed in various forms until 1894.

1. The Need for Federal Election Oversight

Current federal election oversight is at its lowest ebb since before the enactment of the Voting Rights Act. In the wake of *Shelby County's* invalidation of Section 4(b)'s preclearance formula, the Department of Justice interpreted the decision to reach any use of the formula.³⁷⁷ Consequently, the decision has made the federal observer program “largely defunct,” according to one analysis.³⁷⁸ A jurisdiction must either

373. 28 U.S.C. § 636(b)(1)(B) (1968).

374. *Id.*

375. Weinstein-Tull, *supra* note 295, at 794–95 (discussing alternatives to federal election oversight within existing agencies such as the Election Assistance Committee).

376. 42 U.S.C. § 1973f. (2006).

377. Harry Baumgarten, *Failure to Observe: The Federal Observer Program After Shelby County*, CAMPAIGN LEGAL CENTER (July 21, 2016), <https://campaignlegal.org/update/failure-observe-federal-observer-program-after-shelby-county> [<https://perma.cc/Y7C4-X7HB>].

378. *Id.*

consent to federal observers watching its election administration, or a court would have to order federal election observers in a jurisdiction.³⁷⁹ Before the 2016 election, Attorney General Loretta Lynch said “our ability to deploy [federal observers] has been severely curtailed” as a result of *Shelby County*.³⁸⁰ As of March 2017, federal observers were eligible in only six political subdivisions in four states.³⁸¹

Before they were rendered toothless, federal election observers played important roles in deterring and preventing election-related chicanery.³⁸² They were required to observe “whether persons who are entitled to vote are being permitted to vote” and “whether votes cast by persons entitled to vote are being properly tabulated.”³⁸³ Their presence alone deterred malfeasance and misfeasance, as according to one witness, “[f]ew officials discriminate when they are under the microscope.”³⁸⁴ Observers also gathered information (sometimes prompting immediate, preventative action from the DOJ), documented poll-worker practices and training, and generally “serve[d] as the eyes and ears of the Justice Department and federal courts.”³⁸⁵

Another type of federal official, an examiner, played a more active role in voter registration in the 1960s and 1970s.³⁸⁶ They were able to “examine voter registration applicants concerning their qualifications for voting, to create lists of eligible voters to forward to the local registrar, and to issue voter registration certificates to eligible voters.”³⁸⁷ By the 1980s, however, the need for examiners to help register minority voters had decreased and Congress ultimately ended that program.³⁸⁸

379. *Id.*

380. Loretta Lynch, Attorney General of the United States, *Remarks at the League of United Latin American Citizens National Convention*, U.S. DEP’T OF JUSTICE (July 15, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-league-united-latin-american-citizens> [<https://perma.cc/N978-MPZB>].

381. DEP’T OF JUSTICE, ABOUT FEDERAL OBSERVERS AND ELECTION MONITORING (last updated Mar. 15, 2017) (“[F]ederal observers are currently authorized in [six] political subdivisions in [four] states by federal court order: Alabama (1), Alaska (3), California (1), and Louisiana (1)”). This number is down from [fifty-one] jurisdictions in [twenty-three] states in 2012 and even [twenty-eight] jurisdictions in [eighteen] states in 2014, the year after *Shelby County*. Baumgarten, *supra* note 377 (identifying jurisdictions with federal observers in 2012 and 2014).

382. James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227, 230–34 (2007).

383. 42 U.S.C. § 1973f (2006).

384. Tucker, *supra* note 382, at 231 (quoting S. Hrg. 109–669, at 391 (testimony of Constance Slaughter-Harvey)).

385. *Id.* at 233.

386. *Id.* at 237–38 (tracing history of federal examiners).

387. *Id.* (quoting 42 U.S.C. §1973e (2000), repealed by Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 §3(c), enacted as Pub. L. No. 109–246 §3(c), 120 Stat. 577, 579–80).

388. *Id.* at 238–39.

Congress can revitalize portions of these modern federal programs—in addition to the type of federal supervision of the 1870–71 Enforcement Acts—as part of a “complete code” of election regulations that cover, among other things, “registration, supervision of voting . . . [and] the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”³⁸⁹ Tapping into the Elections Clause’s deep reserve of federal authority, the MEA could reverse the “severely curtail[ed]” status of the federal observer program.³⁹⁰ A revitalized observer program could take a number of forms on the spectrum of historical election oversight—from the eyes and ears of the observer program to the more hands-on federal examiners and federal supervisors programs.

Recent elections have provided no shortage of justification for federal oversight and observation. North Dakota’s voter identification law made it tougher for Native Americans living on reservations to vote.³⁹¹ Dodge City, Kansas’s 27,000 residents only had one voting location—and it was out of town.³⁹² States are consistently and increasingly embarking on sprawling purges of the voting rolls.³⁹³ Dubious methods of signature matching have led to thousands of lost ballots (and plenty of successful lawsuits).³⁹⁴ In each of these

389. *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932).

390. Lynch, Remarks, *supra* note 382.

391. Maggie Astor, *North Dakota Voter ID Law Stands After Last-Ditch Lawsuit*, (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/us/politics/north-dakota-voter-id-tribe.html> [<https://perma.cc/C4CW-4TTS>].

392. Roxana Hegeman, *Iconic Dodge City moves its only polling place outside town*, AP NEWS (Oct. 18, 2018), <https://www.apnews.com/78f02d14245043aab005046ef4063c10> [<https://perma.cc/Q6SG-3PN7>].

393. JONATHAN BRATER, et al., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE, BRENNAN CENTER FOR JUSTICE 1 (2018), https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.1.pdf [<https://perma.cc/2GJQ-LNXY>] (finding that “states removed almost 16 million voters from the rolls” between 2014 and 2016, an increase of 33 percent more than between 2006 and 2008, and that eight states have engaged in either illegal purges or implemented unlawful purge rules).

394. *See, e.g.*, *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018) (finding Florida law permitting laypeople to reject absentee ballots for mismatched signatures burdened fundamental right to vote); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1341 (N.D. Ga. 2018) (entering preliminary injunction to give voters notice and opportunity to cure perceived signature mismatch on absentee ballots); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 203 (D.N.H. 2018) (concluding New Hampshire’s signature match requirement was facially unconstitutional); *Fla. Democratic Party v. Detzner*, 4:16-cv-607-MW/CAS, 2016 WL 6090943, at *1 (N.D. Fla. Oct. 16, 2016) (holding Florida’s lack of cure for signature-mismatched absentee ballots failed constitutional muster); *see also* Steve Bousquet, *If You Vote by Mail in Florida, it’s 10 Times More Likely that Ballot Won’t Count*, MIAMI HERALD (Sept. 21, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article218654810.html?fbclid=IwAR0788igqY14RjDvR6WiOtFKAILO1-ykYTi0xprPUiM-LkUwhM8kwaMziFyU>.

recent examples, federal observation and oversight might have deterred local policymakers from implementing these procedures.

Georgia’s experience in the 2018 gubernatorial race alone illustrates the aid federal oversight can provide.³⁹⁵ Now-Governor Brian Kemp was the Secretary of State and the state’s chief election officer.³⁹⁶ From this perch of election administration, Kemp dished out a buffet of questionable practices. Shortly before Election Day, in a race polls showed was tight, Secretary Kemp accused Georgia Democrats of attempting to hack the state’s voter registration system, though citing no evidence.³⁹⁷ His office held up more than 53,000 voter registrations because those names failed to “exact match” with social security and driver’s license databases.³⁹⁸ A federal judge preliminarily enjoined the system for more than 3,000 individuals who were flagged for citizenship status, gave them an opportunity to cure, and concluded the state’s system “sweep[s] broader than necessary to advance the State’s interest, creating confusion as Election Day looms.”³⁹⁹ Another federal judge preliminarily enjoined Georgia’s rejection of absentee ballots due to mismatched signatures and required those rejected voters to receive an opportunity to cure.⁴⁰⁰ And when parties sued Kemp over grave vulnerabilities in Georgia’s direct recording electronic voting systems, yet another federal judge observed Kemp and other state officials “had buried their heads in the sand” in addressing cybersecurity.⁴⁰¹ Despite concluding that the plaintiffs had a substantial likelihood of success on many issues, the judge declined to enjoin Georgia’s direct recording electronic system because of the proximity to the 2018 elections.⁴⁰²

395. Focusing on 2018, of course, ignores past election cycles and their troubles. See, e.g., Spencer Woodman, *Register Minority Voters in Georgia, Go to Jail*, NEW REPUBLIC (May 5, 2015), <https://newrepublic.com/article/121715/georgia-secretary-state-hammers-minority-voter-registration-efforts> [<https://perma.cc/LN7T-W5KT>] (outlining Georgia Secretary of State’s earlier questionable efforts to prosecute allegedly fraudulent voter registrations).

396. *Id.*

397. Mark Niese, *Without Disclosing Evidence, Kemp Accuses Georgia Democrats of Hacking*, ATLANTA JOURNAL-CONSTITUTION (Nov. 4, 2018), <https://www.ajc.com/news/state-regional-govt-politics/kemp-office-investigates-georgia-democrats-after-alleged-hacking-attempt/VyyeNgNH4NN6xaXUOfI8HL/> [<https://perma.cc/6XL8-QKJY>].

398. Ben Nadler, *Voting Rights Become a Flashpoint in Georgia Governor’s Race*, AP NEWS (Oct. 9, 2018), <https://apnews.com/fb011f39af3b40518b572c8cce6e906c> [<https://perma.cc/65KJ-EDT6>].

399. *Georgia Coalition for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1267 (N.D. Ga. 2018).

400. *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1341–42 (N.D. Ga. 2018).

401. *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1327–28 (N.D. Ga. 2018).

402. *Id.* at 1326–27.

Curling v. Kemp and other recent decisions⁴⁰³ highlight an important issue in election litigation—eleventh-hour lawsuits and judicial hesitation to remedy issues so close to elections.⁴⁰⁴ Federal election oversight could deter or prevent practices from being implemented without the time-consuming and costly resort to litigation. Take, for example, the recent issue of bilingual ballots for Puerto Rican voters.⁴⁰⁵ The Voting Rights Act requires bilingual ballots for any citizen educated in Puerto Rico.⁴⁰⁶ Rather than force the Spanish-speaking voters to file a preliminary injunction motion in court (who still did not receive their full requested relief because of the election’s proximity),⁴⁰⁷ federal election supervisors, at the behest of concerned citizens, could have quickly identified the faulty practice and worked to remedy it. Federal oversight could also, among other things, deter questionable signature mismatch policies, stem the tide of overinclusive voter purges, prompt action on cybersecurity, and, as truly neutral actors, restore universal public confidence in election administration.⁴⁰⁸

2. *The Mechanics of Federal Election Oversight*

Importantly, federal election regulators or observers need not result from a top-down, court- or DOJ-imposed mechanism. Citizen initiation can be a key feature of federal election oversight. The original Enforcement Acts only required two citizens to petition a federal court for election supervision per precinct—an extraordinarily low threshold for seeking federal oversight.⁴⁰⁹ A two-person threshold might not indicate any semblance of a consensus in any community. Congress can set a higher threshold to trigger federal election oversight. Federal

403. See, e.g., *Spirit Lake Tribe v. Jaeger*, 2018 WL 5722665, at *1 (D.N.D. Nov. 1, 2018) (declining to enter a Temporary Restraining Order because, despite “great cause for concern[,] . . . a further injunction on the eve of the election will create as much confusion as it will alleviate”); *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1284 (N.D. Fla. 2018) (“Due to the timeline of this lawsuit and the looming deadlines Florida election officials face, this Court does not order all of Plaintiffs’ requested relief. Rather, it orders attainable compliance with Section 4(e).”); *Rangel-Lopez v. Cox*, 344 F. Supp. 3d 1285, 1292 (D. Kan. 2018) (rejecting Motion for Temporary Restraining Order to open a second polling location “on the eve of election—just five days away”).

404. See *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (“Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.”).

405. *Madera*, 325 F. Supp. 3d at 1274–75.

406. 52 U.S.C. § 10303(e).

407. *Madera*, 325 F. Supp. 3d at 1284 (ordering Florida to provide Spanish-language sample ballots because election was too close for officials to provide official Spanish-language ballots).

408. Cf. Hasen, *From Bad to Worse*, *supra* note 20, at 653 (“Already, public confidence in the fairness of the election process is largely driven by who wins and who loses elections.”).

409. Enforcement Act of 1871, § 2, ch. 99, 16 Stat. 433 (1871).

oversight could require a number of signatories totaling one percent of all voters who cast ballots in the previous federal election.⁴¹⁰

This citizen-powered structure attempts to thread the needle between no oversight and the Voting Rights Act’s preclearance infrastructure that the Supreme Court characterized as one in which “[s]tates must beseech the Federal Government for permission to implement laws.”⁴¹¹ Any beseeching under this regime would come from a chorus of citizens. The MEA would place a group of citizens as decisionmakers on the federal oversight question. And, because every jurisdiction would have an equal opportunity to petition for federal oversight, this structure avoids an equal state sovereignty issue.

A citizen-initiated federal oversight mechanism can also supplement the Voting Rights Act’s bail-in provisions. Section 3(c) of the Act authorizes courts to place jurisdictions under preclearance if the court finds Fourteenth and Fifteenth Amendment violations, necessitating equitable relief have occurred.⁴¹² That preclearance requires that voting procedures must be shown to “not have the purpose and will not have the effect” of denying voting rights for a discriminatory purpose before implementation.⁴¹³ Section 3(c) jurisprudence is notably limited.⁴¹⁴ One district court in Arkansas, in placing a district under preclearance, considered the persistence of violations, temporal proximity to the litigation, likelihood of their recurrence, and outside political developments.⁴¹⁵ In an MEA world, a court considering a Section 3(c) challenge could deem as persuasive whether a jurisdiction is regularly subject to federal oversight and federal officials regularly identify voting problems.

410. Alternatively, Professor Tolson suggests a 10,000-person threshold. See Franita Tolson, *Setting a Voting Rights Agenda in an Era of “Legal” Disenfranchisement*, in AMERICAN CONSTITUTION SOCIETY, WHAT’S THE BIG IDEA: RECOMMENDATIONS FOR IMPROVING LAW AND POLICY IN THE NEXT ADMINISTRATION 1.3 (Oct. 2016). One implication of a relatively small numerical threshold to activate federal election oversight is that petitioners may not mirror the electoral district’s desires. For example, a concentrated number of activists in urban areas can petition for statewide oversight. A predominantly minority town in an otherwise white congressional district may provide enough petitions to place that district under federal oversight. The one-percent threshold is aimed to be an attainable total—but only if there is *some* demand for federal oversight. It requires some modicum of organization and prevents any frivolous or truly unwanted petitions for federal oversight. The FEAA could promulgate rules to streamline or tighten the petitioning process. For example, it could require at least one signature from every county in the state and/or one percent of all voters in every congressional district for statewide petitions.

411. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 570 U.S. 529, 544 (2013).

412. 52 U.S.C. § 10302(c).

413. *Id.*

414. Travis Crum, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L. J. 1992, 2007 n. 87 (2010) (noting only one reported district court “address[es] the standards for imposing preclearance”).

415. *Jeffers v. Clinton*, 740 F. Supp. 585, 601 (E.D. Ark. 1990).

To be clear, federal oversight *alone* is not a total substitute for preclearance for the simple reason that preclearance is prophylactic—identifying and rejecting problematic changes to election laws—while oversight is reactionary—stemming the bleeding from problems that may have slipped through the cracks. Even so, oversight can provide critical deterrent effects to any discrimination and incompetence that may slide beneath the radar of public awareness. And it can remedy such problems quicker than court enforcement.

Robust federal election oversight could tilt the federal-state balance in election administration toward the federal government. Such a tilt would have far-reaching repercussions. Even in a universe where the MEA’s grant of authority to federal officials is taken to its maximum, state election officials will still be present during elections. At the very least, state officials would regulate purely state and purely local elections. As a practical matter, in many jurisdictions, state officials would be the *only* election workers present simply because there would not be enough federal officials. How, then, would federal election officials interact with state and local officials on the ground? In the nineteenth century, federal election officials supervised polling places and registration sites. They supplemented preexisting state election officers, but their supplementary role had final authority.

In short, the MEA could authorize federal officials to occupy three roles that historical federal officials have occupied.⁴¹⁶ First, federal officials could serve a supervisory function over state officials. Second, they could serve a supplementary role in actually administering elections, stepping in when necessary. Third, federal officials could serve as passive observers, the “eyes and ears” of the FEAA, the DOJ, and the federal judiciary.

There remains a fourth possibility of federal election oversight—commandeering state officials.⁴¹⁷ But the commandeering question may be subsumed by the hypothetical FEAA’s broad grant of authority. In jurisdictions where citizens have not petitioned for federal oversight, state and local officials would still be bound by FEAA regulations over federal and mixed elections. In effect, state and local officials would become *de facto* agents of the federal government in administering federal elections.⁴¹⁸

416. See *supra* Section I.

417. Tolson, *Limits of the Antidiscrimination Framework*, *supra* note 270, at 2218 (“[T]he [Elections Clause’s] text empowers Congress to engage in the quintessentially ‘anti-’federalism action of displacing state law and commandeering state officials toward achieving this end.”).

418. See *Arizona et al. v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 41 (2013) (Alito J., dissenting) (recognizing that federal regulations under the Elections Clause are “likely to displace not only state control of federal elections but also state control of state and local elections”).

In *Ex Parte Siebold*, the Supreme Court faced this exact question of which law—state or federal—a state election worker owed his allegiance to.⁴¹⁹ In concluding that a state election worker is not shielded from federal authority by virtue of his position as a state worker, Justice Bradley wrote that the federal government “is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed” by a state official.⁴²⁰ “A violation of duty is an offence against the United States, for which the offender is justly amenable to that government,” he explained.⁴²¹ He based his conclusion on prudential concerns. Federal election regulation would otherwise be unsuccessful if state election workers were “amenable only to the supervision of the State government which appointed them.”⁴²² More recently, in *U.S. Term Limits, Inc. v. Thornton*,⁴²³ the Court described the Elections Clause as an effort “to minimize the possibility of state interference with federal elections.”⁴²⁴ In striking down an Arkansas law setting term limits for congresspeople, the Court reasoned that states possess only a limited power to regulate federal elections.⁴²⁵ State procedures are “not a reserved power of the States, but rather [are] delegated by the Constitution.”⁴²⁶ Accordingly, efforts to federalize procedures require state workers to abide by the federal rules and regulations.

It is worth considering that state and local officials may resist federal oversight. Even a proposed bill would likely attract pushback from state and local officials. Richard Hasen speculates over how “the lobby of local and state election administrators” would gather “considerable” forces to block central federal election administration.⁴²⁷ “The common wisdom about election administration reform . . . is that anything that increases a federal role over state and local election administrators is a nonstarter because of the power of these groups,” he writes.⁴²⁸ Even surviving the speculative forces, the MEA’s execution could face a groundswell of resistance from state and local officials. Although actively hindering or obstructing federal officials would be illegal, state

419. *Ex parte Siebold*, 100 U.S. 371, 388 (1880).

420. *Id.*

421. *Id.*

422. *Id.* at 389. But Justice Bradley remained optimistic. “There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature.” *Id.* at 384.

423. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

424. *Id.* at 808.

425. *Id.* at 779–80.

426. *Id.* at 805.

427. Hasen, *New Institutionalism*, *supra* note 10, at 1098.

428. *Id.*

or local officials may assert noncompliance with some federal orders, resent the federal presence, or simply leave their positions altogether. Any hypothetical FEAA would likely—and quickly—issue clear regulations detailing best practices in dealing with recalcitrant local officials and appropriate sanctions against them.

Finally, it is worth considering the risk that federal election observers could be used to chill, or even threaten, voter participation. Nefarious actors can use election monitoring to intimidate. In 2016, for example, a federal judge in Ohio issued a temporary restraining order (though the Sixth Circuit stayed it) against the Trump campaign and Roger Stone after now President Trump “encourage[ed] rally attendees to monitor ‘certain areas’” and his supporters promised to “aggressively patrol polling places.”⁴²⁹ While federal oversight officials would ideally be well-meaning (like the vast, vast majority of poll workers), the FEAA can promulgate strict guidelines to ensure and advertise their nonpartisan nature.

V. CONCLUSION

The original Enforcement Acts created a complex system of federal election regulation that lasted for a generation in the late nineteenth century. The federal oversight program existed during an era of intense political partisanship, amidst charges of rampant voter fraud, and distrust of national authority. Despite their imperfections, the Acts helped protect the suffrage of African Americans in the South and created mechanisms to root out the most egregious forms of voter fraud in urban areas.

The United States’ national election infrastructure today is a “radically decentralized” hodgepodge of state and local systems.⁴³⁰ That structure and its many known imperfections need not be permanent. The federal government can enact significant legislation under the Elections Clause and the Fifteenth Amendment to protect voters and to ensure that elections run efficiently, neutrally, and fairly. One avenue is to establish an agency of election professionals to create uniform standards, rules, and regulations, to run oversight programs to ensure that voters can efficiently and fairly vote, and to adjudicate election-related disputes. The old Enforcement Acts provide a blueprint for executing this vision of bold institutional change. And there is an appetite for electoral reform, as evinced by H.R. 1’s introduction and its 236

429. *Ohio Democratic Party v. Ohio Republican Party*, No. 16-cv-02645, 2016 WL 6542486 (N.D. Ohio Nov. 4, 2016), *stayed*, No. 16-4268, 2016 WL 6608962 (6th Cir. Nov. 6, 2016), *application to vacate stay denied*, 137 S. Ct. 15 (2016) (mem.); *see also* Hasen, *From Bad to Worse*, *supra* note 20, at 639.

430. Hasen, *Lawlessness Principle*, *supra* note 340, at 988.

cosponsors,⁴³¹ as well Senator Elizabeth Warren's election reform plan to create uniform federal standards.⁴³² Perhaps one scholar's prediction that "the adoption of nonpartisan election administration is simply not on the horizon" is overstated.⁴³³ Then, in the words of W.E.B. Du Bois, the United States would no longer be "the only modern nation in the world that dares not control its own elections."⁴³⁴

431. See Cosponsors: H.R.1—116th Congress (2019–2020), Congress.gov <https://www.congress.gov/bill/116th-congress/house-bill/1/cosponsors> [<https://perma.cc/4Z5F-KC95>].

432. See *supra* note 5.

433. Gaughan, *Illiberal Democracy*, *supra* note 23, at 123.

434. W.E.B. Du Bois, *The Negro Citizen*, in *THE NEGRO IN AMERICAN CIVILIZATION* 461, 469 (Charles S. Johnson, ed. 1930).

