

June 24, 2019

Dear Senator Warren,

You asked for information on Congress’s authority to regulate federal and state elections.

Congress’s authority to regulate federal elections is broad. The Elections Clause of the Constitution empowers Congress to regulate the “Times, Places and Manner” of federal elections, which includes the power to “provide a complete code for congressional elections.”<sup>1</sup> The Supreme Court has historically—and recently—upheld a wide range of congressional action that regulates federal elections, even when that regulation intrudes upon what would otherwise be areas of state sovereignty.

Congress’s authority to regulate state elections is more limited. Congress may regulate both federal and state elections pursuant to its authority to enforce the Fourteenth and Fifteenth Amendments as well as the Thirteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments. Congress may also exercise its Spending Clause authority to persuade states to voluntarily reform their own elections systems in exchange for federal funding.

### Federal Elections

The Elections Clause gives states the initial responsibility for determining the “Times, Places and Manner” of federal elections, but gives Congress the power to “alter those regulations or supplant them altogether.”<sup>2</sup> The founders gave Congress that power for three principal reasons. First, to ensure the federal government could continue functioning even if a state refused to hold federal elections.<sup>3</sup> Second, to allow Congress to prevent state politicians from “manipulat[ing]” elections to “entrench themselves or place their interests over those of the electorate.”<sup>4</sup> And third, to allow Congress to step in if states were invaded and could not provide a safe place to vote.<sup>5</sup>

Both recently and historically, and across the spectrum of justices, the Court has found Congress’s Elections Clause powers to be wide-ranging. In *Arizona v. Inter Tribal Council of Arizona*, Justice Scalia—writing for a majority that included Chief Justice Roberts—held that “Times, Places, and Manner . . . are ‘comprehensive words,’ which ‘embrace authority to provide a complete code for congressional elections.’”<sup>6</sup> Congress’s power to enact policy in this

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<sup>1</sup> *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8-9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

<sup>2</sup> *Id.* at 8 (holding that the voter registration provisions of the National Voter Registration Act of 1993 preempted Arizona’s proof-of-citizenship requirement for voter registration). The 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.” U.S. CONST. art. I, § 4, cl. 1.

<sup>3</sup> *Inter Tribal*, 570 U.S. at 8.

<sup>4</sup> *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2672 (2015). Madison noted that the Elections Clause was necessary to prevent states from “mould[ing] their regulations as to favor the candidates they wished to succeed.” *See* 2 Records of the Federal Convention 241 (M. Farrand rev. 1966).

<sup>5</sup> Joseph L. Story, *Commentaries on the Constitution of the United States* § 823 (1833).

<sup>6</sup> *Inter Tribal*, 570 U.S. at 8-9 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

realm is “paramount, and may be exercised at any time, and to any extent which it deems expedient.”<sup>7</sup>

This breadth is consistent with the Court’s longstanding interpretations of the Elections Clause. In *Smiley v. Holm*, the Court interpreted “Times, Places and Manner” of elections broadly to include all policies necessary “to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.” Specifically, this includes all laws related to “notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.”<sup>8</sup> In *Ex Parte Siebold*, the Court held that Congress’s Elections Clause authority allows it to regulate state administration of elections “either wholly or partially.” Congress’s preferences trump any conflict with existing state laws.<sup>9</sup>

Standard federalism constraints do not limit Congress’s Elections Clause authority. In *Inter Tribal*, Justice Scalia held that the Court’s preemption doctrine—which protects state sovereignty by presuming that Congress does not intend to preempt state law unless it says so clearly—does not apply to Elections Clause legislation. The Elections Clause was *designed* to allow Congress to preempt state law. “[T]he power the Elections Clause confers is none other than the power to pre-empt.”<sup>10</sup>

Neither is Congress’s Elections Clause authority limited by the anti-commandeering principle, which prevents the federal government from commandeering state officers into administering federal law. The Elections Clause empowers Congress to “conscript state agencies” to carry out its election priorities,<sup>11</sup> and it “specifically grants Congress the authority to force states to *alter* their regulations regarding federal elections.”<sup>12</sup>

Using these basic guideposts, courts have stated that Congress has the power to:

- regulate the districting and redistricting of federal elections<sup>13</sup>
- prevent political gerrymandering<sup>14</sup>
- set the date of federal elections<sup>15</sup>

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<sup>7</sup> *Id.* at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

<sup>8</sup> *Smiley*, 285 U.S. at 366. *See also* *United States v. Manning*, 215 F. Supp. 272, 284 (W.D. La. 1963) (“[T]he manner of holding elections’ therefore must be read as referring to the entire electoral process, from the first step of registering to the last step, the State’s promulgation of honest returns.”).

<sup>9</sup> *Siebold*, 100 U.S. at 383-84.

<sup>10</sup> *Inter Tribal*, 570 U.S. at 14-15.

<sup>11</sup> *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) (rejecting California’s Tenth Amendment argument that the NVRA impermissibly commandeered state government and upholding the constitutionality of the National Voter Registration Act of 1993).

<sup>12</sup> *Ass’n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997) (emphasis added). *Cf.* *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726-27 (2003) (noting that while Congress may not abrogate state sovereign immunity pursuant to its Commerce Clause authority, it may do so pursuant to a valid exercise of its Fourteenth Amendment authority).

<sup>13</sup> *See Vieth v. Jubelirer*, 541 U.S. 267, 276-77 (2004) (plurality opinion of Scalia, J., also joined by Thomas, J.).

<sup>14</sup> *See id.* at 275 (plurality opinion of Scalia, J., also joined by Thomas, J.).

<sup>15</sup> *See Foster v. Love*, 522 U.S. 67, 69-70 (1997).

- regulate state voter registration procedures<sup>16</sup>
- criminalize fraudulent voting activity in federal elections.<sup>17</sup>

### State Elections

The Elections Clause does not empower Congress to regulate purely state and local elections.<sup>18</sup> But Congress does have the authority to regulate state and local elections under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments. Both of these Amendments grant Congress the “power to enforce” the provisions “by appropriate legislation.”<sup>19</sup> This enforcement power enables Congress to prevent and remedy constitutional violations by state and local governments. In the context of voting, that unconstitutional conduct would include intentionally denying the vote on the basis of race or administering elections in a way that unjustifiably burdens the franchise.

Under certain circumstances, Congress may also use its enforcement authority to enact broader legislation that deters unconstitutional conduct even if the conduct the legislation targets for prohibition is not itself unconstitutional,<sup>20</sup> and even if the legislation impinges upon state sovereignty.<sup>21</sup> Under the Fourteenth Amendment, this broader legislation is only constitutional if its means are congruent with and proportional to the injury.<sup>22</sup> Under the Fifteenth Amendment, the current need for the legislation must justify the burdens on state sovereignty and any disparate treatment of the states must be sufficiently related to the problem targeted.<sup>23</sup>

The Court most recently set limits on Congress’s power to enforce the Fifteenth Amendment in *Shelby County v. Holder*, where it struck down section 4(b) of the Voting Rights Act.<sup>24</sup> Although *Shelby County* has been severely criticized as resting on a theory of interstate equality lacking basis in the Constitution and on an insufficient appreciation of current realities, its limitations remain the law. At least to support legislation along the lines of a fully restored VRA, efforts to comply with those limitations would require Congress to go even further in compiling a record of contemporary discriminatory practices than it did the last time it considered the need for certain jurisdictions to be subjected to federal preclearance before making voting changes.

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<sup>16</sup> Ass’n of Cmty. Organizations for Reform Now v. Edgar, 56 F.3d 791, 795-96 (7th Cir. 1995) (Posner, J.) (upholding the National Voter Registration Act of 1993 as a constitutional exercise of Congress’s Elections Clause authority); Voting Rights Coal. v. Wilson, 60 F.3d 1411, 1415 (9th Cir. 1995) (same).

<sup>17</sup> See United States v. Slone, 411 F.3d 643, 650 (6th Cir. 2005).

<sup>18</sup> See United States v. Bowman, 636 F.2d 1003, 1011 (5th Cir. 1981); Ex parte Siebold, 100 U.S. 371, 393 (1879).

<sup>19</sup> U.S. CONST. art. XIV, § 5 (Fourteenth Amendment enforcement authority); U.S. CONST., art. XV, § 2 (Fifteenth Amendment enforcement authority). See also U.S. CONST. art. XIX; U.S. CONST. art. XXIV, § 2; U.S. CONST. art. XXVI, § 2.

<sup>20</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’ (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976))). The leading example is *Katzenbach v. Morgan*. The Court upheld a provision of the Voting Rights Act of 1965, which extended the franchise to certain Puerto Ricans living in New York City by barring the use of otherwise constitutional English literacy tests as a precondition to their voting. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

<sup>21</sup> See *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003).

<sup>22</sup> See *City of Boerne*, 521 U.S. at 520.

<sup>23</sup> See *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 542 (2013).

<sup>24</sup> *Id.* at 556-57.

In addition to Congress's enforcement powers with respect to racial discrimination in voting, Congress also has enforcement powers under the Fourteenth Amendment with regard to fundamental rights. Because the Supreme Court has recognized, in a series of cases, that the right to vote is a fundamental right as to which a form of heightened scrutiny applies,<sup>25</sup> Congress has broad enforcement power with respect to protecting that right.<sup>26</sup>

To overcome the limits the federal courts have imposed, and might continue to impose, on Congress's regulatory powers under the Enforcement Clauses, Congress may choose to influence state elections indirectly, by using its Spending Clause authority, which allows it "to pay the Debts and provide for the . . . general Welfare of the United States."<sup>27</sup> Congress's Spending Clause power is broad, and empowers Congress "to grant federal funds to the States, and . . . condition such a grant upon the States' taking certain actions that Congress could not require them to take." Spending Clause legislation operates like a contract: its invocation depends upon the states "voluntarily and knowingly" accepting the terms of whatever offer Congress makes.<sup>28</sup>

Congress may use this power to offer states a contract that provides federal funding in exchange for the states' agreement to reform their elections. Beyond the enforcement clauses noted above, Congress cannot *force* states to reform their state and local elections, but it can "use its spending power to create incentives for States to act in accordance with federal policies."<sup>29</sup>

The Spending Clause limitations imposed by *National Federation of Independent Businesses v. Sebelius (NFIB)* are not likely to limit election reform so strictly as to nullify its efficacy. In *NFIB*, the Court struck down the Affordable Care Act's (ACA) Medicaid expansion on the ground that it was coercive given the size of the funding at stake.<sup>30</sup> The design of the ACA was such that states would lose their pre-existing Medicaid funding if they declined to expand Medicaid in the way the ACA required. The Court held that punishment denied states a meaningful choice, and therefore fell outside of Congress's authority.

To avoid coercion, Congress need only refrain from conditioning pre-existing Medicaid-sized federal funding to states on satisfying new federal election standards. Incentivizing state reform by offering purely new federal funding, as with many other federal programs, would be a constitutional exercise of Congress's Spending Clause authority.

### Conclusion

In sum, Congress has broad authority to enact election reforms that require states to alter the way they currently administer *federal elections*. It may also remedy or prevent racial and other forms of invidious discrimination in voting in *state elections* under the circumstances described above. And, to cope with the limits, justified or otherwise, that the Supreme Court may continue to

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<sup>25</sup> *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

<sup>26</sup> *Tennessee v. Lane*, 541 U.S. 509 (2004).

<sup>27</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>28</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576-77 (2012) (internal citations omitted).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 585.

impose on that regulatory power, Congress may also invoke its broad authority to use federal funding to incentivize states to voluntarily reform their own elections.

Sincerely,

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