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Report
The Elections Clause:
States' Primary Constitutional Authority Over Elections

Representative Rodney Davis (IL-13)
Ranking Member

U.S. House of Representatives
Committee on House Administration

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Executive Summary

Republicans believe that every eligible voter who wants to vote must be able to do so, and all lawful votes must be counted according to state law. Through an examination of history, precedent, the Framers' words, debates concerning ratification, the Supreme Court, and the Constitution itself, this document explains the constitutional division of power envisioned by the Framers between the States and the federal government with respect to election administration. Article 1, Section 4 of the Constitution explains that the States have the primary authority over election administration, the "times, places, and manner of holding elections". Conversely, the Constitution grants the Congress a purely secondary role to alter or create election laws only in the extreme cases of invasion, legislative neglect, or obstinate refusal to pass election laws. As do other aspects of our federal system, this division of sovereignty continues to serve to protect one of Americans' most precious freedoms, the right to vote.

The¹ Constitution reserves to the States the primary authority to set election legislation and administer elections—the “times, places, and manner of holding of elections”—and Congress’ power in this space is purely secondary to the States’ power. Congress’ power is to be employed only in the *direst* of circumstances.² Despite Democrats’ insistence that Congress’ power over elections is unfettered and permits Congress to enact sweeping legislation like H.R. 1, it is simply not true. History, precedent, the Framers’ words, debates concerning ratification, the Supreme Court, and the Constitution itself make this exceedingly clear.

The Framing Generation grappled with the failure of the Articles of Confederation, which provided for only a weak national government incapable of preserving the Union. Under the Articles, the States had *exclusive* authority over federal elections held within their territory;³ but, given the difficulties the national government had experienced with State cooperation (*e.g.*, the failure of Rhode Island to send delegates to the Confederation Congress),⁴ the Federalists, including Alexander Hamilton, were concerned with the possibility that the States, in an effort to destroy the federal government, simply might *not hold* elections or that an emergency, such as an invasion or insurrection, might prevent the operation of a State’s government, leaving the Congress without Members and the federal government unable to respond. Indeed, as counsel for the Democrat Members of our Committee so keenly observed:

For the Founders, particularly during the Federal Constitutional Convention, the primary concern was informing the discussions of federal elections in Article I was the risk of uncooperative states. For example, Alexander Hamilton noted that by providing states the authority to run congressional elections, under Article I, Section 4, “risk[ed] ‘leaving the existence of the Union entirely at their mercy.’” Following the failings of the Articles of Confederation, the Founders looked for processes that would insulate Congress from recalcitrant states. Indeed, “[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation[.]” and that “*the Clause ‘was the Framers’ insurance*

¹ A version of this Report was delivered by Ranking Member Rodney Davis as his opening remarks at the Committee on House Administration’s July 12, 2021, hearing, *The Elections Clause: Constitutional Interpretation and Congressional Exercise*.

² See Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (Nov. 2010) (describing the origins of the Elections Clause, the meaning of “manner of” versus “manner of holding” elections, the debates leading to its adoption, and the promises made and compromises reached that led the author to conclude quite plainly, “In any event, the ratifiers clearly informed future generations how to resolve such questions: The power of Congress to regulate its own elections is a power that, while necessary to address unusual situations, nevertheless invites self-dealing and abuse. In cases of doubt, it must be narrowly construed.” (*Id.* At 15.))

³ ARTS. OF CONFED’N, Art. 5, Sec. 1.

⁴ Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010) (citing to various historical documents).

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against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress."⁵

Quite plainly, Alexander Hamilton, a leading Federalist and proponent of our Constitution, understood the Elections Clause as serving only as a sort of emergency fail-safe, not as a cudgel used to nationalize our elections process.⁶ Writing as Publius to the people of New York, Hamilton further expounds on the correct understanding of the Elections Clause: "T[he] natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, ***in the last resort***, the election of its own members."⁷

When questioned at the States' constitutional ratifying conventions with respect to this provision, the Federalists confirmed this understanding of a constitutionally limited, secondary congressional power under Article 1, Section 4:⁸

Maryland: "[C]onvention delegate James McHenry added that the risk to the federal government [without a fail-safe provision] might not arise from state malice: An insurrection or rebellion might prevent a state legislature from administering an election."⁹

N. Carolina: "An occasion may arise when the exercise of this ultimate power of Congress may be necessary . . . if a state should be involved in war, and its legislature could not assemble, (as was the case of South Carolina and occasionally of some other states, during the [Revolutionary] war)."¹⁰

Pennsylvania: "Sir, let it be remembered that this power ***can only operate in a case of necessity***, after the factious or listless disposition of a particular state has rendered an interference essential to the ***salvation*** of the general government."¹¹

John Jay made similar claims in New York.¹² And, as constitutional scholar Robert Natelson, notes in his invaluable article, *The Original Scope of the Congressional Power to Regulate Elections*,

⁵ Sean J. Wright, *The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections*, 81 ALB. L. REV. 609 (2017-2018) (internal citations omitted) (alterations in original).

⁶ See Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 11 (Nov. 2010) (quoting *Federalist* no. 59).

⁷ Alexander Hamilton (writing as Publius), *Federalist* no. 59, *Concerning the Power of Congress to Regulate the Election of Members*, N.Y. PACKET (Fri., Feb. 22, 1788), available at <https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493435> (emphasis added).

⁸ See, generally, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (Nov. 2010).

⁹ Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010).

¹⁰ *Id.*

¹¹ *Id.* at 13.

¹² *Id.* at 13.

Alexander Contee Hanson, a member of Congress whose pamphlet supporting the Constitution proved popular, stated flatly that Congress would exercise its times, places, and manner authority *only in cases of invasion, legislative neglect or obstinate refusal to pass election laws* [providing for the election of Members of Congress], or if a state crafted its election laws with a ‘sinister purpose’ or to injure the general government.”¹³

Cementing his point, Hanson goes further to decree, “The exercise of this power must at all times be so very invidious, that congress will not venture upon it without some very cogent and substantial reason.”¹⁴ In Floor debate during the 117th Congress concerning H.R. 1, the Democrats’ intended nationalization of elections, Ranking Member Davis argued, as he has many other times, that:

According to Article 1, Section 4 of the Constitution, States have the primary role in establishing “[t]he Times, Places and Manner of holding Elections for Senators and Representatives.” Under the Constitution, Congress has a purely secondary role in this space and must restrain itself from acting improperly and unconstitutionally. Federal election legislation should never be the first step and must never impose burdensome, unfunded federal mandates on state and local elections officials. When Congress does speak, it must devote its efforts only to resolving highly significant and substantial deficiencies. State legislatures are the primary venues to correct most issues.¹⁵

In fact, had the Democrats’ view of the Elections Clause been accepted at the time of the Constitution’s drafting—that is, that it offers Congress unfettered power over federal elections—it is likely that the Constitution would not have been ratified or that an amendment to this language would have been required. Indeed, at least seven¹⁶ of the original 13 states—over half and enough to prevent the Constitution from being ratified—expressed specific concerns with the language of the Elections Clause. However, “[l]eading Federalists . . .” assured them, “. . . that, even without amendment, the [Elections] Clause should be construed as limited to emergencies.”¹⁷

¹³ *Id.* at 12-13 (quoting in part *infra* n. 11).

¹⁴ Alexander Contee Hanson (writing as Astrides), *Remarks on the Proposed Plan: 31 January*, reprinted in John P. Kaminski, Gaspare J. Saladino, and Richard Leffler (eds.), *3 Commentaries on the Constitution, public and private 18 December 1787 to 31 January 1788* 522- 26 (1984), available at <https://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=goto&id=History.DHRCv15&isize=M&submit=Go+to+page&page=522>.

¹⁵ Ranking Member Rodney Davis, U.S. H. of Reps. Comm. on H. Admin., *Republican Election Law Principles*.

¹⁶ A record of congressional debate of August 21, 1789, as recorded in the *Annals of Congress*, suggests Maryland might also be included, which would bring the total to eight states. 1 *Annals of Cong.* 799 (1789), Joseph Gales (ed.) (1834), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=401>.

¹⁷ See *supra* n. 7 at 12.

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Three states, New York, North Carolina, and Rhode Island, specifically made their ratification contingent on this understanding being made express:¹⁸

New York:

Under these impressions and declaring that the rights aforesaid cannot be abridged or violated, and the Explanations aforesaid are consistent with the said Constitution, And in confidence that the Amendments which have been proposed to the said Constitution will receive early and mature Consideration: We the said Delegates, in the Name and in [sic] the behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution. In full Confidence . . . that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding Elections for Senators or Representatives unless the Legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same, and that in those cases such power will only be exercised until the Legislature of this State shall make provision in the Premises[.]¹⁹

N. Carolina:²⁰

That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse or be disabled by invasion or rebellion, to prescribe the same.

Rhode Island:

Under these impressions, and declaring, that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid, are consistent with the said constitution, and in confidence that the amendments hereafter mentioned, will receive an early and mature consideration, and conformably to the fifth article of said constitution, speedily become a part thereof; We the said delegates, in the name, and in [sic] the behalf of the People, of the State of

¹⁸ *Id.* at 13.

¹⁹ *Ratification of the Constitution by the State of New York* (July 26, 1788), available at https://avalon.law.yale.edu/18th_century/ratny.asp. See also *Id.* at 13 and n. 189.

²⁰ North Carolina's ratification document handled the issue slightly differently. It included a Declaration of Rights and several proposed amendments to the Constitution. The Convention "[r]esolved, That a Declaration of Rights, asserting and securing from encroachment the great Principles of civil and religious Liberty, and the unalienable Rights of the People, together with the Amendments to the most ambiguous and exceptional Parts of the said Constitution of Government, ought to be laid before Congress, and the Convention of States that shall or may be called for the Purpose of Amending the said Constitution, for their consideration, previous to the ratification of the Constitution aforesaid, on the part of the State of North Carolina." *Ratification of the Constitution by the State of North Carolina* (Nov. 21, 1789), available at https://avalon.law.yale.edu/18th_century/ratnc.asp.

Rhode-Island and Providence-Plantations, do by these Presents, assent to, and ratify the said Constitution. In full confidence . . . That the Congress will not make or alter any regulation in this State, respecting the times, places and manner of holding elections for senators and representatives, unless the legislature of this state shall neglect, or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that [i]n those cases, such power will only be exercised, until the legislature of this State shall make provision in the Premises[.]²¹

This clearly demonstrates that the Framers designed and the ratifying States understood the Elections Clause to serve solely as a protective backstop to ensure the preservation of the Federal Government,²² not as a font of limitless power for Congress to wrest control of federal elections from the States.

This understanding was also reinforced by debate during the first Congress that convened under the Constitution. “During the first session of the First Congress . . . Representative Aedanus Burke unsuccessfully proposed a constitutional amendment to limit the Times, Places and Manner Clause to emergencies.”²³ But those on both sides of the Burke amendment debate *already understood the Elections Clause to limit Federal elections power to emergencies*.

For example, the recorded description of opponent Representative Goodhue’s comments notes that he believed the Elections Clause as written was intended to prevent “. . . the State Governments [from] oppos[ing] and thwart[ing] the general one to such a degree as finally to overturn it. Now, to guard against this evil, he wished the Federal Government to possess every power necessary to its existence.”²⁴ With any change to the original text therefore unnecessary to achieve Burke’s desired goal, Mr. Goodhue voted against the proposed amendment.²⁵

Similarly, proponent Representative Smith of South Carolina also believed the original text of the Elections Clause already limited the Federal Government’s power over federal elections to emergencies and so thought there would be no harm in supporting an amendment to make that language express.²⁶ So, even the records of the First Congress reflect a recognition of the emergency nature of congressional power over federal elections.

²¹ *Ratification of the Constitution by the State of Rhode Island* (May 29, 1790), available at https://avalon.law.yale.edu/18th_century/ratri.asp. See also Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 13 and at n. 183 (Nov. 2010).

²² See *supra* n. 5 (“EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION.”). See also Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010).

²³ Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 13 (Nov. 2010) (citing 1 Annals of Cong. 797 (1789), Joseph Gales (ed.) (1834), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=400>).

²⁴ 1 Annals of Cong. 801 (1789), Joseph Gales (ed.) (1834), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=402>.

²⁵ *Id.*

²⁶ *Id.* at 799.

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Similarly, the Supreme Court has supported this understanding. In *Smiley v. Holm*, the Court held that Article 1, Section 4 of the Constitution reserved to the States the primary

. . . ***authority to provide a complete code for congressional elections***, not only as to times and places, but in relation 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; 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. All this is comprised in the subject of “times, places and manner of holding elections,” and involves lawmaking in its essential features and most important aspect.²⁷

This holding, of course, is consistent with the understanding of the Elections Clause since the framing of the Constitution. The *Smiley* Court also held that while Congress maintains the authority to “. . . supplement these state regulations or [to] substitute its own[.]”, such authority remains merely “a general supervisory power over the whole subject.”²⁸ More recently, the Court noted in *Arizona v. Inter-Tribal Council of Ariz., Inc.* that “[t]his grant of congressional power [that is, the fail-safe provision in the Elections Clause] was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.”²⁹ The Court explained that the Elections Clause “. . . imposes [upon the States] the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators[.]”³⁰ And, while, as the Court noted, “[t]he power of Congress over 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; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith[.]’”,³¹ the *Inter-Tribal* Court explained, quoting extensively from *The Federalist no. 59*, that it was clear that the congressional fail-safe included in the Elections Clause was intended for the sorts of governmental self-preservation discussed in this Report: “[E]very government ought to contain in itself the means of its own preservation[.]”; “[A]n exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.”³²

²⁷ *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

²⁸ *Id.* (also quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)).

²⁹ *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1, 7-9 (2013).

³⁰ *Id.* at 8.

³¹ *Id.* at 9 (quoting U.S. CONST., Art. 1, Sec. 4 and *Ex parte Siebold*, 100 U.S. at 392).

³² *Inter-Tribal*, 285 U.S. at 8.

Conclusion

It is clear in every respect that the congressional fail-safe described in the Elections Clause vests purely secondary authority over federal elections in the federal legislative branch and that the primary authority rests with the States. Congressional authority is intended to be, and as a matter of constitutional fact is, limited to addressing the worst imaginable issues, such as invasion or other matters that might lead to a State not electing representatives to constitute the two Houses of Congress.³³ Our authority has never extended to the day-to-day authority over the “Times, Places and Manner of Election”³⁴ that the Constitution clearly reserves to the States. Unfortunately for Democrats, this clear restriction on congressional authority means that we do not have the power to implement the overwhelming majority—if not the entirety—of their biggest legislative priority, H.R. 1 and related legislation, which would purport to nationalize our elections and centralize their administration in Washington, D.C. Thankfully, the Framers had the foresight to write our Constitution so as to prevent those bad policies from going into effect and preserve the health of our republic.

³³ See, e.g., *supra* n. 4.

³⁴ U.S. CONST., Art. 1, Sec. 4.