

THE POPULAR SOVEREIGNTY FOUNDATIONS OF THE RIGHT TO VOTE

Franita Tolson†

ABSTRACT

In recent years, courts and commentators have focused on the federalism-based limits on the power of the federal government, with significantly less attention given to similar constraints on state power. It is not surprising, therefore, that both camps have overlooked that the Ninth and Tenth Amendments, with their reservation of both rights and power “to the people” contain a popular sovereignty principle that affects the constitutionality of various state election law regulations. This goal of this Article is to reaffirm that the people are, in essence, part of the federalism equation, and not simply as protectors of state power, but as sovereign entities in their own right.

This Article contends that the power that the people had to “alter or abolish” their state governments following the Revolutionary War is the foundation of the right to vote in state elections. The Founding generation considered the alter or abolish power to be a natural right and an expression of popular sovereignty that followed the people into the Union upon the ratification of the Constitution. Once this power was circumscribed during the Civil War era, the people used the right to vote as the vehicle to express this sovereign authority. Thus, voting, as the heir to the alter or abolish power, is part of the bundle of participatory rights preserved by the Ninth and Tenth Amendments’ reservation of “rights” and “power,” respectively, to the people.

Given its genesis, these amendments provide a better conceptual foundation for the right to vote in state elections than the Equal Protection Clause of the Fourteenth Amendment. Respect for its popular sovereignty foundations demand that the U.S. Supreme Court, in assessing burdens on the right to vote, acknowledge the reliance interest that the people retain in actively participating in the democratic process at the state level, an interest preserved by the Ninth and Tenth Amendments. Both amendments illustrate the hybrid nature of suffrage as one part sovereign power and one part fundamental right, which should influence the judicial means-ends assessment of restrictions on the right to vote in state elections.

† Betty T. Ferguson Professor of Voting Rights, Florida State University College of Law. This Article, in one form or another, benefitted from discussions with Tara Grove, Guy Charles, Garrick Pursley, Jake Linford, Areto Imoukhuede, Shawn Bayern, Jay Kestan, Megan Shaner, Hannah Wiseman, Sam Wiseman, and Saul Zipkin, and presentations at the Florida State University College of Law and University of Maryland Francis M. Carey School of Law. Thanks to Kirsten Sencil, Christopher Cabral, and the librarians at Florida State University College of Law for excellent research assistance.

INTRODUCTION

The right to vote is a bundle of contradictions. The Supreme Court has framed it as “preservative of all other rights,” explicitly holding that there is a constitutional right to vote in federal elections.¹ Yet the Court stops short of according the same protection to the right to vote in state elections, even though the Constitution explicitly links state voter qualifications to participation in federal elections.² Part of this confusion stems from the Court’s conception of voting as a right that derives from the Equal Protection Clause of the Fourteenth Amendment, holding that states can choose whether to extend the right, but once available, it has to be extended on equal terms.³ This Article illustrates that voting in state elections is better understood, not as an equal protection fundamental interest subject to retraction at will,⁴ but as the centerpiece of a bundle of participatory rights that citizens used during the Founding era to directly influence and participate in government at the state level. While scholars have acknowledged the connection between voting and popular sovereignty,⁵ none have properly conceptualized it as the rightful heir of the power that the people had to “alter or abolish” their state

¹ Harper v. State Bd. of Elec. See also Lassiter v. Northampton Cty. Bd. of Elec., 360 U.S. 45, 51 (1959) (inferring from various provisions of the Constitution that “the right of suffrage is established and guaranteed” for federal elections but noting that the substance of the right is “established by the laws and Constitution of the State”).

² *Id.* See James A. Gardner, *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. Pa. L. Rev. 893, 894 (“In a contradiction unparalleled in constitutional law, the Court has said both that the Constitution ‘undeniably’ protects the right to vote in state and federal elections and that that the right to vote ‘is not a constitutionally protected right.’”).

³ 14th Am; Harper

⁴ See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 114 (1973) (“The right to vote in federal elections is conferred by Art. I, § 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is ‘preservative of other basic civil and political rights’”). Commentators have criticized the equal protection conception of voting, but still treats right to vote as identical in state in federal elections. See, e.g., Pamela S. Karlan, *Voting Rights and the Third Reconstruction*, in THE CONSTITUTION IN 2020, at 159, 164-65 (Jack M. Balkin & Reva B. Siegel, eds., 2009).

⁵ See, e.g., Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness As a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol’y Rev. 301, 315 (1991) (arguing that voting is “a means to affirm the philosophy of popular sovereignty”); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 487-94 (1994); Bruce Ackerman & Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (2002). See also Gray v. Sanders, 372 U.S. 368 (1963) (linking an equally weighted vote directly to the principle of popular sovereignty).

governments following the Revolutionary War.⁶ After the Civil War, the power to alter or abolish state government was domesticized, as the Reconstruction era rejected the violence inherent in the right due to its role in southern secession, and transitioned to more peaceful expressions of this authority by implementing a more robust right to vote in state constitutions.

The thesis of this Article is that the Ninth Amendment's reservation of "rights to the People" can provide an interpretive framework for understanding the sovereign power "not delegated to the United States" and "reserved... to the people" in the Tenth Amendment,⁷ power that found its expression, first through the "alter or abolish" provisions in state constitutions, and later through the exercise of specific political rights including, most importantly, the right to vote.⁸ Because the right to vote derives from the people's sovereign authority to "alter or abolish" their governments at the Founding,⁹ a power that was not delegated to the federal government upon ratification, both the Ninth and Tenth Amendments illustrate the hybrid nature of voting as a "power-right," or one part sovereign power and one part fundamental right.¹⁰ This framework is reducible to general principles that

⁶ Many state constitutions adopted in the post-Revolutionary era had alter or abolish provisions, which bestowed in people the inalienable right to change or dismantle their state governments at any time.

⁷ U.S. Const. amend. X. Some scholars associate the "alter or abolish" authority with the Ninth Amendment, *see* Akhil Reed Amar, *The Bill of Rights* (describing the power of the people to alter or abolish their governments as "the most obvious and inalienable right underlying the Ninth Amendment"), but arguably, it is better conceptualized as both a natural right to abolish government and a means by which voters express their sovereign power since this authority could be exercised outside of the confines of government institutions. *See* Fritz, *supra* note , at 24 (noting that people were not bound by "existing procedures for change in the Constitution" in exercising the alter or abolish authority).

⁸ The argument that the Ninth Amendment can serve as an interpretive framework for understanding the powers preserved by the Tenth Amendment is a view commonly associated with Kurt Lash. *See* Lash, *supra* note , at 410 ("The Tenth declares the principle of enumerated federal power. The Ninth controls the interpretation of those powers. In situations where Congress has implausibly extended its enumerated powers, this would call into play both Amendments: the Ninth, as establishing the proper rule of construction, and the Tenth, as prohibiting the exercise of any power not fairly attributable to an enumerated power.").

⁹ *See, e.g.,* *Lubin v. Panish*, 415 U.S. 709, 722 (1974) (Douglas, J., concurring) (arguing that the Ninth Amendment is the source of the constitutional right to vote in state elections).

¹⁰ *See generally* James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. Pitt. L. Rev. 189, 203 () (referring to elections in a republican government as "a limited or specialized act of sovereign choice designating a particular individual to exercise specific government powers as the people's agent"). *See also* Vikram David Amar and Alan Brownstein, *The*

courts can employ in assessing the means/ends fit of state election regulations that affect voting rights, and it protects the reliance interest that the people have had, since at least Civil War era, in using suffrage as a means to express their sovereign will.

In critiquing the Court's equal protection jurisprudence, the legal scholarship has ignored the link between voting and state alter or abolish provisions, leading to undertheorized conceptions of the right that do not protect voting rights any more than the Court's flawed version of the right. Much of the scholarly confusion stems from the failure to give meaning to one simple word: "or." The Tenth Amendment in its entirety provides that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."¹¹ The use of the word "or" in the phrase "reserved to the states respectively, or the people" strongly suggests that the people have reserve power that is independent of the powers retained by the state, a possibility that has been ignored because of the state-centered view of the Tenth Amendment that has dominated the legal scholarship.¹² Questions arise about how to translate this power into judicially accessible principles that can protect and give substance to this sovereign authority that the people retain under the Tenth Amendment. The Ninth Amendment,¹³ with its acknowledgement of "certain rights...retained by the People,"¹⁴ arguably provides a workable framework for the

Hybrid Nature of Political Rights, 50 Stan. L. Rev. 915, 925 (1999) ("Voting is about the exercise of power. It operates as the mechanism through which popular sovereignty directs the actions of the government.").

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¹² Cf. Lash, *supra* note at 391-395 (interpreting the retained rights of the people and the autonomy of the states collectively instead of separately). See also Lash, *supra* note , at 31, 33 (arguing that "Madison...equated the retained rights of the states with the collective interests of the 'local' people" because the people retained the ability to replace their representatives at the next election cycle but there are also "numerous references to retained individual rights"). The trend in the legal scholarship has been to conflate the Ninth and Tenth Amendments because both stand for the principle that the powers not delegated to the federal government have been reserved, *see* Randy Barnett, "James Madison's Ninth Amendment," in *The Rights Retained by the People* 8 (1989) (criticizing this approach), but this does not mean that the Tenth Amendment should have no bearing on what rights are retained by the People under the Ninth Amendment, given that both reference the People. See Lash, *supra* note , at 75 (arguing that the term "shall not be construed" in the Ninth Amendment shows that its "sole textual function is control the interpretation of other provisions," notably the Tenth).

¹³ The Ninth Amendment states, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People." U.S. Const. amend. IX.

¹⁴ Most interpretations of the Ninth and Tenth Amendment view them as constraining

sovereign power that the people retain; in fact, many scholars have argued that the Ninth Amendment is the source of the right of the people to alter or abolish government, making it the natural home of the right's predecessor, the right to vote.

Indeed, the popular sovereignty origins of the right to vote are part of a broader tradition of "practical" sovereignty which was, during the revolutionary period, "the principle of the power of the people to destroy the constitution they created,"¹⁵ and this power to alter or abolish later provided the theoretical basis for fundamental law premised on the consent of the govern.¹⁶ The right of revolution that justified the colonists' rebellion against Britain in 1776 evolved from a right to alter or abolish government through sometimes violent means to enforcing fundamental law against "errant rulers" through the exercise of political rights, including the rights of petition, assembly, speech, and, most important, the right to vote.¹⁷ The Civil War era cemented the evolution of this power from one focused

only the federal government. Indeed, one way around this, embraced by some scholars, is to argue that the Ninth Amendment rights constrain the states through the Fourteenth Amendment's Privileges and Immunities Clause. Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. Balt. L. Rev. 169 (2003). See also Griswold, 381 U.S. at 493 (Goldberg, J., concurring) (noting that the Ninth itself does not apply against the states, but that the Fourteenth protects the same set of retained rights). This Article does not embrace the incorporation argument because it obscures the nature of the rights that the Article seeks to protect—those based on the sovereign authority embraced by the Tenth Amendment that owe their existence to the character of state governments at the time of the Founding (rather than at the time of the Fourteenth Amendment). See also Lash, *supra* note , at 245 (rejecting incorporation of the Ninth through the Fourteenth Amendment).

¹⁵ Fritz, *supra* note , at 279. See Lash, *supra* note , at 341 ("Scholars have identified the term "the people," as used in the Bill of Rights and in the Preamble of the Constitution, as an expression of popular sovereignty - the idea that ultimate authority is retained by the people who may alter or abolish their system of government as they see fit.").

¹⁶ Kramer, *supra* note , at 11-13. See also Akhil Reed Amar, *The Consent of the Governed, Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 483 (describing popular sovereignty as a concept that has historically been based on majority rule). While the notion of who "the people" are has changed over the course of the last two centuries, *see* U.S. Const. amend. XV, XIX, XXVI, the idea that "the people" should have the ability to participate in the mechanics of state government, primarily through voting, to a much greater extent than at the federal level has changed very little during this time. *See* Part II, *infra*. *See also* ALEXANDER KEYSAR, *THE RIGHT TO VOTE* (2000). Keyssar notes that "all of the early state constitutions (except that of Delaware) treated the right to vote as a matter of fundamental—and thus constitutional—law, rather than statute law", *id.* at 20, while "citizenship in the new nation – controlled by the federal government – was divorced from the right to vote." *Id.* at 24.

¹⁷ Kramer, *supra* note , at 25 ("The community itself had both a right and a

on violent overthrow to the belief that the legitimacy of government is determined by periodic elections that are an accurate gauge of public sentiment.¹⁸ The Ninth and Tenth Amendments incorporated these majoritarian sentiments, protecting those rights and powers of the people that were central to their status as the ultimate sovereigns.¹⁹ Given these populist origins, voting as a power-right, although a federal constitutional guarantee, is defined primarily by state constitutional law and applies against both the states and the federal government.²⁰

responsibility to act when the ordinary legal process failed, and unconstitutional laws could be resisted by community members...Means of correction and forms of resistance were well-established and highly structured. First and foremost, was the right to vote...Next in importance, though perhaps not effectiveness, was the right to petition, together with what became its corollary, the newly emerging right of assembly.”). See also Fritz, *supra* note , at 281 (noting that his concept of collective sovereign and Kramer’s theory of popular constitutionalism “are not synonymous” because “[p]opular constitutionalism involves actions to interpret and enforce the constitution” and “the idea of [the people as] a collective sovereign is a broader foundational principle that justified the creation, revision, and even the destruction of constitutions”). As Part II shows, theories of collective sovereignty as a justification for constitutional change became less popular because of the violence inherent in the theory’s view that people could “destroy” constitutions, and popular sovereignty through the exercise of political rights became an important replacement that arguably, as Part III illustrates, affected the Constitution’s protection of these rights. See *id.* at 281 (noting that “popular constitutionalism comes into play only when a constitution already exists” and its “effectiveness against official action stems from its exertion of political pressure rather than from a recognition that government is the agent of the people”).

¹⁸ Keyssar, *supra* note , at 24 (stating that the “experience of the revolution—the political and military trauma of breaking with a sovereign power, fighting a war, and creating a new state—served to crack the ideological framework that had upheld and justified a limited suffrage”)

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²⁰ [cite to old supreme ct precedent treating state power as plenary in this area] Textually, it is not clear that the Tenth Amendment has to be read to limit only the powers of the federal government, although such a view may be ahistorical. See footnote *infra*. Nonetheless, the Ninth Amendment does not have to be read in such a limited manner because, unlike the Tenth Amendment, it is not overly burdened by precedent. See *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); See also Massey, *supra* note at 1248. As Massey notes, the Ninth Amendment has not been incorporated against the states through the due process clause of the Fourteenth Amendment because “at least at this point in our constitutional history, there is thought to be virtually nothing to incorporate.” *Id.* Massey argues, however, that “because ninth amendment rights originate in and derive substance from state constitutional law they also apply to the state of origin through the constitution of the state.” *Id.* See also Lash, *supra* note , at 248-267 (reconciling the Ninth Amendment with the Fourteenth Amendment).

This framework is consistent with the framers' expectations that state, rather than federal, law would be the source of the right to vote.²¹

This Article is divided into three parts. Part I shows that the equal protection conception of the right to vote is erroneous and does not account for the reliance interest that people have in participating in governance at the state level, which is central to understanding how voting is a "power-right" that furthers the people's use of their sovereign authority.²² Equal protection wrongly presents the right to vote as permissive in state elections, subject to retraction by state authorities as they see fit, or as it applies to both state and federal elections, subject to extensive and restrictive regulation at the hands of state authorities.²³ In reality, the only context in which the Constitution allows states to retract the right to vote is for presidential elections,²⁴ and its popular sovereignty foundations suggest that the right is mandatory for all other state and federal elections.²⁵ Part II engages in a historical analysis that supports this point, illustrating that, while the rights that people retain against the federal government are necessarily mitigated by the compromises in the text and structure that impose representative government,²⁶ the Republican Form of Government Clause of Article IV ("the Guarantee Clause") mandates only that republicanism serve as a floor, rather than a ceiling, on the type of government that can be adopted at the state level.²⁷ As a result, states have, since the Founding, opted for governments that are significantly more "democratic" than that which exists at the federal level, with the people directly electing almost all of their state officials; and later, enjoying an explicit right to

²¹ See, e.g., Thornton, 514 U.S. 779, 790 (1995) (discussing "a proposal made by the Committee of Detail that would have given Congress the power to add property qualifications" which was rejected because James Madison argued that "such a power would vest 'an improper & dangerous power in the Legislature,' by which the Legislature 'can by degrees subvert the Constitution.' ") (certain internal quotations marks omitted) (quoting *Powell v. McCormack*, 395 U.S. 486, 533–34 (1969)).

²² All states had some variation of the right to vote during the colonial period, the scope of which expanded throughout the Founding era and varied by location. See Keyssar, *supra* note , at 8-21. The right to vote and the burdens that states place on the right also have evolved such that comparisons will have to be drawn. There may not be a popular sovereignty right to participate in early voting, for example, but if the state provided early voting and then rescinded it, the Court would take the popular sovereignty principle into account and closely scrutinize the state's reasons. Cf. http://www.eastvalleytribune.com/arizona/capitol_media_services/article_8a05991e-7f04-11e3-8a04-001a4bcf887a.html.

²³ See *Harper v. Virginia State Board of Elections*

²⁴ See U.S. Const. Art. II, Sec. 1.

²⁵ See

²⁶ See John Manning, *the Generality Problem in Constitutional Law*

²⁷ See Part I, *infra*.

vote and participating directly in lawmaking through initiatives and referenda under virtually all state constitutions.²⁸ Given the choice of democracy as a foundational principle at the state level and, moreover, that the constitutional standard for who can be a “voter” in both state and federal elections is derived primarily from state law,²⁹ part III makes the normative claim that consideration of the popular sovereignty origins of the right to vote require that courts credit the reliance interest that voters had in the preexisting regime that governed their state’s election apparatus. Where the contested state regulation constricts the right to vote compared to the preexisting rule, then the Court should apply heightened scrutiny.³⁰ Thus, the balancing test derived from *Anderson v. Celebrezze*,³¹ *Burdick v. Takushi*,³² and *Crawford v. Marion County*³³ that the Court has employed to assess both direct and indirect restrictions on the right to vote has to be reformulated to replace the Court’s blind deference to state authorities with a framework that assesses regulations from the baseline of both the states’ considerable authority to regulate the electoral arena and the rights of participation that voters retain to participate in state level governance, rights that find their expression through the right to vote.³⁴

²⁸ See, e.g., *Minor v. Happerset*, 88 U.S. 162 (1874) (“It is true that the United States guarantees to every State a republican form of government...The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specifically provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.”). See also Josh Douglas, *The Right to Vote Under State Constitutions*

²⁹ See Wiecek, *supra* note 18-19 (“Democracy, referring to a distinctive form of government, meant the direct, complete, and continuing control of the legislative and executive branches by the people as a whole...all but extreme conservatives by 1787 conceded that a ‘democratic element’ was essential or at least unavoidable in the composition of state governments.”). See also *Arizona v. Inter Tribal Council of Arizona*

³⁰ This is similar to the nonretrogression analysis that the Court used to apply in cases brought under section 5 of the Voting Rights Act.

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³² (cite). See also *Anderson v. Celebrezze*.

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³⁴ In determining the means-ends fit, the Court would utilize principles similar to those embodied by the nonretrogression analysis of section 5 of the Voting Rights Act, which captures the historical reality that voters have a reliance interest in broad participation in the mechanics of state level governance, and states have to come forward with compelling reasons for changing a rule if voters are worse off under the new rule. (cite cases). For example, as the analysis in Part III(B) shows, states have considerable authority to pass voter identification laws, but these laws can be unconstitutional if structured to

I. REVISITING THE EQUAL PROTECTION ORIGINS OF THE RIGHT TO VOTE

Until recently, commentators had taken as a given that the right to vote derived from the Equal Protection Clause of the Fourteenth Amendment, and were content with its dubious origins because the Court was willing to assess infringements of the right under strict scrutiny.³⁵ This support has proven to be fatal as the conception of the right to vote as an equal protection fundamental interest, rather than as a fundamental right under related doctrines such as substantive due process,³⁶ provided an opening for the Court to reduce its scrutiny of laws infringing on the right. As this section will show, the equal protection principles underlying the Supreme Court's voting jurisprudence are best applicable to presidential elections; when applied in other contexts, the Court oscillates between different conceptions of the right to vote because it lacks a clear theoretical foundation for understanding the value of a vote.³⁷

Scholars have grouped the Court's approach into individual and structuralist theories of the right to vote in an attempt to understand the harm to individual voters and, in the process, illustrate the ill fit of the equal protection framework.³⁸ Here, I focus on two related theories—communitarian and protective theories of democracy—both of which do an excellent job of explaining the Court's jurisprudence in the last four decades, but only one of which, the protective democracy theory, highlights the problems with the equal protection framework by

unreasonably constrict the electorate and leave voters worse off. See also Barnett, *supra* note , at 11-16 (embracing a power-constraining approach to interpreting the Ninth Amendment in which courts interpret unenumerated rights by reference to the means-ends fit of the legislation in question rather than as the converse of delegated powers).

³⁵ 79 NCL Rev. 1345

³⁶ Ira Lupo

³⁷ See Dan Rodriguez, *Got Theory?* See also Rick Pildes, What Kind of Right is “The Right To Vote”?, 93 Va. L. Rev. *In Brief* 43, 44 (2007) (“Not only does the right to vote protect several different core interests, but these interests are also qualitatively distinct. Put in other terms, there is not one right to vote. There is several.”)

³⁸ See Joseph Fishkin, Equal Citizenship and the Individual Right to Vote, 86 Ind. L.J. 1289, 1292 (arguing that the individual rights framework is appropriate for assessing the new vote denial cases, which deal with issues of who can vote rather than questions of how to aggregate votes to ensure fairness and equality among groups). See also Richard L. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* 139, 154 (2003) (rejecting a structuralist approach to voting rights cases); Chad Flanders, *How to Think About Voter Fraud (And Why)*, 41 Creighton L. Rev. 93, 150 n.138 (2007) (siding with the “individualist” rather than the “structuralist” analysis of voter fraud controversies).

placing voting within the larger scheme of democratic governance,³⁹ emphasizing the accountability of elected officials that is key is to the right to vote being able to function as a mechanism for popular sovereignty.⁴⁰ Similar in some respects to aspects of the structuralists critique, theories of protective democracy conceptualize voting as a means to allow the citizenry to control the actions of their government when key liberties are threatened, and as a result, is closely related to the exercise of popular sovereignty.⁴¹ But the assessment is significantly

³⁹ See, e.g., Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 *Ind. L.J.* 1289, 1292 (“The individual-rights- versus-state-interests doctrinal framework plainly was not capturing the real interests at stake on both sides of these cases. Structuralist scholars urged the Court to reorient its jurisprudence toward promoting the interests of the whole polity, framed in terms of democratic values: competitiveness, participation, “democratic contestation,” the disruption of “lockups,” and other indicia of a healthy democratic order.”)

⁴⁰ See also Pildes, *supra* note , at 44 (arguing that the individualistic vs. group rights analysis should not be the starting point, but instead scholars should focus on the fact that “the right to vote protects several distinct interests [including] the expressive interest in equal protection standing that inheres to each citizen [as well as] the interests groups of citizens have in systems of election and representation that distribute political power ‘fairly’ or ‘appropriately’ as between these various groups”). There is a robust literature debating the shortcomings of the individual rights framework for conceptualizing the right to vote. See, e.g., Guy-Uriel Charles; Joseph Fishkin; Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 *Harv. L. Rev.* 2276, 2282 (1998); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 *U. Chi. Legal F.* 83, 84; Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 *Cal. L. Rev.* 1201, 1202-03 (1996); Pildes, *supra* note 19, at 2544 n.133; Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 *Mich. J. Race & L.* 389, 432-40 (1999); John R. Low-Beer, *Note, The Constitutional Imperative of Proportional Representation*, 94 *Yale L.J.* 163, 164 (1984). But see Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, 26 *Rutgers L.J.* 723, 734-35 (1995). See generally Lani Guinier, *The Supreme Court, 1993 Term - Comment: Erasing Democracy: The Voting Rights Cases*, 108 *Harv. L. Rev.* 109 (1994). Implicit in this debate is that the framework is inadequate for federal elections since as Heather Gerken has argued, representative government is premised on the assumption that “individuals can collaborate to elect a person to speak on their behalf.” Gerken, *supra* note , at 1678. There are different assumptions that undergird the right to vote in the state elections, where voters are directly involved in matters of governance and the accountability function of elections is salient. See Part II, *infra*.

⁴¹ This discussion of protective and communitarian theories of voting builds on a wonderful article written by Jim Gardner, who persuasively illustrates how these theories apply to the Court's conception of the right to vote. See Gardner, *supra* note , at 901-02 (“to seek to vote under... a theory [of protective democracy] is to seek the ability to protect one's liberty by controlling the identity of officeholders and, indirectly, their actions”). There are a number of democratic theories that could provide a framework for

more pluralistic than that offered by structuralists because while it does not ignore the bottom line metrics such as the decline of competition, turnout, and overall levels of participation that drive the structuralist critique, these metrics are not dispositive.⁴² Instead, this approach highlights the instrumental value of voting as a means of holding elected officials accountable to the sovereign authority of the people, but it does so from the baseline of assessing the levels of participation that the people have historically enjoyed in the state.⁴³ It provides historical context for understanding when measures are truly “anti-democratic.” In contrast, theories of communitarian democracy contend that voting is important because “it is the hallmark of full membership in the political community,” and this approach focuses on the message conveyed by extending or retracting voting rights from certain individuals.⁴⁴

The Court has fluctuated between these two theories because it has treated voting as both a right and a privilege, with cases decided in the 1960s as the high water mark for voting’s conception as a right, but subsequent decades seeing a retraction of the right.⁴⁵ In 1966, the Court decided *Harper v. Board of Elections* and held that voting is a fundamental interest under the Equal Protection Clause of the Fourteenth Amendment, and as such, once the right to vote is extended, then it must be extended equally.⁴⁶ *Harper* struck down a poll tax on the grounds that

understanding the right to vote in state elections. See, e.g., David Held, *Models of Democracy*; C.B. Macpherson, *The Life and Times of Liberal Democracy*; Cass R. Sunstein, *The Partial Constitution*; James Fishkin, *Deliberation by the People Themselves: Entry Points for the Public Voice*, 12 *Election L.J.* 490, 490, (2014); Lani Guiner, *More Democracy*, 1995 *U.Chi. L. Forum* 1. While a robust right to vote is certainly consistent with most of these theories, protective democracy accords best with the popular sovereignty origins of the right because it captures its unique status as one part right and one part power.

⁴² Cf. Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 *Hastings Const. L.Q.* 643, 675-77 (2008); Spencer Overton, *Voter Identification*, 105 *Mich. L. Rev.* 631, 634, 657-58 (2007).

⁴³ See Part II, *infra*.

⁴⁴ *Id.* at 902. This is not “expressiveness” in the sense of voters using the ballot to communicate a message. See *Burdick v. Takushi*; *Doe v. Reed*. It is expressive in the message that is sent to the broader community about denying some residents access to the ballot.

⁴⁵ See, e.g., *Storer v. Brown*, 415 U.S. 724, 730 (1974) (noting that there is “no litmus-paper test for separating those restrictions that are valid from that there are invidious under the Equal Protection Clause...Decisions in this context...is very much a matter of degree, very much a matter of considering the facts and circumstances behind the law...”).

⁴⁶ *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), *overruling Breedlove v. Suttles*, 302 U.S. 277 (1937).

invidiously discriminated on the basis of wealth, marking a notable departure from a case decided just seven years earlier, *Lassiter v. Northampton County Board of Elections*, where the Court applied rational basis review to a state law requiring all individuals take a literacy test as a prerequisite to voting.⁴⁷ Similarly, *Reynolds v. Sims* established that the states' failure to reapportion their state legislative districts violated the Equal Protection Clause of the Fourteenth Amendment because malapportionment, like the poll tax at issue in *Harper*, unduly infringed the right to vote. In so holding, the Court noted that, "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."⁴⁸ The Court then adopted a principle designed to prevent the vote dilution that had persisted through the states' failure to redistrict: one person, one vote.⁴⁹ Both *Harper* and *Reynolds* presented opportunities for the Court to intervene and address what it considered to be egregious abridgments of the right to vote. These extremes did not require the Court to establish a baseline from which to adjudge the harm of malapportionment,⁵⁰ or alternatively, an affirmative vision of state regulatory authority over elections.⁵¹

Consequently, neither *Harper* nor *Reynolds* stand for the proposition that the right to vote in state elections has to exist, even if the corresponding right to vote in federal elections must exist.⁵² Rather, the Court focused on what the Constitution

⁴⁷ 360 U.S. 45 (1959).

⁴⁸ *Reynolds*, 377 U.S. at 660-561.

⁴⁹ *Id.* at 569 ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.").

⁵⁰ See, e.g., Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket*, 1986 SUP. CT. REV. 175, 191 (1986) (observing that "it was the gerrymander [emerging through malapportionment] that led the Court to respond, not the population discrepancies in and of themselves. Had those discrepancies been random, operating to the detriment of rural interests and to the advantage of urban interests as often as the other way around, it is unlikely that these discrepancies would have generated sufficient concern to have induced the Court to enter the political thicket").

⁵¹ See *Lassiter*, 360 U.S. at ("We do not suggest that any standards which a State desires to adopt may be required of voters," but noting that "there is wide scope for exercise of its jurisdiction").

⁵² *Id.* ("While the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution, the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or a fee. We do not stop to canvass the relation between voting and political expression.").

requires should states decide to extend the right of suffrage, a focus that ultimately did more harm than good as the Court has decreased its level of scrutiny of voting regulations in the years since *Harper*.⁵³ Numerous scholars have criticized this turn, noting that the equal protection standard allows the Court to avoid the question of *what* voting requires.⁵⁴ This standard also blurs the line between state and federal elections, which impacts not only the breadth of the state's regulatory authority but also, conceptually, whether the right is mandatory or optional for state elections.⁵⁵ The Court focuses on the relative burdens on the right to vote, defined by reference to community norms regarding political influence, against the backdrop that states enjoy plenary authority to structure state and federal elections, and it does so without a theoretical justification that adequately explains why any given regulation can be a "burden" because it has no affirmative theory of voting.⁵⁶

The absence of theory is palpable once one separates out the instrumental value of voting, which varies depending on the election at issue. Given the size of the electorate in national elections, the vision of voting as based on a message of inclusion rather than a form of accountability is more compelling because the accountability function is diluted.⁵⁷ At the state level, however, voting is the most effective way for citizens to express their sovereign authority, and in turn, protect their fundamental rights, from government invasion, consistent with the theory of protective democracy. As James Gardner has argued, a right to vote premised on this theory forces the Court to commit to a finite and clear conception of the right

⁵³ See Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 1972 WASH. U.L.Q. 421, 450 ("The equal protection clause was clearly not intended to include the right to vote.").

⁵⁴ See, e.g., Heather Gerken, The Right to An Undiluted Vote

⁵⁵ See, e.g., *Arizona v. Inter Tribal Council of Arizona* (holding that the National Voter Registration Act, passed under the Elections Clause, preempts a contrary state law, but noting in passing that Congress has no control over voter qualifications for state or federal elections).

⁵⁶ Gardner, *supra* note , at 900 (noting that "[v]oting has no intrinsic value"). See also Ira Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981 (1979).

⁵⁷ In our 200 plus years history, there have only been four presidential elections decided by a margin of less than one percent of the popular vote. In state elections, this is far more common. See, e.g., http://www.washingtonpost.com/opinions/government-has-to-make-voting-easier/2014/02/02/ae99345a-8875-11e3-916e-e01534b1e132_story.html. While this Article focuses on the accountability function of voting, this does not exclude the fact that there are other reasons why people vote. See Fishkin, *supra* note , at 1336, 1355 (eschewing the "rational choice model of [of voting that focuses on] one's impact on an election outcome" in favor of a theory of voting that emphasizes the "dignity inhering in the idea that my vote counts just as yours counts-that I am, with respect to the right to vote, your equal.").

to vote, hence its awkward turn to the Equal Protection Clause.⁵⁸ *Harper* and *Reynolds* are cases that embrace a protective democracy theory of voting, designed to facilitate popular sovereignty by eliminating effective barriers to voting, yet it is the communitarian vision that has come to dominate the caselaw.⁵⁹ For example, in *Kramer v. Union Free School District*, the Court held that the a childless stockbroker who lived with his parents could not be excluded from school board elections because the state had failed to tailor the statute to avoid unduly narrowing the scope of the relevant political community.⁶⁰ To vote in school elections in that particular district, the statute required that individuals 1) own or lease taxable real estate in the district or 2) have children who are enrolled in district schools. The Court found that the state had not, with any precision, limited the franchise to those “directly affected” or “primarily interested” in the school elections because the statute allowed many people who had, at best, a remote interest to vote in the elections at the expense of excluding “interested and informed residents.”⁶¹

Scholars view *Kramer* as an extension of *Harper*’s strong conception of the right to vote as a fundamental interest,⁶² indicating that it too may have a foundation in protective democracy; nonetheless, it is difficult to view the plaintiff, *Kramer*, as suffering harm in the traditional sense given that he has no children and no taxable property in the district in which he desires vote. His interest is fairly remote, but implicit in the opinion is that his “injury” is an expressive one, an indication to outsiders that he had been excluded from the political community unfairly, in lieu of other, less interested persons who could vote in the school board elections.⁶³ Thus, *Kramer* is best understood as reflecting a communitarian view of the right to vote, which trumps the protective democracy theory in this instance because of the inherent flexibility of the equal protection standard in assessing relative burdens.⁶⁴

⁵⁸ Gardner, *supra* note , at 941 (“the inherent logic of a protective democracy-based voting rights claim forces the Court to do something that it has never wanted to do: commit itself to the principle that the Constitution creates a definite, judicially discernible structure for the exercise of popular political power. The reasons the Court has historically given for wanting to avoid this task go to its view of its own competence. Another reason, however, may well be that the Court wishes to avoid publicly pronouncing the unappealing conclusion that the Constitution provides Americans with a level of political influence that is not merely minimal, but unacceptable by contemporary standards of democratic self-government.”).

⁵⁹ Gardner, *supra* note , at 975.

⁶⁰ 395 U.S. 621 (1968) (“Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”).

⁶¹ *Id.* at 633.

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⁶⁴ Gardner, *supra* note , at (arguing that, because of the equal protection framework,

The judicial focus on the right to vote as an indicator of political inclusion, rather than as a means of vindicating sovereign power, does little to explain why one regulation may be a burden on the right to vote relative to others.⁶⁵

To understand this point, consider *Holt Civic Club v. City of Tuscaloosa*, where the Court held that individuals who resided in the police jurisdiction of Tuscaloosa, and therefore were subject to Tuscaloosa's police and sanitary regulations, were properly excluded from voting in municipal elections because they lived outside city boundaries.⁶⁶ The Court held that this was not disenfranchisement in any meaningful sense because the plaintiffs, although affected by the extraterritorial effect of municipal regulations, did not have a direct interest in participating in the elections since they did not physically reside in the Tuscaloosa's geographical boundaries.⁶⁷ Oddly, the Court's sees voting in this context as instrumental, but in a very limited sense, where the only function of voting is to promote the political interests of those who are informed or directly affected, with very narrow view of who fits in either category.⁶⁸ The expressive, communitarian notion of voting, so central to *Kramer*, is still relevant in *Holt* but it commanded a different outcome due to the narrowness with which the Court defined the political community. The Court did not think that the exclusion of these voters sent any particular message since they are already excluded from the political community by virtue of geography. The Court makes this assumption, even though the residents of Holt are subject to Tuscaloosa's police and sanitary regulations, and arguably suffered more concrete injury than the 31-year-old childless stockbroker.⁶⁹ Had it recognized the right's popular sovereignty foundations, the Court would have

the Court has been more receptive to claims of voting that are communitarian rather than based on protective democracy).

⁶⁵ Gardner (paren about baseline)

⁶⁶ 439 U.S. 60 (1978)

⁶⁷ *Id.* at 68-69.

⁶⁸ Expressive Voting, 68 N.Y.U. L. Rev. 330 (describing the Court's "instrumental power" approach in voting cases which "allows states to disenfranchise in order to promote an "intelligent" electorate or to insure that voters have a direct stake (or "interest") in the outcome. The underlying basis for such distinctions, while never explicitly articulated, is a notion that those who fail to meet the qualifications cannot define with specificity their policy choices in a rational and informed way and pursue such choices through voting").

⁶⁹ See Gardner, *supra* note , at 912 ("Compared to the plaintiffs in *Holt*, the plaintiff in *Kramer* had a far less plausible claim that his inability to vote impaired in any significant way his ability to protect his rights and liberties from government infringement. The residents of *Holt* were subject to all manner of laws, including criminal and traffic offenses, made by Tuscaloosa officials. As a result, any claim by *Kramer* based on a theory of protective democracy would have had to rely on a far more attenuated connection between the actions of the school board and the plaintiff's rights and interests than existed in *Holt*.").

appreciated that the burden on Holt residents had little to do with geography. The harm resulted from the deprivation of *sovereign* authority, which requires that the delegation of power to Tuscaloosa be contingent upon those subject to its laws retaining the right to vote as an accountability mechanism, even if those individuals reside outside city boundaries.⁷⁰ Instead, the equal protection framework allowed the Court to rely on its own subjective perception of what constituted a burden, a result that often prioritizes the communitarian theory of the right to vote over the protective democracy view.⁷¹

Despite the Court's theoretical shortcomings, there is a role for equal protection principles to play in assessing the constitutionality of state electoral regulations. Implicit in the equal protection standard is the notion that the right to vote can be rescinded, a point that is consistent with communitarian notions that the value of the vote lies, not in its instrumental value, but in its signal that one is part of the political community.⁷² If the right is rescinded from everyone, then no one is "excluded" and therefore suffers a cognizable injury.⁷³ Moreover, if one looks at the history and the text of the Constitution, the only context in which the right to vote explicitly can be rescinded is in presidential elections, suggesting that its conception as an equal protection fundamental interest should be limited to that context.

Bush v. Gore, which ended the Florida recount in the 2000 presidential election on equal protection grounds, is instructive here.⁷⁴ The Florida Supreme Court had ordered a manual recount in all Florida counties where the undervotes had not been tabulated, but did not set standards for conducting the recount.⁷⁵ Since the Florida Supreme Court did not establish uniform rules for determining voter intent in tabulating the undervotes, the U.S. Supreme Court held that the recount that had

⁷⁰ See Gardner, *supra* note , at 908-09 ("[T]he basis of the plaintiffs' invocation of the right to vote is an almost paradigmatic expression of a theory of protective democracy. The plaintiffs did not contend that the police jurisdiction of Tuscaloosa could not be extended beyond its boundaries, but that it could not be so extended without a concomitant extension of the franchise....In other words, they did not want to be subjected to laws enacted by representatives whom they had no hand in choosing and over whom they exercised no effective control.").

⁷¹ Gardner, *supra* note (making this point).

⁷² See Harper

⁷³ Gardner, *supra* note , at 973 ("The heart of a communitarian democracy claim is the contention that the government has given the plaintiff less than it has given others, a claim with obvious similarities to a *prima facie* claim of unequal treatment under equal protection principles.").

⁷⁴ 531 U.S. 98 (2000).

⁷⁵ *Id.* at 100. The Florida Supreme Court also ordered a full recount in some counties, further compounding the equal protection problems. *Id.* at 107-108.

the effect of “valu[ing] one person’s vote over another,” violating the Equal Protection Clause’s guarantee against “arbitrary and disparate treatment.”⁷⁶ Like *Reynolds v. Sims*, the Court presented the core problem with the recount as one in which an individual’s vote either counts or is discarded by virtue of which county he resides in.⁷⁷ Equal protection requires that states “value” votes equally, a standard that “extends beyond the initial allocation of the franchise.”⁷⁸ Opening the door for an equal protection challenge to the nuts and bolts of election administration was arguably not the Court’s intent, given that the disparate counting of votes always exist in every election. So either *Bush v. Gore* cannot mean what it says, hence the “ticket good for one day only” criticism that has followed the decision,⁷⁹ or there is something unique about the presidential context that justifies a robust use of the Equal Protection Clause in this context.⁸⁰

While both of these premises suggest that the equal protection holding of *Bush v. Gore* does not apply to the nuts and bolts of election administration outside of the context of presidential elections, it is the latter point that is most relevant here in explaining why this might be the case.⁸¹ Notably, the Court did not hold that Florida may not vary the way in which it counts its ballots by county, or alternatively, that the mechanisms for counting votes in every election must ensure that every voter’s ballot is treated the same.⁸² Instead, the Court is upfront that this situation is unique precisely because it implicates Article II, section 1, which delegates to the states the authority to choose how electors are appointed.⁸³ The fact that *Bush v. Gore* is an equal protection case is a bit of a fluke, an approach dictated by the Florida state legislature’s choice to extend the right to vote to its citizens rather than standing as any indication that the Court is embracing an affirmative vision of what the right to vote entails—protective democracy,

⁷⁶ *Id.* at 105

⁷⁷ *Id.*

⁷⁸ *Id.* at 104.

⁷⁹ Karlan, *supra* note , at 1363 (referring to *Bush v. Gore* as a rare equal protection case in which the Court has “leveled down,” and the inequality is remedied by “depriving the previously included group” of the benefit by ending the recount); 68 U. Chi. L. Rev. 757; 68 U. Chi. L. Rev. 637; Klarman, 89 Cal. L. Rev. (2001).

⁸⁰ See *Bush v. Gore*, 531 U.S. 98, 111 (Rehnquist, C.J., concurring) (making this point).

⁸¹ Cf. Ohio Cases using *Bush v. Gore*

⁸² See *id.* See also *id.* at 112 (Rehnquist, C.J., concurring) (“We deal here not with an ordinary election, but with an election for the President of the United States.”); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (“In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.”).

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communitarian, or otherwise. *Bush v. Gore* signals the opposite, in fact. The Court's failure to hew to any one theory of voting is not immediately apparent, as it seems to endorse the same vision of voting from *Kramer* in finding that the state has to "value" votes equally, yet the Court's failure to hold that Florida *generally* may not vary the way in which it counts its ballots by county, or alternatively, that the mechanisms for counting votes in every election must ensure that every voter's ballot is treated the same, illustrate that the case is not of the same vein as *Kramer*.⁸⁴

In reality, the theoretical foundation of voting is less important in the context of a presidential election because it is the one situation in which the state can in fact rescind the right to vote;⁸⁵ thus, equal protection makes sense as a framework for assessing the grounds that states have extended the franchise in this context because it is unique among constitutional provisions that govern the involvement of states in federal elections.⁸⁶ The presidential context is one in which the right to vote, standing alone, is arguably not as robust as other circumstances because the states' authority to deprive their citizens of this right is both historically and textually grounded, but once the right is extended, state regulations that curb it should be reviewed under strict scrutiny given the national interest at stake.⁸⁷ Even if the right to vote is defined by state law, the scope of a national election as well as the discretion provided to the legislatures by the constitutional text undermines any possibility of an affirmative vision of the right to vote in this context;⁸⁸ all that remains is a system of minimal entitlements defined by the efficacy of one vote vis a vis another.

For this reason, it may be best to view the right to vote in the context of presidential elections as different, both descriptively and normatively, and therefore inappropriate for establishing the standards by which the Court

⁸⁴ See Karlan, *supra* note , at 1364 (arguing that *Bush v. Gore* is about structural equal protection, or the "perceived systemic interest in having recounts conducted according to a uniform standard" rather than vindicating "the interest of an identifiable individual voter").

⁸⁵ *Bush*, 531 U.S. at 104 (noting that "no federal constitutional right to vote for electors for the President of the United States").

⁸⁶ See McConnell, *supra* note , at 661 (noting that Article II, Section 1's delegation to the legislatures of determining electors for presidential elections "puts the federal court in the awkward and unusual posture of having to determine for itself whether a state court's 'interpretation' of state law is an authentic reading of the legislative will").

⁸⁷ See, e.g., http://lubbockonline.com/stories/120900/nat_120900078.shtml. See also Michael McConnell, 68 U. Chi L. Rev. 657 By specifying "the Legislature" as the source of state law, [Article II, Section 1] departs from the usual principle of federal constitutional law, which allows the people of each state to determine for themselves how to allocate power among their state governing institutions.").

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determines whether the right to vote has been abridged. In *Anderson v. Celebrezze*, the Court created the balancing test currently applied to regulations affecting the right to vote, but subsequently has ignored that the test was developed in the context of restrictive ballot access laws affecting candidates for the presidency.⁸⁹ The Ohio law at issue in *Anderson* required independent candidate to declare their candidacy earlier than the nominees of the two major political parties. Even though the Court previously had upheld ballot access restrictions in order to promote the state's interest in avoiding political fragmentation, it was "in the context of elections wholly within the boundaries" of the state. In contrast, the "State's interest in regulating a nationwide presidential election is not nearly as strong."⁹⁰ Despite this language, there is no acknowledgment, as in *Bush v. Gore*, that presidential elections are different; instead, the Court has simply extended the balancing test to every electoral context, with no delineation of the election at issue. Recently, in *Crawford v. Marion County*, the Court applied the *Anderson* balancing test to assess the burdens of a voter identification law on the right to vote, with no acknowledgment of the context in which the law was being applied.⁹¹ *Crawford* struggled to reconcile *Harper* and *Anderson*, relegating strict scrutiny to "rational restrictions on the right to vote [that are] unrelated to voter qualifications" and reserving balancing for everything else.⁹² The problem is that the Court's appropriation of equal protection analysis into the context of all elections, despite its limited use in those circumstances where the legislature has delegated its authority under article II, section 1 to choose presidential electors directly to the voters, has not stopped lower courts from applying a similar equal protection analysis to regulations of the right to vote across the board, no matter what the interests at stake or the election as issue.⁹³ Using standards developed in the presidential context as precedents to assess electoral regulations in other, more pedestrian, contests obscures the harm of the regulation and minimizes the right that is at stake. As the next section shows, the popular sovereignty foundations of the right to vote undermine the equal protection foundation that implies that states can rescind the right to vote at will, even for their own elections.

⁸⁹ 460 U.S. 780. Some might argue that this deference was unwarranted, even in the context of presidential elections. See generally Gardner, *supra* note at 969 ("One of the earliest manifestations of a tension between the constitutional scheme and popular American beliefs about democracy was the almost immediate collapse of the electoral college. Intended to be a body of wise and virtuous citizens exercising independent judgment, it quickly devolved into a reliable conduit for the implementation, as nearly as possible within constitutional constraints, of a form of direct presidential election.").

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⁹² *Crawford v. Marion County*, 553 U.S. 181, 189 (2008). See also *Burdick v. Takushi*

⁹³ [cite cases]. See also *Crawford v. Marion County*

II. THE RIGHT TO VOTE AS A POWER-RIGHT UNDER THE NINTH AND TENTH AMENDMENTS

The Supreme Court conceives of the Ninth and Tenth Amendments as textually based limits on the authority of the federal government,⁹⁴ the Tenth Amendment in particular defined only by those portions of the Constitution that explicitly delegate power to each of the three branches and the Ninth rarely mentioned beyond the occasional concurring opinion.⁹⁵ While this principle of a limited federal government has not been consistently adhered to, the last three decades has witnessed a revitalization of Tenth Amendment constraints on federal power, with the Court holding, for example, that Congress infringes on state sovereignty when it forces states to take title for radioactive waste generated within their borders;⁹⁶ stating that Congress cannot compel state officials to administer federal law;⁹⁷ and requiring a clear statement from Congress before the Court will treat state legislation as preempted.⁹⁸ Recently, the Court has expanded the sphere of Tenth Amendment enforcement to include individuals, holding in *Bond v. United States* that a person convicted under federal law can challenge their conviction on Tenth Amendment grounds.⁹⁹

Yet implicit in this jurisprudence is the assumption that only the states, and not individuals, have cognizable interests under the Tenth Amendment because the Court has assumed that, with respect to the constitutional structure, the interests of the people are perfectly aligned with those of the state.¹⁰⁰ Even the *Bond* Court, which recognized that individuals “can assert injury from governmental action taken in excess of the authority that federalism defines” and that their rights “in this regard do not belong to the state,” would not go as far as to say that individuals have reserve “power” under the Tenth Amendment because such power does not translate easily into the rights/power framework with which we are accustomed.¹⁰¹ Thus, the decision to allow an individual to enforce the boundaries

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⁹⁵ See, e.g., *U.S. Term Limits v. Thornton*

⁹⁶ *New York v. United States*, 505 U.S. 144 (1992).

⁹⁷ *Printz v. United States*, 521 U.S. 898 (1997).

⁹⁸ *Georgia v. Ashcroft*, 501 U.S. 452 (1991).

⁹⁹ *Bond v. United States*, 131 S. Ct. 2355 (2011).

¹⁰⁰ Probably the most famous iteration of the Ninth Amendment is in Justice Goldberg’s concurrence in *Griswold v. Connecticut*, although it has appeared from time to time. See also *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (plurality opinion based in part on the Ninth Amendment).

¹⁰¹ Instead, the Court frames the liberty that individuals have under the Tenth Amendment as a derivative of the diffusion of the power between the two sovereigns. and aligns the individual’s interests with those of the state. *Bond*, 131 S. Ct. at 2364.

of federalism became an issue of standing, rather than a reflection of the sovereignty that the people retain vis a vis their states.¹⁰²

Few, if any, scholars have probed whether the delineation in the Tenth Amendment of the powers that are “reserved to the states,” on one hand, **or** “to the people,” on the other, signify that the people have powers under the Tenth Amendment that are distinct and separate from the states, nor is there much discussion about how this authority can be furthered.¹⁰³ While this Article does not weigh in on the broader debates surrounding which rights are protected by the Ninth Amendment,¹⁰⁴ it views the Ninth Amendment is an indispensable medium to facilitate the people’s Tenth Amendment sovereignty, as most scholars agree that the phrase “or to the people” in the Tenth Amendment concern the allocation of sovereignty rather than stand as a source of potential unenumerated rights.¹⁰⁵

Unlike the courts, the legal scholarship has exhibited more comfort with the idea that the people retain power, analyzing at length the extent to which popular sovereignty principles constrain governmental action.¹⁰⁶ However, most of the debate has taken place within the framework of judicial supremacy, or whether the Supreme Court or the people have the final say about the meaning of the Constitution,¹⁰⁷ with occasional discussion about how the people best express their

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¹⁰³ See Lash, *supra* note , at 391-392 (arguing that the Ninth Amendment was intended to protect the power of the states, but not delineating between the interest of the states and those of the people). Lash assumes that when the federal government exceeds its enumerated power, it encroaches on areas of law reserved to the states, presumably power that the states would exercise on behalf of the people. *Id.* 394 (“Madison conceived the Ninth Amendment in response to calls from state conventions that a provision be added limiting the constructive expansion of federal power into matters properly belonging under state control...A rule of construction guarding the retained rights of the people amounted to the same thing as limiting the power of the federal government to interfere with matters believed left to state control.”).

¹⁰⁴ 1990 Wis. L. Rev. 1229, 1238 (noting that even during the debates contemporaneous to the adoption of the Ninth Amendment, there was not a consensus as to which rights were protected).

¹⁰⁵ Massey, *supra* note at 1239.

¹⁰⁶ See, e.g., 112 Harv. L. Rev. 434, 443 (1998) (arguing that, to the extent that the legitimacy of government hinges on popular consent, then “each person’s voice must be given equal weight” and “each person’s voice should be heard as fully and accurately as possible.”); Akhil Reed Amar & Alan Hirsch, *For the People: What the Constitution Really Says About Your Rights* 3-33 (using theory of popular sovereignty to argue that the Constitution can be changed through majority vote).

¹⁰⁷ Larry Kramer has, most famously, pushed back against the widely accepted premise of judicial supremacy on popular sovereignty grounds, arguing that the Constitution is not ordinary law, “not peculiarly the stuff of courts and judges;” rather, it is “a special form of

sovereign will.¹⁰⁸ Some scholars also study how popular sovereignty manifests itself procedurally within the Constitution's framework,¹⁰⁹ but most fail to give extended thought to how the Constitution preserves certain rights that derive almost entirely from state law in order to facilitate popular sovereignty.¹¹⁰

A. *The People's Authority to Alter or Abolish Their State Governments as the Predecessor of the Right to Vote*

Under traditional political theory, as the sovereign, people could act collectively to abolish the government or alter it through violent means.¹¹¹ Scholars typically associate mob action as the purest expression of the people's sovereign authority.¹¹² The belief that the people could resist the government through extra-constitutional mechanisms and by revising their constitutions without limit was based on a theory of inherent rights, and it was broader than the original right of revolution that prompted the war with Great Britain.¹¹³ Five of the eleven states that drafted constitutions in 1776 contained alter or abolish provisions,¹¹⁴ while others had amendment provisions similar to Article V.¹¹⁵

popular law, law made by the people to bind their governors." *But see* Larry Alexander & Lawrence B. Solum, Book Review: Popular? Constitutionalism?, 118 Harv. L. Rev. 1594, 1640 (2005) ("Kramer has pushed the idea of popular sovereignty to its limit by embracing the idea of constitutional interpretation by mob...it seems clear that, in its purest form, popular constitutionalism is about as unattractive as a constitutional theory could possibly be").

¹⁰⁸ For notable examples, see Fritz; Michael Kent Curtis, *Free Speech: The People's Darling Privilege: Struggles for Freedom of Expression in American History*

¹⁰⁹ 8 Seton Hall Const. L. J. 363, 412 (1998) (arguing that the Constitution limits the use of supermajority requirements "to instances that would reinforce popular sovereignty").

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¹¹¹ Fritz at 17. Because the people retained the ability to abolish their state governments, this is why the authority of the people and the power of the states treated, in most respects, as identical. Lash, *supra* note , at 394. This assumption was also driven in part by a view of the Founding generation that the states were too democratic and too reflective of the desires of the citizenry; given this link, it made sense for the framers to equate, as Kurt Lash argues, the "prerogatives of the people with the autonomy of the states." *Id*

¹¹² Larry D. Kramer, *The Supreme Court 2000 Term: We the Court*, 115 Harv. L. Rev. 4, 27 (2000) ("Mobbing was an accepted, if not exactly admired, form of political action - common in England and on the Continent as well as in America. Mob action represented a direct expression of popular sovereignty, justified as a last resort by the writings of Grotius, Puffendorf, and Locke, not to mention long tradition.").

¹¹³ *Id.* at 22.

¹¹⁴ DINAN, *SUPRA* note ; FRITZ, *SUPRA* note , at 24.

¹¹⁵ *See generally* Amar, *supra* note , at 487 (noting that various states had constitutional clauses that looked like Article V, but arguing that these "Article V

As Christian Fitz has argued, there were competing views at the Founding about how the power to alter or abolish government should be domesticated from its violent, British origins: that the “collective sovereign expressed its will only through the use of procedural mechanism,” or alternatively, “collective sovereignty meant that ‘the people’ could express their will directly...without using formal procedures.”¹¹⁶ These competing strands took root at different levels of government, with the federal government utilizing Article V as its own unique version of the alter or abolish theory popularized by the Revolutionary War.¹¹⁷ In contrast, state governments were not as formalistic, initially allowing the people significant authority to revise their state constitutions at will,¹¹⁸ but by the Civil War, facilitating this authority through individual rights that allowed the people to control the composition of government.

1. Article V and Alter or Abolish at the Federal Level

The Constitution of 1787 is an attempt to tie the expansive authority of the new government to the most credible source, the “sovereign” people, but without the chaos that had accompanied popular sovereignty at the state level.¹¹⁹ In trying to

analogues were not...as exclusive” and “the polity had retained the legal right to alter or abolish outside these analogues by simple majority vote”).

¹¹⁶ *Id.* at 268.

¹¹⁷ See Fitz, *supra* note , at 25 (describing the alter or abolish principle that came out of the Revolutionary War as one that gave the people authority “to revise their constitutions without limit”). See also Brannon Denning, *Means to Amend: Theories of Constitutional Change*, 65 *Tenn. L. Rev.* 155, 178 () (“Article V can be seen as the Constitution writ small [because] [i]t affirms the right of the people to alter or abolish their government...[but] the institutional procedures and supermajority requirements help guarantee that reason and not passion guide the sovereign people”).

¹¹⁸ See Fitz, *supra* note , at 30 (“Americans routinely revised their constitutions by citing the people’s inherent right as the sovereign to change their minds.”). See also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131 (1991) (arguing that the right of assembly and petition are “an express reservation of the collective right of We the People to assemble in a future convention and exercise our sovereign right to alter or abolish our government by a simple majority vote”). See Dinan, *supra* note , at 3 (“the drafters of the federal Constitution established a rigid amendment and revision process, [but] state convention delegates have almost uniformly rejected this approach and adopted relatively flexible procedures for constitutional change.”).

¹¹⁹ 2 Farrand, *supra* note , at 88 (Madison’s characterization of the Legislatures that would ratify the Constitution as “mere creatures of their State Constitutions” and were no “greater than their creators [the people],” arguably helped to legitimize the Constitution’s requirement that it be ratified by three-fourths of state conventions as having a basis in popular sovereignty).

determine how government can be based on a fairly narrow conception of “the consent of the governed,” the framers created a structure that both embraced and rejected certain beliefs about the nature of popular sovereignty. The new government was not a wholesale rejection of the form of popular sovereignty that was implicit in the Articles—that the authenticity of the people finds its best expression through the filter of state government, but now this interest would be represented in the Senate. Instead, the radicalism emerged in the Constitution’s acknowledgment that there will be times when the views of the state and those of its residents will diverge, dissent that can be expressed in part by members of the House who represent smaller, more geographically compact constituencies.¹²⁰ Thus, the Constitution emphasizes localism by preserving a significant amount of the state sovereignty that existed under the Articles of Confederation, but it also recognizes that the people themselves retain both rights and powers with which they entered the new union. The delegation of powers and rights directly to the people and structurally through the house legitimated the more powerful national government because its responsibilities no longer ran solely to the states.¹²¹

The idea that the people would continue to have considerable control at the state level ultimately validated the form of government created by the framers, where the people could only act through the filter of their state governments or, alternatively, through their representatives.¹²² Undoubtedly, many of the framers viewed democracy as inconsistent with the protection of property rights, and rationalized that narrow access to the franchise and governance by elites was

¹²⁰ See generally Morgan, *supra* note , at 83 (discussing the “fiction” of popular sovereignty in seventeenth century England where, with respect to Parliament, there was “no distinction between sovereign and subject, and in the absence of any higher expression of popular will, could endow an existing government with absolute and arbitrary powers”).

¹²¹ WOOD, *EMPIRE OF LIBERTY*, *SUPRA* note , at 31 (“In addition to correcting the deficiencies of the Articles of Confederation, the Constitution was intended to restrain the excesses of democracy and protect minority rights from overbearing majorities in the state legislatures.”).

¹²² See Amar, *supra* note , at 1436 (“As sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers. Within the sphere of these delegated powers, government agents could legitimately compel obedience in the name of their sovereign principal, but those agents lacked authority to go beyond the scope of their agency. So long as the People at all times retained the ability to revoke or modify their delegations, such agency relationships were in no sense a surrender or division of ultimate sovereignty.”). *But see* Henry Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121 (1996) (criticizing Amar for overlooking “the democracy restraining nature of the Constitution” in trying to draw parallels between Article V and the traditional understanding of the alter or abolish power).

necessary to minimize this risk.¹²³ The framers hoped to escape the sometimes chaotic and unwieldy democratic governance that existed at the state level, where assemblies were elected under popular suffrage and contained officials from all walks of life, the antithesis of the governance by landed gentry that many framers preferred.¹²⁴ The early days of the Republic reinforced this sense that a “natural” aristocracy, led by elites, was the key to the success of representative democracy, where the interests of the people would be adequately represented by reasoned and learned gentlemen who govern through consensus rather than by faction.¹²⁵

Learning from past mistakes, the framers provided that if the people wanted to amend the Constitution or otherwise change their government, the remedy lies in Article V’s amendment process, or alternatively, frequent elections.¹²⁶ In limiting the ability of the people to amend the new constitution, the framers repudiated old notions of government as based on a virtually unbreakable contract between the people and an equal or superior sovereign; now, the people are sovereign and government is subordinate subject to the caveat that the people are limited in how they can exercise their sovereignty.¹²⁷ Consistent with this, the Article V amendment process prevented the direct involvement by the people in amending the Constitution: amendments have to be proposed by two-thirds of both Houses of Congress, or two-thirds of the states have to call a convention for proposing amendments.¹²⁸ Under the Constitution, the people as sovereign agreed to be bound, not only by its substantive mandates, but also the mechanisms by which it could be altered.¹²⁹

¹²³ Federalist No. 10 (“Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and having general been as short in their lives as they have been violent in their deaths.”). There were some exceptions. *See* Keyssar, *supra* note , at 12).

¹²⁴ Bernard Bailyn, *The Origins of American Politics* 7-9 (1965) (noting that “the political background and deeper context of the Revolution lie in the ‘rise of the assemblies’ in America, from their rudimentary origins to the status of full-fledged legislatures incapable of simple subordination to external political forces”). *See* also Federalist Papers No. 10 (“Theoretic politicians, who have patronized this species of government [democracy], have erroneously supposed that by reducing mankind to perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.”).

¹²⁵ Alexander Keyssar, *The Right to Vote* 8 (“The planters, merchants and prosperous farmers who wielded power and influence in late-eighteenth-century affairs had an unmistakable interest in keeping the franchise narrow: a restricted suffrage would make it easier for them to retain their economic and social advantages.”).

¹²⁶ U.S. CONST. art. V.

¹²⁷ FRITZ, *SUPRA* note , at 21-22.

¹²⁸ U.S. CONST. art. V.

¹²⁹ “After creating governments based on their authority as the sovereign, the people

Given this, it is not surprising that there is no mechanism for direct democracy at the federal level,¹³⁰ as well as no alter or abolish power that correlated to that which existed at the state level. Splitting the atom of sovereignty allowed the framers to use popular sovereignty as a principle that validated the new powers of the national government,¹³¹ while preserving “true” popular rule and majoritarianism for the people in the states.¹³² This structure was consistent with the view of the role of government shared by most people in the 1780s. As Jack Rakove observed,

For most Americans, indeed, national politics mattered little...When Americans thought about politics at all, they directed their concerns

were henceforth bound by their constitutions. Under this view, the written constitution and the government it created were the only channels through which the sovereign’s will could be recognized.” FRITZ, SUPRA note, at 21 (citing *Chisholm v. Georgia*). See also Amar, supra note , at 1441 (arguing that only direct ratification by the people in convention could limit state governments).

¹³⁰ See Amar, supra note , at 460 (describing Article V as “minoritarian...[p]recisely because ordinary Government is distrusted”). See also Fritz, supra note , at 135 (“The federal framers did not include alter or abolish language in the federal Constitution. Moreover, they rejected the assumption that the sovereign source creating the constitution retained an inherent right of revision. The framers’ position dramatically departed from an expansive view of the people’s sovereignty.”). There is an open question of whether direct democracy violates the Guarantee Clause, a question that the Court has avoided as a political question. See *Pacific States*. If I am correct, that the Clause is one of minimal entitlements as opposed to a direct reflection of how state government must be structured, then arguably, direct democracy is constitutional. See Part , *infra*.

¹³¹ Our constitution is based on the idea of sovereignty lying in the people, that “people made a government legitimate or illegitimate by withdrawing their support.” FRITZ, SUPRA note , at 16.

¹³² See also *The Federalist* No. 32 (arguing that “the State governments would clearly retain all the rights of sovereignty which they before had, and which were not...exclusively delegated to the United States”); *The Federalist* No. 39 (noting that the states possess “a residuary and inviolable sovereignty over all other objects.”). See also CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 21 (1993):

[The framers] attempted to carry forward the classical republican belief in virtue—a word that appears throughout the period—but to do so in a way that responded realistically, not romantically, to likely difficulties in the real world of political life. They continued to insist on the possibility of virtuous politics...[but] tried to make a government that would create such politics without indulging unrealistic assumptions about human nature. We might understand the Constitution as a complex set of precommitment strategies, through which the citizenry creates institutional arrangements to protect against political self-interest, factionalism, failures in representation, myopia, and other predictable problems in democratic governance.

Id.

toward local and state issues. These were the levels of governance whose decisions affected their daily lives, and which had to cope with the aftermath of a prolonged revolutionary struggle that had placed so enormous a strain on American society.¹³³

Robustly democratic states and a far less majoritarian federal government also validated the idea that a Republic can exist in a country the size of the United States.¹³⁴ The framers believed that the American experiment could be successful in protecting individual liberties by playing the two, very different, sovereigns against each other.¹³⁵

Thus, populism is notably absent from federal elections, as they were never intended to be democratic in any meaningful sense. For example, the electors (not voters) participating in the first and second presidential elections unanimously selected George Washington to be president,¹³⁶ and three of the next five presidents after Washington were all be from Virginia's wealthy planter class, and two of the five were a wealthy father-son duo from Massachusetts. The absence of an affirmative federal right to vote contributed to this state of affairs because many of the framers also were against the Constitution itself imposing suffrage requirements for participation in House elections, utilizing voting as a means to link the fortunes of the state and federal governments together, rather than as a vehicle that could accurately convey the collective will of the people.¹³⁷ The

¹³³ RAKOVE, SUPRA note , at 28. See also Chilton Williamson, American Suffrage from Property to Democracy 1760-1860 42 (1960) (making a similar point).

¹³⁴ Allison La Croix; Toqueville

¹³⁵ See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). In *Gregory*, the Supreme Court argued that the "federalist structure of joint sovereigns preserves to the people numerous advantages":

It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id. See also John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 433 (2010) (describing the Constitution as "a complex effort to reconcile competing values about the appropriate sphere of state authority" and describing one value as the "value of federalism" and the other as "that of a stronger, more effective natural government."); Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1229 (1994) (describing federalism based on different conceptions of the state).

¹³⁶ A. James Reichley, *The Life of the Parties* 29, 34 (1992).

¹³⁷ The Federalist No. 57. The full quote is: "Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humbles sons of obscure and

framers were aware of the potential pitfalls that accompanied popular suffrage, and tried to control for it by, for example, delegating to each house of Congress the power to be the “Judge of the Elections, Returns, and Qualifications of its own members,”¹³⁸ given Congress the authority to set aside the election of even the most democratically elected representative. Likewise, Article I, section 2 states that the House of Representatives shall be composed of members chosen “by the People of the several States,” but it delegates to states the responsibility of choosing the qualifications of the electors.¹³⁹ So presumably the people still “choose” their representatives, but this provision allowed states to exclude individuals from the franchise based on any number of criteria including wealth, crime, age, race, and gender. This illustrated that, at least for federal elections, the people do not have the final say over the composition of Congress.¹⁴⁰ The framers did not impose a similar requirement on the states, choosing only to impose a minimum requirement of republicanism in recognition of the value that comes in having a diversity of governing approaches as a means for effectuating the popular will.

2. The Guarantee Clause and Expanded Suffrage as Constraints on the Alter or Abolish Power in the States

The limited field of presidential candidates at the national level was inconsistent with the broad authority that the people had to nominate their candidates of choice for their own state legislatures. By allowing the people to directly control the composition of government with very few structural checks like those that existed for federal elections,¹⁴¹ the franchise evolved into a suitable replacement for the people’s natural law right to alter or abolish government. The search for a replacement was prompted by the Constitution’s ratification in 1789, but this evolution actually started occurring much earlier in the founding era. Unlike the federal government, the suspicion of popular sovereignty did not manifest into structural changes that would dilute, or minimize this authority; instead, the post-revolutionary era saw not-so-subtle changes in the ability of the people to alter or abolish their governments. For example, the state that later became Vermont attempted to break away from New York in 1777, relying on the alter or abolish

unpropitious fortune. The electors are to be the great body of the people of the United States.” *Id.*

¹³⁸

¹³⁹ U.S. CONST. art. I, sec. 2.

¹⁴⁰ Chafetz, *supra* note , at 170. See also Franita Tolson, Congress’s Authority to Enforce Voting Rights after Shelby County and Arizona Inter Tribal (manuscript on file with the author).

¹⁴¹ See, e.g., U.S. Const. Art. I, Sec. 5; the Elections Clause; Art. II, Sec. 1.

power, but congressional leaders rejected this attempt as “untenable.”¹⁴² Many state leaders agreed, but did not want to (and did not believe they had the authority to) abolish the alter or abolish power outright. Many post-1776 state constitutions circumscribed this authority by adding mechanisms by which state constitutions could be formally amended,¹⁴³ and also, by providing the people with more power at the polls, first in deciding who can be nominated and later in expanding who can vote.

The adoption of the Guarantee Clause in 1787 formally necessitated changes to the natural right to alter or abolish government. The requirement of republicanism, although ill-defined during the founding era,¹⁴⁴ circumscribed the alter or abolish authority by rejecting the violence that had accompanied exercise of this power.¹⁴⁵ Some framers believed that the object of the Clause was “merely to secure the States against dangerous commotions, insurrections and rebellions.”¹⁴⁶ Others were against having a Guarantee Clause at all, believing that it would “perpetuat[e] the existing Constitutions of the states,”¹⁴⁷ tapping into the fear of democracy that had prompted the structure of the federal government. Notably, Edmund Randolph proposed an amendment, seconded by James Madison, that would have included the words “and that no state be at liberty to form any other than a Republican Government,” but both Randolph and Madison withdrew the amendment and the second in favor of the language “that a Republican form of Government shall be

¹⁴² Fritz, *supra* note , at 55 (noting that “Americans could ‘alter or abolish’ their governments but congressional leaders faced a quandary” because “maintaining the status quo of newly established American governments was a more pressing concern than extending the logic of the Revolution’s principles that might challenge those governments.”).

¹⁴³ Fritz, *supra* note , at 242 (“With one exception, every state between 1820 and 1842 holding a constitutional convention inserted a provision for amendment if one did not already exist in its constitution”).

¹⁴⁴ As William Wiecek noted in his seminal study of the Clause, there was very little consensus about what the Guarantee Clause of Article IV actually requires. Wiecek, *supra* note , at 13 (“If the word [Republican] did have a definable meaning it probably had several, and they may have been vague, ambiguous, multifarious, or conflicting...a republic might have been the antithesis of a monarchy or an aristocracy, yet [John] Adams and others found no difficulty in imagining monarchic or aristocratic republics. Some of the framers and their contemporaries expected the concept of republican government to change over time, hopefully perfecting the experiment begun by the Revolution.”).

¹⁴⁵ See *Luther v. Borden*, 48 U.S. 1 (1849) (“In the case of an insurrection against a state or the government thereof, the President is to interfere”).

¹⁴⁶ Debates 280 (comments of Wilson).

¹⁴⁷ Debates 281 (comments of Houston) (noting that the “Georgia [constitution] was a very bad one”).

guaranteed to each State and that each State shall be protected against foreign and domestic violence.”¹⁴⁸

Given the rejection of language that arguably would limit states to governments that are Republican in nature, it is plausible that the alter or abolish power, although different in kind from the power that existed during the revolutionary era, has to be interpreted in light of the flexibility that the states retain in structuring their governments in accordance with the Clause. Arguably, republicanism requires some level of citizen participation, further validating the turn in the alter or abolish power from one centered in violence to one consisting of political rights.¹⁴⁹ As Roger Sherman argued during founding era debates about the Clause’s meaning, a republican government is one that has three branches of government, including legislative and executive branches determined “by periodical elections, agreeable to an established constitution; and that what especially denominates it a republic is its dependence on the public or the people at large, without hereditary powers.¹⁵⁰ The “floor” of republicanism is not certain,¹⁵¹ and besides the likely prohibition of a pure monarchy at the state level, Congress has used its authority under the Clause to suspend southern governments that deprived African-Americans of civil and political rights post-Reconstruction as nonrepublican in form.¹⁵² Functionally, this means that state governments could

¹⁴⁸ Debates 281.

¹⁴⁹ Countless law review articles have been written on what constitutes a republican form of government, and many agree that republicanism requires that states extend political rights to their citizens. See, e.g., Fred O. Smith, Jr., *Awakening the People’s Giant: Sovereign Immunity and the Constitution’s Republican Commitment*, 80 *FORDHAM L. REV.* 1941 (2012); Hans A. Linde, *Guaranteeing a Republican Form of Government*, 65 *U. COLO. L. REV.* 709 (1994); Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 *MINN. L. REV.* 513 (1962).

¹⁵⁰ Roger Sherman to John Adams, July 20, 1789, reprinted in Adams, ed., *Work of Adams VI*, 437. See also Fed. 39, defining a republican government as:

[A] government which derives all of its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.

Id. See also Wiecek, *supra* note , at 7 (“The negative senses of ‘republican’ that is nonmonarchical and nonaristocratic commanded the assent of most Americans in 1787. Beyond this it is unsafe to generalize about the precise meaning of the term.”).

¹⁵¹ See Sanford Levinson, *Framed: America’s 51 Constitutions and the Crisis of Governance* 102 (2012) (discussing the broadening of the franchise over time as “part of the ‘living Constitution’” and noting that “[t]he fact that what was perfectly acceptable in 1788 or even 1888 is certainly unacceptable today suggests that any scholarly analysis of ‘republican government’ in American political life must necessarily be part of what I earlier called the ‘narrative of change’”).

¹⁵² See Military Reconstruction Act; Wiecek 12 (“Nearly all Americans were certain that they wanted no monarchy in either the state or federal governments.”). See also

radically defer from the representative nature of the federal government, and citizens can tie the legitimacy of their state governments directly to their ability to participate in its electoral processes.¹⁵³

Notably, this turn away from the more violent alter or abolish power, though a firmly entrenched natural right,¹⁵⁴ corresponded to discussions in the eighteenth century about whether voting was a natural right. As Alexander Keyssar argued in his seminal study, “The idea that voting was a right, even a natural right, had become increasingly widespread in the eighteenth century (its ancestry dated to antiquity) and was embraced by many small farmers and artisans, as well as by the most radical leaders of the revolution such as Franklin, Thomas Young of Pennsylvania, and Ethan Allen of Vermont.”¹⁵⁵ While the concept of voting as a natural right did not become the dominant view,¹⁵⁶ these discussions elevated its importance as a mechanism for protecting other natural rights such as the alter or abolish power. Voting, along with the rights of assembly and petition, became the ideal theoretical foundations for reworking and reformulating the alter or abolish power.¹⁵⁷ It also provided an answer to the perplexing question of “how the people act as one, like a traditional sovereign” at the state level, an answer that varied

Debates in the Federal Convention 281 (comments of Ghorum) (arguing that the Guarantee Clause is essential because “an enterprising citizen might erect the standard of monarchy in a particular state”).

¹⁵³ See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) (arguing that “the states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government”). See also Gardner, *supra* note , at 961 (“Although states are apparently free to provide more opportunities for self-protection through democratic institutions than the [Guarantee] clause requires, they need not provide much if they so choose.”).

¹⁵⁴ Declaration of Independence. See also Alabama Constitution of 1819 (referring to the alter or abolish power as “an unalienable, and indefeasible right”); Miss. Const. art. I, § 2 (1832) (same).

¹⁵⁵ Keyssar, *supra* note , at 12.

¹⁵⁶ The Supreme Court implicitly rejected this argument in *Luther v. Borden*, 48 U.S. 1 (1849), which is famous for its holding that the power to determine whether a state government has been lawfully established is a political question, but also challenged the suffrage provisions of the Rhode Island Constitution on the grounds that the property requirements excluded half the state’s population of white males from voting.

¹⁵⁷ See Christian Fritz, *Recovering the Lost Worlds of Americas Written Constitutions*, 68 Alb. L. Rev. 261 (2005). See also Kramer, *supra* note , at 25 (arguing that “unconstitutional laws could be resisted by community members who continued to profess loyalty to the government” and “[m]eans of correction and forms of resistance were well established and highly structured. First and foremost, was the right to vote...[n]ext in importance, though perhaps not effectiveness, was the right to petition...[and] the newly emerging right of assembly”).

from how the authority manifested with respect to the federal government without violence.¹⁵⁸ Arguably, the use of voting as a means to facilitate the sovereignty of the people contributed to the speed with which states broadened voter base.¹⁵⁹

It is not until the post-Civil War era that the voting-as-natural-right debate would pick up steam again, yet states expanded suffrage in the first half of the nineteenth century, despite the lack of a firm basis in natural rights theory.¹⁶⁰ This change was driven in part because of a shrinking electorate,¹⁶¹ and the expansion of the voter base also was a foreseeable consequence of granting the people broad authority to choose which individuals would actually be on the ballot.¹⁶² While many states retained freehold requirements for voters,¹⁶³ at least initially, state officials were quite liberal in allowing the public to play a substantial role in choosing who could run for office in both state and federal elections. For example, New Jersey law provided that “it shall be lawful for every Inhabitant of this State, who is or shall be qualified to vote for Members of the State Legislature, to nominate four Candidates to the Choice of the People, as Representatives in the said Congress of the United States, by writing on one Ticket or Piece of Paper the Names of four Persons...at least thirty Days previous to the Day of Election...”¹⁶⁴

Similarly, New York election law divided the state into six districts, and gave the people in each district the authority to elect one representative without articulating any constraints on who could be nominated outside of those criteria specifically mentioned in the U.S. Constitution.¹⁶⁵ Connecticut likewise provided that “each

¹⁵⁸ Fritz, *supra* note , at 268. See also John Adams, Diary Notes on the Right of Juries, Feb. 12, 1771, in L. Kinvon Wroth, et al., eds., *Legal Papers of John Adams* 228-29 (1965) (describing voting as “the Part which the People are by the Constitution appointed to take, in the passing and Execution of the Laws”).

¹⁵⁹ Kramer, *supra* note , at 109 (noting that citizen demands to “control the course of government” was reflected in “expanded suffrage and higher voter turnout”).

¹⁶⁰ See Chilton Williamson, *American Suffrage from Property to Democracy 1760-1860* (1960).

¹⁶¹ Numerous scholars have noted the connection between who can be on the ballot and who can participate in the election, *see e.g.*, 50 *Stan. L. Rev.* 643; but there is also the more practical concern that it is difficult for the state to allow anyone to be a candidate while circumscribing that candidate’s support amongst the electorate.

¹⁶³ See, e.g., *id.* at 365 (quoting freehold requirements in the 1787 New York Constitution).

¹⁶⁴ Gordon DenBoer et al., eds., *The First Federal Elections 1788-1790*, Vol. III 16 (1986).

¹⁶⁵ *Id.* at 361. See also Gordon DenBoer et al., eds., *The First Federal Elections 1788-1790*, Vol. III 362 (1986) (New York Constitution provides that “all such Elections [for Representatives of the Congress] shall be held and conducted by such Persons and in the

[Freeman shall] give his Votes or Suffrages for a number not exceeding twelve Persons whom he Judges Qualified to stand in nomination for Representatives of the People of this State to the Congress of the United States”¹⁶⁶ while Delaware allowed voters to name “two persons” for their one congressional seat, subject only to the limitation that “one of whom at least shall not be an Inhabitant of the same County with themselves.”¹⁶⁷ Virginia, in contrast, was one of the more restrictive states and allowed voters to name one person for the office so long as that person is “a freeholder and... a bona fide resident for twelve months.”¹⁶⁸

The initial assumption in allowing voters to freely name their candidates was that they would pull from the same pool of distinguished individuals; nonetheless, the virtually unfettered ability to nominate candidates “of the people,” once conceived as an aspect of the people’s sovereign authority,¹⁶⁹ made the slide toward liberal access to the ballot inevitable. The change was gradual at first – with Delaware eliminating its property qualification for voting in 1792 and Maryland right after the turn of the century.¹⁷⁰ Then, Massachusetts and New York allowed more liberal access to the ballot in the 1820s and Virginia and North Carolina in the 1850s.¹⁷¹ Similarly, between 1830 and 1855, six states abolished the poll tax.¹⁷² Notably, as Alexander Keyssar has observed, “none of the new states admitted to the union after 1790 adopted mandatory property requirements in their original constitutions.”¹⁷³ In turn, state legislatures compelled municipalities to adopt more liberal voting regulations for local elections, leading to a convergence between state and local regulations that governed voter qualifications by 1855.

same manner as the Elections for Members of the Assembly of this State are by Law to be held and conducted”). Gordon DenBoer et al., eds., *The First Federal Elections 1788-1790*, Vol. II 70 (1984) (same for Delaware); *id.* at 290 (same for Virginia).

¹⁶⁶ Gordon DenBoer et al., eds., *The First Federal Elections 1788-1790*, Vol. II 24 (1984).

¹⁶⁷ *Id.* at 71.

¹⁶⁸ *Id.* at 294.

¹⁶⁹ *See, e.g.*, Roderick Hills, *A Defense of State Constitutional Limits on Federal Congressional Terms*, 52 *U. Pitt. L. Rev.* 97, 124 (1992) (defending the ability of state citizens to add qualifications for federal legislators as an aspect of popular sovereignty).

¹⁷⁰ Keyssar, *supra* note , at 29.

¹⁷¹ *Id.*

¹⁷² *Id.* *See also* Kramer, *supra* note , at 191 (noting that “wealth restrictions on voting by white men were abandoned in many states even before the 1820s, and other majority-restrictive devices were similarly replaced during these years. By the time of Andrew Jackson’s first election in 1828, significant property or tax-paying requirements for voting existed in no more than two or three states, and only in South Carolina were presidential electors not popularly chosen”).

¹⁷³ Keyssar, *supra* note , at 29.

The expansion of the franchise coincided with the rise of mass political parties in the 1820s, which underscored the view that political rights could express the people's sovereign authority and reinforced the ability of these rights to serve as a replacement for the more robust alter or abolish power.¹⁷⁴ The increasing competition between the political parties, and the corresponding increase in the adult male population who could not meet the property requirements instituted by most states in order to vote, motivated additional suffrage reform, which had become a partisan political issue.¹⁷⁵ In turn, these reforms led to the election of more populous candidates such as Andrew Jackson, who ended the reign of the Founding-era aristocracy.¹⁷⁶ Over the next several decades, the right of the people to alter and abolish their governments "became domesticated and evolved" in each of the colonies, where "[b]allots would replace bullets."¹⁷⁷ During the Civil War era, the people's ability to alter or abolish their state governments officially moved from a power grounded in violence to one that involved changing government through democratic means, bringing full circle the connection between voting and the alter or abolish power as vehicles of sovereign expression.¹⁷⁸

B. Cementing a New Understanding of Alter or Abolish: The Civil War and Reconstruction Era State Constitutions

As the prior section shows, the adoption of the Guarantee Clause made it doubtful that the right of revolution that was exercised in 1776 could ever be justified.¹⁷⁹ This premise would not be tested until the Civil War, the exigencies of which

¹⁷⁴ Dinan, *supra* note , at 144 (noting that "Constitution makers during this period came under pressure to eliminate any distinctions grounded in property holdings").

¹⁷⁵ Keyssar, *supra* note 34-36. Chilton, *supra* note , at 260.

¹⁷⁶ Chilton, *supra* note , at 223 (noting that upon Jackson's 1829 inauguration, "only two of the states comprising that section of the country where had been born required a freehold qualification for voting in any elections, North Carolina and Virginia"). See Kramer, *supra* note , at 191 (noting that "wealth restrictions on voting by white men were abandoned in many states even before the 1820s" and "[b]y the time of Andrew Jackson's first election in 1828, significant property or tax-paying requirements for voting existed in no more than two or three states").

¹⁷⁷ Amar, *supra* note , at 464.

¹⁷⁸ See Akhil Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 458 (1994) (arguing that "popular sovereignty principles in America [had] evolved beyond the Lockean core of the Declaration and established the legal right of the polity to alter or abolish their government at any time and for any reason, by a peaceful and simple majoritarian process"). See also Fritz, *supra* note , at 124-126 (discussing debates in 1787 about whether the alter or abolish provision in the Maryland Constitution, which described all government officials "as trustees of the public" included a corresponding right of the people to instruct their representatives to the Senate).

¹⁷⁹ *Id.*

dictated that alter or abolish provisions would become significantly watered down during the post-war era.¹⁸⁰ Congress rejected the constitutions of states that attempted to retain the same alter or abolish language from the pre-war era, and failed to adequately protect political rights. The extension of the franchise to nonfreeholding males in the first half of the nineteenth century, and the significance of political rights in the wake of emancipation made suffrage an obvious stand in for the once robust alter or abolish authority.¹⁸¹ **[quick discussion on the legal basis for secession in order to show that the alter or abolish power had to be watered down but could not be completely eliminated because of its status as a natural right]**

During Reconstruction, the Republicans in control of Congress realized that, not only did they have to ensure that African-Americans were granted the right to vote, they also had to mitigate the natural right to alter and abolish state government to prevent ex-confederates from overthrowing the new southern regimes. This process started with ensuring that ex-confederates were constitutionally barred from assuming elected office,¹⁸² and continued by changing the nature of rights in state constitutions.¹⁸³ As a result, states that had alter or abolish clauses prior to the war, such as Arkansas, Alabama, Texas, and Florida, instituted alter and abolish clauses in the 1860s and 1870s that were less far reaching than their predecessors of the 1830s, but in response, these states increased the political protections and rights of their citizens in the Reconstruction era constitutions. During this era, African-Americans suffrage was the most important issue at the time, and it is therefore not surprising that this authority was seen as a natural replacement for the more robust alter and abolish provisions.¹⁸⁴

Notably, only two of the state constitutions adopted by the former confederacy during the post-Civil War era added “alter or abolish” provisions to their constitutions,¹⁸⁵ and all of these provisions—both the newly added and the

¹⁸⁰ See footnote 206, *infra*.

¹⁸¹ Many states eliminated freehold requirements well before the Civil War. See, e.g., Miss. Const., Art. I, Sec. 20 (1832) (“No property qualification for eligibility to office, or for the right of suffrage, shall ever be required by law in this state.”); Fla. Const. Art. I, Sec. 4 (1838) (same).

¹⁸² U.S. Const. amend XIV, sec. 3

¹⁸³ See, e.g., Alabama Constitution of 1867, Art. VII, Sec. 3 (providing that “the following list of persons shall not be permitted to register, vote or hold office: 1st, Those, who, during the later rebellion, inflicted, or caused to be inflicted, any cruel or usual punishment upon any soldier...of the United States, or who, in any other way, violated the rules of civilized warfare. 2d, Those who may be disqualified from holding office by the proposed amendment to the Constitution of the United States, known as ‘Article XIV’...”).

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¹⁸⁵ Those states that added alter or abolish provisions constrained this power by

preexisting clauses—were qualified in favor of federal power.¹⁸⁶ The Civil War and Reconstruction era brought about the domestication of the alter or abolish power in favor of political rights, recognizing that sovereignty still lies with the people but tying this power to principles of republicanism by emphasizing the supremacy of federal law. For example, the South Carolina Constitution did not have an alter or abolish provision in its Constitution at the time of the Civil War, and rather than add this provision, the 1868 Constitution gave the people the right to “at all times...modify their form of government,”¹⁸⁷ but noting that “[n]o power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage in this State.”¹⁸⁸ Congress had rejected South Carolina’s 1865 Constitution because the document did not adequately protect the voting rights of the emancipated slaves.¹⁸⁹

referencing federal law and disavowing a right of secession. See Va. Const. art. I, § 5 (1872) (adding an alter or abolish provision); *id.* at art. I, § 2 (“...all attempts, from whatever source, or upon whatever pretext, to dissolve said Union or to sever said nation, are unauthorized...”); *Id.* at art. I, § 3 (“That the constitution of the United States, and the laws of congress passed in pursuance thereof, constitute the supreme law of the land, to which paramount allegiance and obedience are due from every citizen, anything in the constitution, ordinances, or laws of any state to the contrary notwithstanding.”). See also N.C. Const. art. I, § 3 (1868) (adding an alter or abolish provision); *id.* at N.C. Const. art. I, § 4 (1868) (“That this State shall ever remain a member of the ' American Union ; that the people thereof are part of the American nation ; that there is no right on the part of this State to secede, and that all attempts from whatever source or upon whatever pretext, to dissolve said Union, or to sever said nation, ought to be resisted with the whole power of the State.”)

¹⁸⁶ Notably, Georgia did not have an alter or abolish provision prior to the Civil War, and arguably adopted language in its 1861 Constitution that would limit the ability of the people to alter or change government. See Ga. Const. art. I, § 2 (1861) (“God has ordained that men shall live under government; but as the forms and administration of civil government are in human, and therefore, fallible hands, they may be altered, or modified whenever the safety or happiness of the governed requires it. No government should be changed for light or transient causes; nor unless upon reasonable assurance that a better will be established.”). See, e.g., Louisiana Constitution of 1868 (no alter or abolish provision added).

¹⁸⁷ Compare S.C. Const. art. I, § 1 (1868) (“All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government.”) with S.C. Const. art. 9, § 1 (1790) (1861) (1865) (“All power is originally vested in the people; and all free governments are founded on their authority, and are instituted for their peace, safety, and happiness.”).

¹⁸⁸ S.C. Const. art. II, sec. 2 (1868).

¹⁸⁹ W. Lewis Burke, Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina After the Civil War, 57 S.C. L. Rev. 859, 861-62 (2006).

Like South Carolina, the Alabama Constitution of 1868 gave its citizens the right to “change,” but not abolish its government.¹⁹⁰ Under the 1819 Constitution, the people had retained “a right to alter, reform, or abolish their form of government, in such manner as they may think expedient.”¹⁹¹ This document similarly provided that “[e]very white male person of the age of twenty one years, or upwards, who shall be a citizen of the United States and shall have resided in this State one year next proceeding an election, and the last three months within the county, city or town in which he offers to vote, shall be deemed a qualified elector,”¹⁹² a requirement that the 1868 Constitution changed by eliminating the race restriction, reducing the residency requirement to six months instead of a year,¹⁹³ and adding a requirement that all electors, prior to registering to vote, take an oath that to “support and maintain the Constitution and laws of the United States;” “never countenance or aid in the secession of this State from the United States;” and “accept the civil and political equality of all men.”¹⁹⁴

Arkansas’ constitution of 1868 contained a provision that allowed citizens to alter or reform government, but it limited the ability of citizens to dissolve their connection with or rebel against the federal government,¹⁹⁵ as compared to its 1836 Constitution which gave the people an unqualified right to alter or abolish government at will.¹⁹⁶ Arkansas also provided that “all elections shall be free and equal”¹⁹⁷ and granted suffrage to “[e]very free white male citizen...who shall have attained the age of twenty-one years, and who shall have been a citizen of this State six months”¹⁹⁸ in its 1836 Constitution, which was expanded by 1868 to, like Alabama law, eliminate the race requirement and exclude former confederates from voting and holding office.¹⁹⁹

¹⁹⁰ Art. I, Sec. 3 (1868) (“That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have, at all times, an inherent right to change their form of government, in such manner as they may deem expedient.”). See also Ala. Const. art. I, § 3 (1875) (same); Ala. Const. art. I, § 2 (1901) (same).

¹⁹¹ Ala. Const. art. I, § 2 (1819)

¹⁹² Alabama Constitution Art. III, Sec. 5 (1819).

¹⁹³ Alabama Constitution, Art. VII, Sec. 2 (1867).

¹⁹⁴ Alabama Constitution, Art. VII, Sec. 4 (1867).

¹⁹⁵

¹⁹⁶ Art. II, Sec. 2 (“That all power is inherent in the people; and all free Governments are founded on their authority...For the advancement of these ends, they have, at all times, and unqualified right to alter, reform or abolish their Government, in such manner as they may think proper.”).

¹⁹⁷ Arkansas Const. Art. II, Sec. 5. (1836).

¹⁹⁸ Arkansas Constitution Art. IV, Sec. 2 (1836).

¹⁹⁹ Arkansas Constitution, Art. VII, Secs. 2-5 (1868).

Florida also had an “alter or abolish” provision in its Constitution at the time of secession,²⁰⁰ but it amended this provision in 1868 to subordinate the people’s alter or abolish power to “the paramount allegiance of every citizen” to the federal government, and eliminate the ability of the people “to dissolve their connection therewith.”²⁰¹ Like Arkansas, the 1838 Florida Constitution provided for “free and equal” elections, extending the vote to every “[e]very free white male person of the age of twenty-one and upwards” who was a U.S. citizen, but subject to longer residency requirement of “two years next preceding the election at which he shall offer to vote.”²⁰² Florida had attempted to retain the alter or abolish language from its 1838 Constitution in the first constitution it submitted to Congress in 1865 as a condition of readmission, but this constitution was rejected.²⁰³ Notably, the 1865 constitution also did not change its suffrage requirements, limiting voting to free white males.²⁰⁴ Its 1868 constitution was significantly more inclusive, extending voting rights to “[e]very male person of the age of twenty-one years...of whatever race, color, nationality, or previous condition, who shall...be a citizen,” and it reduced the residency requirement from two years to one year.²⁰⁵

Once Reconstruction ended, some states reintroduced broader alter or abolish provisions, but this right was still qualified by an implicit expectation that the people will use political power, rather than violence, to change government. For example, Tennessee kept its alter and abolish provision in both its 1835 and 1870 Constitutions, but its 1870 Constitution specifically limited the circumstances in which this power could be exercised to majoritarian political processes:

The Legislature shall have the right by law to submit to the people...the question of calling a convention to alter, reform, or abolish this Constitution, or to alter, reform or abolish any specified part or parts of it; and when, upon such submission, a majority of all the voters voting upon the proposal submitted shall approve the proposal to call a convention...No change in, or amendment to, this Constitution proposed by such convention shall become effective...unless approved and ratified by a majority of the qualified voters...No such convention shall be held oftener than once in six years.²⁰⁶

²⁰⁰ Fla. Const. art. I, § 2 (1838)

²⁰¹ Fla. Const. art. 3, § 2 (1868); Fla. Const. art. 1, § 2 (1885).

²⁰² Fla. Const. art. I, § 4 (1838); *Id.* at art. VI, § 1.

²⁰³ Fla. Const. art. I, § 2 (1865).

²⁰⁴ Fla. Const. art. VI, § 1 (1865).

²⁰⁵ Fla. Const. art. XIV, § 1 (1868).

²⁰⁶ Tenn. Const. art. 10, § 3 (1870). The 1835 constitution, although it contained a similar alter or abolish provision as the 1870 version, did not provide a vehicle for abolishing the constitution through official means. Unlike the 1870 constitution, it required

Similarly, in 1874, Arkansas reinstated a strengthened alter or abolish provision than that which existed in the 1868 constitution, giving citizens the right to “alter, reform or abolish...[government] in such manner as they think proper”²⁰⁷ yet this right was qualified by an expansive requirement of free elections:

Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted, whereby the right to vote at any election shall be made to depend upon any previous registration of the elector’s name; or whereby such right shall be impaired or forfeited, except for the commission of a felony at common law, upon lawful conviction thereof.²⁰⁸

Texas followed suit, giving its residents an alter or abolish authority in its 1876 Constitution after removing this language in its 1869 Constitution,²⁰⁹ but subject to “the preservation of a republican form of government” rather than inalienable “right to alter, reform, or abolish their government” that had existed under the 1836 Constitution.²¹⁰ In the post-Civil War era, the constitutional provisions guaranteeing free and fair elections became significantly more elaborate than its alter or abolish provision, signaling a change in the nature of which the people express their sovereign authority.²¹¹ For example, Texas’s 1836 constitution granted the right to vote to every citizen, defined as “all free white persons,”²¹² “who has attained the age of twenty-one years and shall have resided six month within the district or county where the election is held”²¹³ whereas the right of suffrage in its 1869 Constitution was more expansive:

Every male citizen of the United States, of the age of twenty-one years and upwards, not laboring under the disabilities named in this Constitution,

that the state legislature initiate the process of constitutional amendment. See Tenn. Const. art. XI, § 3 (1835) (“proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each House, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner, and at such time, as the General Assembly shall prescribe. And if the people shall approve and ratify such amendment or amendments, by a majority of all the citizens of the State, voting for Representatives, voting in their favor, such amendment or amendments shall become part of this Constitution”).

²⁰⁷ Arkansas Const. Art. II, Sec. 1 (1874).

²⁰⁸ Arkansas Constitution, Art. III, Sec. 2 (1874).

²⁰⁹ Tex. Const. art. I (1869).

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²¹¹ See, e.g., S.C. Const. art. II, sec. 2 (1868);

²¹² Tex. Const. art. 6, § 12 (1836).

²¹³ Tex. Const. art. 6, § 11 (1836).

without distinction of race, color or former condition, who shall be a resident of this State at the time of the adoption of this Constitution, or who shall thereafter reside in this State one year, and in the county in which he offers to vote sixty days next preceding any election, shall be entitled to vote for all officers that are now, or hereafter may be elected by the people, and upon all questions submitted to the electors at any election...²¹⁴

This section is markedly different than the suffrage provision of the 1866 Texas Constitution rejected by Congress, which limited suffrage to “[e]very free male person” rather than “[e]very male citizen,” and it did not disenfranchise former confederates,²¹⁵ while retaining the same broad alter or abolish language as its 1832 counterpart.²¹⁶ In addition to more expansive suffrage that penalized former confederates, the 1869 constitution eliminated the alter or abolish provision and the preamble to the bill of rights stated, “That the heresies of nullification and secession, which brought the country to grief, may be eliminated from future political discussion.”²¹⁷

Even those constitutions adopted in late nineteenth and early twentieth century that retained alter and abolish provisions were shadows of the power that had existed at the Founding,²¹⁸ using these provisions as a basis for exercising political power rather than violent overthrow of government. Mississippi had an “alter or abolish” provision that was removed after the Civil War.²¹⁹ It was reinserted in the 1890

²¹⁴ Tex. Const. art. 6 § 1 (1869)

²¹⁵ Tex. Const. art. 3 § 1 (1866)

²¹⁶ Tex. Const. art. I, § 1 (1866):

All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit' and they have at all times the inalienable right to alter, reform or abolish their form of government, in such manner as they may think expedient.

²¹⁷ Tex. Const. art. I, § 1 (1869)

²¹⁸ The Oklahoma constitution of [date] similarly provided that people have a right to “alter or reform” (not to abolish!) their governments, and further, “such change shall not be repugnant to the Constitution of the United States.” [cite] The 1865 Missouri constitution also kept its alter or abolish provision from its 1820 constitution, although it added that “every such right should be exercised in pursuance of law, and consistently with the Constitution of the United States.” Mo. Const. Art. 1, § 5. (1865), and it included very specific processes by which the constitution could be amended or altered by majoritarian processes. *Id.* art. XII, § 3.

²¹⁹ The Constitution of 1832, in effect at the time of secession, read:

That all political power is inherent in the people, and all free governments are founded on their authority, and established for their benefit; and, therefore, they have at all times an unalienable and indefeasible right to alter or abolish their form of

Constitution, and is still a part of the state constitution today; however, like Florida and Texas, Mississippi's citizens could only act in accordance with the alter or abolish provision if such action did not violate the U.S. Constitution.²²⁰ Notably, in 1967, Kentucky voters used their constitutional authority to "alter or abolish" as a legal basis for changing their constitution through direct democracy.²²¹ This use of the power as a basis for democratic action, rather than violence, signaled its complete evolution from its Revolutionary War origins.²²²

government, in such manner as they may think expedient.

Miss. Const. art. I, § 2 (1832)

After the Civil War, that provision was removed and another provision was added, specifically declaring the state would never secede from the union:

The right to withdraw from the Federal Union on account of any real or supposed grievances shall never be assumed by this State; nor shall any law be passed in derogation of the paramount allegiance of the citizens of this State to the Government of the United States.

Miss. Const. art. I, § 20 (1868)

²²⁰ The Constitution in effect today, the Constitution of 1890, maintains an "alter or abolish" provision. However, the power to abolish is conditioned on such an action being allowed by the U.S. Constitution:

The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; Provided, Such change be not repugnant to the constitution of the United States.

Miss. Const. art. III, § 6 (1890).

In addition, an anti-withdrawal clause remains:

The right to withdraw from the Federal Union on account of any real or supposed grievance, shall never be assumed by this state, nor shall any law be passed in derogation of the paramount allegiance of the citizens of this state to the government of the United States.

Miss. Const. art. III, § 7.(1890).

²²¹ www.LRC.ky.gov/lrcpubs/1059.pdf

²²² Kramer, *supra* note , at 192. See also Fritz, *supra* note , at Chapter 8 (discussing the debates over the people's authority to change the constitution outside of existing laws in the context of the rebellion in Rhode Island in the 1840s). The Supreme Court, in *Luther v. Borden*, concedes the existence of this power, although given the outcome of the rebellion, it is questionable whether this authority legitimately can be exercised through violence. See *Luther v. Borden*, (finding that the actions Rhode Island officials under martial law were justified).

C. From Power to Right: Voting as a Ninth Amendment Right that Bind the States

Unlike the U.S. Constitution, forty-nine state constitutions contain an affirmative right to vote.²²³ It is no surprise, therefore, that state courts have historically been more amenable to voting claims premised on democratic notions of participation than federal courts.²²⁴ Additionally, as the prior section shows, the rise of suffrage as a substantive right under state constitutions corresponded with the decline of the right to abolish state governments in those same documents, arguably illustrating how suffrage was one of the rights (along with speech and assembly) that replaced the alter or abolish right as the primary expression of popular sovereignty.

Despite the sovereign pedigree of voting as an heir to the revolutionary era alter or abolish provisions, voting had never found its place as an explicit right under the U.S. Constitution until the Supreme Court read it into the Equal Protection Clause in *Harper v. Virginia State Board of Elections*. While the framers of the Constitution viewed state law as the ultimate source of who can vote in federal elections, the Court did not utilize state law as a basis for conceptualizing the right. Instead, the Court recognized the mandatory nature of the right to vote in federal elections, while leaving the right to vote in state elections as entirely permissive. To the extent that the right to vote in state elections has its foundations in the right of the people to alter or abolish their governments, however, it would have been more consistent for the Court to read the Ninth Amendment as encompassing a right to vote in state elections that is also mandatory in nature. Notably, Akhil Amar has referred to the “collective right of We the People to alter or abolish government” as “the most obvious and inalienable right” underlying the Ninth

²²³ See Josh Douglas, *The Right to Vote Under State Constitutions*. See, e.g., Ariz. Const. art. II, § 21 (“All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”); Ga. Const. art. II, § 1, P 2 (“Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people.”); Ind. Const. art. II, § 1 (“All elections shall be free and equal.”); Iowa Const. art. II, § 1 (“Every citizen of the United States [meeting the age and residency requirements] ... shall be entitled to vote at all elections which are now or hereafter may be authorized by law.”); N.M. Const. art. II, § 8 (“All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”)

²²⁴ Rick Hasen, *The Democracy Canon*, 62 *Stan. L. Rev.* 69; See also *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006) (striking down a photo identification law as a violation of the right to vote under the state constitution).

Amendment;²²⁵ other scholars also adhere to this view of the Ninth as containing this principle.²²⁶

Inherent in the argument that the Ninth Amendment protects the right to alter or abolish government is that the Amendment only protects collective rights, rather than individual rights like the right to vote.²²⁷ Arguably, the Ninth Amendment does not have to be read this narrowly—its historical antecedents suggest that it was adopted because of Anti-Federalists concerns that enumerating some rights would imply the exclusion of others, suggesting that positive rights and natural rights, rather than just collective rights, could also be protected under the Ninth Amendment.²²⁸ Given that concerns about rights were at the heart of its adoption, it is plausible that the Ninth Amendment was designed to protect both the individual rights and the collective rights of the people, a view further bolstered by the historical link between the power to alter or abolish government and the exercise of political rights like voting, speech, petition, and assembly in furtherance of this right.²²⁹ While voting may fall short of being accorded the status of a natural right,²³⁰ a view of the Ninth Amendment that would exclude

²²⁵ Akhil Reed Amar, *The Bill of Rights* 120 (1998).

²²⁶ Jeffery Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 *Yale L.J.* 1078 (1991); Randy Barnett,

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²²⁸ See Leonard W. Levy, *Origins of the Bill of Rights* 250 (2001) (“What rights did the Ninth Amendment protect? They had to be either ‘natural rights’ or ‘positive rights’, to use the terms Madison employed in the notes for the great speech of June 8 advocating amendments. In that speech he distinguished ‘the preexistent rights of nature’ from those ‘resulting from the social compact’...[and] he mentioned freedom of ‘speech’ as a natural right...”). See Rosen, *supra* note , at (arguing that, in addition to the power to alter or abolish government, the Ninth Amendment protects the individual rights to “worship God according to the dictates of conscience” and of “defending life and liberty, acquiring, possessing and protecting property...”). See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 258 (2004) (discussing other rights referred to as “natural in the documentary sources” including “the right to emigrate or to form a new state, the rights of assembly, and the freedom of speech”). See Lash, *supra* note , at 88 (describing Ninth Amendment rights as “individual, majoritarian, or collective”).

²²⁹ See Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 *Tex. L. Rev.* 1, 16 (pushing back against the argument that the Ninth Amendment only protects collective rights). But see Lash, *supra* note 89 (arguing that a retained right might be “individual in nature but collective in terms of the combined effect of the Ninth and Tenth Amendments”).

²³⁰ See Keyssar, *supra* note , at 12 (discussing how the notion of voting as a natural right had gained a foothold in post-revolutionary America because “it meshed well with the Lockean political theory popular in eighteenth century America, it had a clear antimonarchical thrust, and it had the virtue of simplicity” but such arguments never became dominant because “there was no way to argue that voting was a...natural right without

voting, which at a minimum is a positive or majoritarian right,²³¹ is untenable, as this would suggest that the Amendment protects a right to alter or abolish government with no corresponding authority to define the means by which this right will be enforced.²³² Moreover, state constitutions extended suffrage to their residents prior to the ratification of the Constitution, suggesting that even if voting is not a natural right, it can still be a “retained” right under the Constitution.²³³

Indeed, the sovereignty authority that the people retained under the Tenth Amendment, given the limitations placed on the right of revolution by the Guarantee Clause, arguably require the Ninth to protect a category of rights that are central to exercising this power.²³⁴ Thus, contrary to the view advocated by some scholars, the Ninth Amendment cannot be a mere truism,²³⁵ defined by

opening Pandora’s box”).

²³¹ Lash, *supra* note 88.

²³² While Lash denies that the Ninth Amendment is a source of right, at the very least, it protects the people’s authority to define and regulate rights protected by state law. *See id.* To illustrate this principle, Lash discusses the Alien and Sedition Acts which James Madison argued violated the First and Tenth Amendments because “the First Amendment denied the federal government control over the retained right to freedom of speech, [and] the Tenth Amendment left seditious libel under the control of the people of the several states”). The Ninth and Tenth Amendments protect the people’s authority to define and regulate retained rights, regardless if those rights are viewed as individual or collective and regardless if the Ninth Amendment is actually the source of the right. *Id.* at 88.

²³³ Cf. Barnett, *supra* note , at 60-61 (describing retained rights as “rights that people possess *before* they form a government and therefore *retain*; they are not positive rights created by the government.”) with Lash, *supra* note , at 88 (defining a retaining right as “a right withheld from governmental control” and arguing that the Ninth Amendment leaves to the people the decision of how and when a right can be regulated).

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²³⁵ *See, e.g.*, Raoul Berger, The Ninth Amendment as Perceived by Randy Barnett, 88 *Nw. U. L. Rev.* 1508 (1994); Charles J. Cooper, Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons, 4 *J.L. & Pol.* 63 (1987); Thomas B. McAfee, The Bill of Rights, Social Contract Theory, and the Rights “Retained” by the People, 16 *S. Ill. U. L.J.* 267, 268 (1992); Caplan. *See also* Gary Lawson, *A Truism with an Attitude: The Tenth Amendment in Constitutional Context*, 83 *Notre Dame L. Rev.* 469, 472 (2008) (“The Bill of Rights, including the Tenth Amendment, in large measure simply reformulates the restrictions on federal power built into the Sweeping [Necessary and Proper] Clause.”); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 *Notre Dame L. Rev.* 1889 (2008) (noting that the Tenth Amendment “delivered on a promise to the state conventions that the federal government would have only expressly delegated power”). *See, e.g.*, *Nat’l Fed’n of Republican Assemblies v. United States*, 218 *F. Supp. 2d* 1300, 1345 (S.D.AL.2002) (arguing that the Tenth Amendment “expresses only the ‘tautology,’ inherent in a Constitution of limited and enumerated federal powers, that whatever is not

reference to those provisions of the U.S. Constitution that expressly delegate power to the federal government.²³⁶ As Kurt Lash has argued, these Amendments also declare that “those powers which are delegated are not to be construed as having no other limits besides those enumerated in the Constitution;” such a reading, according to Lash, “would have the effect of denying or disparaging the people’s retained rights—rights which, by definition, were retained by the people in the states.”²³⁷ To go one step further, defining Ninth Amendment rights and Tenth Amendment powers by reference to what the federal government retains also assumes that the interests of the state and those of the people are identical, while ignoring the sovereignty that people retain in their own right.²³⁸ The Ninth Amendment is the textual home for power-rights that express the sovereign

conferred on the federal government or prohibited to the states is by process of elimination reserved to the states.”); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (same).

²³⁶ Cf. Massey, *supra* note at 1239 (“the inescapable conclusion remains that both amendments were intended to preserve to the people of the states the sovereign’s prerogative to confer powers upon their state governmental agents (recognized in the tenth amendment) and to create personal liberties inviolate from governmental invasion (recognized in the tenth amendment). The intended medium for doing so, in both cases, was the state constitution.”). Massey is not alone in viewing the Ninth Amendment as a source of judicially enforceable unenumerated rights. See Randy E. Barnett, *James Madison’s Ninth Amendment*, in *1 Rights Retained by the People*; Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in *Toward a More Perfect Union: Six Essays on the Constitution* 145 (1988); John Kaminski, *Restoring the Declaration of Independence: Natural Rights and the Ninth Amendment*, in *The Bill of Rights* 150 (1987); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 *Chi.-Kent L. Rev.* 239 (1988); Sherry, *The Founders’ Unwritten Constitution*. Nor is Massey alone in viewing state law as a potential source of Ninth Amendment rights. See Lash, *supra* note , at 399 (“All retained rights, natural or otherwise, were protected from denial or disparagement as a result of the decision to enumerate “certain rights.” Neither the text nor the purpose of the Ninth Amendment was limited to protecting a subcategory of retained rights. The point was to protect the right of the people to manage all those affairs not intended to be handed over to the federal government.”).

²³⁷ Lash, *supra* note , at 93.

²³⁸ Randy Barnett, *Reconceiving the Ninth Amendment*, 74 *Cornell L. Rev.* 1, 5 (“when rights are viewed as the logical obverse of powers, content can be given to unenumerated rights by exclusively focusing on the expressed provisions delegating powers...avoiding the need to directly address the substance of unenumerated rights” and second, this approach “seems to avoid any internal conflict or logical contradiction between constitutional rights and powers.”). Lash, *supra* note , at 90 (“Together, these two amendments preserve all nondelegated powers and rights to the decisionmaking authority of the people in the states, who may then leave the matter to the majoritarian political process or exempt the subject from the political process by placing it in the state constitution”).

authority retained by the people under the Tenth Amendment.²³⁹ Most important, the right to vote, as the key power-right, derives almost entirely from state constitutional law, illustrating that state law stands as the source of developing the contours of the right, which is in line with what some scholars advocate as the purpose behind the Ninth Amendment.²⁴⁰

Calvin Massey, for example, has argued that the Ninth Amendment “allow[s] the people of each state to define unenumerated rights under their own constitution and laws, free from federal interference.”²⁴¹ As Massey observes, this is consistent with a dynamic conception of the Ninth Amendment that “reserve[s] to people their rights under local law,” and therefore, it makes sense “for a state polity to have within its own control the continued vitality of any given state constitutional right.”²⁴² In making the argument that the source of Ninth Amendment rights are to found in state constitutional law, however, Massey argues that states have the authority to rescind or otherwise alter their rights even though they have attained the status of a federal constitutional guarantee.²⁴³ The difficulty with this argument is that, during the Founding era, the alter or abolish power was viewed as inviolable and implicit in the sovereignty retained by the people, suggesting that they are limitations to the state’s ability to rescind Ninth Amendment rights. Using state constitutional law as a source of Ninth Amendment rights means, in practice, that the scope of the right to vote that the people enjoy under state law will vary by state, as did the right of people to alter or abolish their governments,

²³⁹ Although Kurt Lash takes a narrow view of the Tenth Amendment, he argues that the Ninth Amendment serves a rule of construction for interpreting the limitations of the Tenth Amendment. Kurt T. Lash, *The Lost History of the Ninth Amendment* (2009). While I am not convinced that the Tenth Amendment merely restates that the federal government is one of limited powers, my argument draws on Kurt Lash’s observation that the Ninth Amendment, like the Tenth, is also about the power that the people have to regulate and define retained rights at the state level. See text accompanying footnotes , *infra*.

²⁴⁰ See Lash, *supra* note , at 251 (“the ratifiers were promised that all nondelegated powers and rights were retained by the people in the states—‘retained’ being the operative word for it signaled a preexistent collection of sovereign peoples and guaranteed that these people would retain their independent sovereign existence after ratification.”).

²⁴¹ 1990 Wis. L. Rev. 1229, 1238.

²⁴² *Id.* The idea of Ninth Amendment rights as “dynamic” rights that can change over time is consistent with what Larry Kramer has described as constitutional modification through popular consent, in which “the constitution could be altered by clear, convulsive expressions of popular will.” Larry D. Kramer, *By the People Themselves: Popular Constitutionalism and Judicial Review* 15 (2004).

²⁴³ Massey, *supra* note at 1248. Kurt Lash has also suggested that state law can be a source of unenumerated Ninth Amendment rights, although he does not go into detail about whether states can rescind these rights.

but this is consistent with the state level experimentalism embraced by our system of federalism²⁴⁴ and the notion that rights that owe their existence to state law are dynamic, rather than static.²⁴⁵ Nonetheless, states do not have the authority to rescind the right to vote or any other participatory rights that were part and parcel of the inviolable right to alter or abolish government, consistent with founding era assumptions that this right was inherent in the sovereignty retained by the people.²⁴⁶

The fact that state constitutional law is the source of, first, the alter or abolish provisions, and later the right to vote, also means that the Ninth and Tenth Amendments incorporate the basic assumption that these rights apply against both the states, and through Article V, the federal government.²⁴⁷ Logically, it makes little sense to exclude the Ninth Amendment from binding the states given that the Ninth Amendment preserves the people's independent sovereign authority that predated the Union.²⁴⁸ In addition, states have, to some extent, bound themselves by giving the people significant authority over their composition and the execution of their laws, authority that has existed at the state level for well over two hundred years.²⁴⁹ In this vein, Ninth Amendment rights "amount[] to a federally enforced right to make the states abide by their own law,"²⁵⁰ which is something that the Supreme Court had already started to do with respect to the right to vote under the Equal Protection Clause of the Fourteenth Amendment, but, because of the

²⁴⁴ Gregory v. Ashcroft

²⁴⁵ Massey, supra note , at 1248; Kurt Lash, The Lost History of the Ninth Amendment 88 ("Retained rights may be individual, majoritarian, or collective, and the Ninth Amendment ensures that *all* such rights are left under the control of the people in the states.").

²⁴⁶ See Fritz, supra note , at 274-75 (noting that the right to alter or abolish government is "inherent" and a part of the people's sovereignty, a position vindicated by the Supreme Court in *Luther v. Borden*).

²⁴⁷ Some commentators argue that the Ninth Amendment rights apply only against the federal government because that amendment has not been incorporated against the states under the Fourteenth Amendment's due process clause. See *Barron v. Baltimore*, 32 U.S. 243 (1833). See also Ely, at 37; Berger, at 23-24.

²⁴⁸ Cf. Lash, supra note , at 76 (arguing that the Ninth Amendment "does not limit the power of state governments" but state officials must follow it as a rule of construction).

²⁴⁹ Massey, supra note at 1251 (arguing that Ninth Amendment rights are still federal rights, despite the fact that their contours are defined by reference to state law, and they should not be distinguished from other federal rights that are incorporated against the states).

²⁵⁰ *Id.* (citing Massey, *Federalism and Fundamental Rights*, 38 *Hastings L.J.* 305, 327 (1987)).

limitations of that clause, the Court has fallen short of articulating an accurate and compelling view of the right over the long term.²⁵¹

This view of the right to vote as one part federal constitutional guarantee and one part creature of state law has been lurking in the Supreme Court's jurisprudence for over a hundred years. While the Nineteenth Amendment has repudiated *Minor v. Happerset*, the Court rightfully conceived of the right to vote in both state and federal elections as entirely derivative of state law, a fact that is consistent with how the current Court views state control over the franchise in the context of state elections.²⁵² In *Minor*, the Court observed that the "United States has no voters in the States of its own creation,"²⁵³ a conception of voting that remains true today. Other cases decided around the same time as *Minor* also defers to states' authority to define the right of suffrage and who has access to it,²⁵⁴ and while states are constrained in their ability to discriminate in voting, they still retain substantial control over access to the ballot.²⁵⁵ *Shelby County v. Holder* and *Arizona v. Inter Tribal Council* have corroborated this view of state authority, noting that "[p]rescribing voting qualifications... 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the times, the places, and the manner of elections.'"²⁵⁶

²⁵¹ *Id.* (discussing *Allegheny Pittsburgh Coal Co. v. County Comm'r of Webster County*, 109 S.Ct. 633 (1989) (finding an equal protection violation where the West Virginia tax assessor's practice of assessing property price differently for land recently sold and older properties caused huge disparities in valuation in violation of the West Virginia constitution). (discuss other examples above the line). Also, note that there is a line of cases which hold that the Eleventh Amendment bars federal courts from forcing state officials to enforce state law, see *Pennhurst State School & Hospital v. Halderman* 465 U.S. 89 (1984), a case that Massey distinguishes by noting that Allegheny "posed an issue of federal law, albeit one the substance of which was supplied by a state constitution, while Pennhurst raised a claim of pure state law, with no federal medium to transmute the asserted state right into a federal guarantee.").

²⁵² *Arizona v. Inter Tribal; Shelby County*

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²⁵⁴ See, e.g., *Giles v. Harris*. Cruikshank?

²⁵⁵ *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013) (invalidating the formula of section 4(b) of the VRA, which determined the jurisdictions that had to preclear with the federal government any changes to their election laws before the changes could go into effect). *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (holding that the National Voter Registration Act preempts Arizona's requirement that citizens show proof of citizenship in order to register to vote).

²⁵⁶ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2258 (2013).

As should be readily apparent, this view of the Ninth Amendment right to vote calls into question the lockstepping that state courts have engaged in as a part of interpreting the right to vote under state constitutions.²⁵⁷ As Josh Douglas has recently argued, the deference that state courts give to the federal constitution, in many cases attempting to create parity between state and federal conceptions of the right to vote, actually has the effect of undermining the right.²⁵⁸ Since all state constitutions explicitly provide voting protection to their citizens, including in most cases recognizing an explicit right to vote, Douglas rightly argues that parity between state and federal constitutions is not only unwarranted, but undesirable, given that the federal constitution's recognition of the right to vote is implicit, judicially created, and most important, more narrow than the right to vote recognized by state constitutions.²⁵⁹ This approach by state courts ignores that virtually every state constitution goes further than the federal constitution in protecting voting rights, an oversight that is inconsistent with the Ninth and Tenth Amendment protections that the people have vis a vis the states.

Instead, the lockstepping should work the other way. Conceptions of the right to vote in certain federal elections should almost solely be informed by the popular sovereignty principle and state conceptions of the right to vote. Because Article I, § 2 links the qualification of electors for state and federal elections, this principle provides the framework for the right to vote in federal elections. The normative implications of this, discussed in the next section, are several.²⁶⁰ With the exception of presidential elections, state law would supply the rule of decision with respect to the right to vote in federal elections, a reading that does not disturb much of the authority that states already have with respect to crafting the rules that govern both state and federal elections.²⁶¹ Thus, this deference to state

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²⁵⁹ See also 156 U. Pa. L. Rev. 313, 318 (2007) (noting that “[state] courts recently confronted with voter participation claims have generally begun by asking whether there exists a Supreme Court precedent that applies strict scrutiny or lenient review to a facially similar law. If so, and if the court is satisfied that the law at issue is sufficiently similar, the court will take shelter under the Supreme Court's decision.”).

²⁶⁰ My argument also suggests that perhaps federal courts should be looking to state courts in defining the contours of the federal right to vote, a point that Josh Douglas has persuasively argued. See

²⁶¹ This is important because there is a credible argument that this view of the Ninth Amendment as creating a federal enforced guarantee based in state constitutional law could create a conflict between state and federal law that runs afoul of the Supremacy Clause. See Massey, *supra* note , at 1253 (arguing that in cases of conflict, “the right that has its source in federal law should prevail”). Such conflicts are unlikely here because the Article expressly observes that the federal electoral regime is different given the nature of the U.S. government as representative rather than a pure democracy, and therefore the popular

constitutional authority is consistent with those provisions of the Constitution that directly bear on elections – for example, Article I, section 4’s proscription that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof;” Article I, Section 2’s delegation of authority to choose the qualification of electors so long as “the Electors in each States shall have the Qualifications requisite for Electors of the most numerous branch of the state legislature.”²⁶² In this context, Congress can veto contrary state laws pursuant to its authority under the Elections Clause and the Fourteenth and Fifteenth Amendments; nonetheless, states still retain plenary authority to determine the substantive contours of the right to vote.²⁶³ The popular sovereignty principle dictates that state elections function differently. While states also retain the authority to craft rules that govern its own elections under the Tenth Amendment, courts must approach the regulation of state elections differently than it does with respect to federal elections, giving equal weight to the popular sovereignty principles embraced by the Ninth and Tenth Amendments.

III. THE POPULAR SOVEREIGNTY PRINCIPLE IN ACTION: ASSESSING THE VALIDITY OF STATE ELECTORAL REGULATIONS

As the prior section shows, the popular sovereignty foundations of the right to vote undermine the argument that the right to vote is an equal protection concept that states can rescind at will, even for their own elections.²⁶⁴ This analysis does not, however, validate the strict scrutiny used to assess the poll tax in *Harper v. State Board of Elections*, a standard that can obscure the considerable authority that states do have in this context.²⁶⁵ This reframing of the right suggests that a reformulated *Anderson v. Celebrezze/Burdick v. Takushi/Crawford v. Marion County* sliding scale analysis may be a better fit to assess burdens on the right to vote rather than strict scrutiny advocated by some scholars because balancing

sovereignty principle would be much more narrow in the context of federal elections. See Part , supra. Indeed, the focus here is on the regulation of state legislative redistricting, which has little, if any implication, for the Supremacy Clause of the U.S. Constitution.

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²⁶³ See Franita Tolson, *Reinventing Sovereignty?*

²⁶⁴ Start this section with a discussion of this news story? http://www.eastvalleytribune.com/arizona/capitol_media_services/article_8a05991e-7f04-11e3-8a04-001a4bcf887a.html

²⁶⁵ See Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*. See also Fishkin, supra note , at 1329 (defending the balancing approach in *Crawford* because it “nudged courts’ role away from the broad structural evaluation and redesign of election administration regimes and toward a clear focus on whether individual voters are being excluded”).

allows courts to weigh the voter's interest and the state's interest from the baseline that both are constitutionally and historically grounded. This analysis is contrary to most approaches in the legal scholarship, which has extensively criticized the *Burdick* balancing test for privileging the state's interest over the importance of the right to vote, particularly in light of the structural obstacles insulating the major political parties from competition and therefore limiting the ability of voters to participate in the political process.²⁶⁶ In this context, the popular sovereignty principle would level the playing field, forcing the court to consider the arguments on both sides rather than proceeding from the baseline that states enjoy plenary authority to regulate access to the franchise while voters have little or no corresponding interest at stake.²⁶⁷ To illustrate this concept, Parts III (A) and (B) explores the popular sovereignty principle in the context of ballot access and voter identification regulations.²⁶⁸

This right to vote, as an expression of sovereign authority that derived from state level alter or abolish provisions, and by implication, followed the people into the creation of the union, can be read into the Ninth and Tenth Amendments using the same the interpretive method that the Court has applied with respect to determining the power that the states retain in its Tenth Amendment jurisprudence. In *U.S Term Limits v. Thornton*, the Supreme Court held that states retain the powers held pre-ratification and that were not expressly delegated to the federal government.

²⁶⁶ Pildes and Issacharoff (describing this as a political lockup that justified heightened judicial scrutiny).

²⁶⁷ See generally James Fishkin, *Deliberation by the People Themselves: Entry Points for the Public Voice*, 12 Election L.J. 490, 490, (2014) (arguing that the "evaluation and/or selection of candidates in the nomination phase" is a way in which the people themselves practice deliberative democracy).

²⁶⁸ To the extent that the Court has determined that Article I, § 2 is an exclusive delegation to the states of the authority to set voter qualifications for state and federal elections, then the popular sovereignty principle is also a constraint on state authority in this area. See *Arizona v. Inter Tribal Council of Arizona*. However, the effect on federal power is much more limited because there are no "voters" created by federal law, per se, and there are federalism considerations that may impact the constitutionality of state action as it relates to federal elections. See Franita Tolson, *Reinventing Sovereignty*. This part of the argument focuses exclusively on election administration and ballot access, not other regulations that implicate the right to vote but might arguably be considered "manner" regulations under the Elections Clause, like redistricting and reapportionment, that Congress can preempt at will. See, e.g., Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*. Even though election administration and ballot access regulations implicate different constitutional values, see Daniel P. Tokaji, *Response: Judicial Review of Election Administration*, 156 U. Pa. L. Rev. PENnumbra 379 (2008), both impact the voter's ability to participate in elections, subject to minimal federal oversight, and therefore demand some consideration of the popular sovereignty principle.

Thornton involved an Arkansas state constitutional amendment that sought to impose term limits on individuals elected to the U.S. House of Representatives and Senate.²⁶⁹ The U.S. Constitution contains age, citizenship and residency requirements for those offices, but says nothing about term limits.²⁷⁰ *Thornton* relies on the text of the Qualifications Clauses in drawing a distinction between the powers given the new central government and those retained by the sovereign states over congressional qualifications, inferring that these provisions are exclusive and cannot be supplemented by the states.²⁷¹ By looking at the text of the Tenth Amendment as well as the convention and ratification debates, the Court determined that the power to add qualifications of the House or the Senate was not within the power reserved to the states under the Tenth Amendment because the states did not possess this authority prior to the ratification of the Constitution.²⁷²

The text of the Tenth Amendment similarly draws a distinction between the powers retained by the people and those of the states, suggesting that these two categories are not necessarily coterminous; the Ninth Amendment likewise protects the authority of the people to define the scope of this power through majoritarian processes.²⁷³ The historical analysis illustrates that voters enjoyed greater rights of participation at the state level; applying a *Thornton*-esque retained rights analysis means that these rights followed them into the union. This preexisting level of participation is the framework from which we adjudge the constitutionality of current regulations. Judges are equipped to perform this assessment, as it is very similar to the analysis in cases under Section 5 of the

²⁶⁹ 514 U.S. 779 (1995).

²⁷⁰ See U.S. Const. Art. I, § 2, cl. 2 (qualifications for the House); Art. I, § 3, cl. 3 (qualifications for the senate).

²⁷¹ *Thornton*, 514 U.S. at 801.

²⁷² The Ninth and Tenth Amendments also may protect less traditional rights of participation, at least to the extent that these rights are parallel to those that existed at the Founding. For example, one such right might be the idea that people could have a constitutionally cognizable interest in participating in ballot initiatives and referendum at the state level, traceable to the power delegated to the people by early state constitutions. See, e.g., The Constitution of Pennsylvania 1776, Art. III, available at <http://www.wordservice.org/State%20Constitutions/usa1021.htm> (“That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same.”). *Id.* at Art. IV (“That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.”). See also The Constitution of North Carolina 1776, Art. II, available at <http://www.wordservice.org/State%20Constitutions/usa1022.htm> (“That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof.”).

²⁷³ Lash

Voting Rights Act, where courts determine whether minorities are worse off by comparing the proposed change to the current law in order determine if the new rule is “retrogressive.”²⁷⁴ The analysis here is a bit broader—it looks at the level of participation that the people in the state had historically—in determining whether the new rule makes them worse off. Similar to section 5, however, such burdens can be justified if the state is trying to address a problem in its electoral system, or comply with federal law.²⁷⁵ These rights of participation are articulated through the right to vote, a value that can be captured in modern doctrine by 1) viewing the proposed law in the broader historical context of the state’s electoral apparatus to determine whether the people have a reliance interest in the status quo, and 2) comparing the state’s prior law to the proposed change and assessing whether voters are worse off under the new regime. I take each of them in turn.

A. The Foundations of the Reliance Interest: Restrictive Ballot Access Laws as Infringements of the Popular Sovereignty Principle

Ballot access laws, which are inextricably tied to the right to vote, are instructive of the reliance interest since the Court utilizes the same framework to assess both ballot access laws and restrictions on the right to vote. Moreover, the question of whether ballot access regulations are “restrictive” often turns on an assessment of the state’s electoral structure as a whole, an analysis that is key to determining the reliance interests people have developed relative to participating in their respective state electoral systems.²⁷⁶

In *Bullock v. Carter*, the Court invalidated the filing fees imposed by Texas to run as a candidate for certain offices. Some of these fees ranged as high as \$8,900, and had an appreciable effect on exercise of the ballot, even though there were other avenues available to candidates to get on the ballot that did not require the payment

²⁷⁴ See, e.g., *Beer v. United States*, 425 U.S. 130, 140-41 (1976) (“the purpose of section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise”); *Georgia v. Ashcroft*, 539 U.S. 461, 479 (2003) (“any assessment of the retrogression of a minority group’s effective exercise of the franchise depends on an examination of all of the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group’s opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan.”).

²⁷⁵ See *Bush v. Vera*, 517 U.S. 952 (assuming without deciding that racial gerrymanders that otherwise violate the Constitution could be justified in order to comply with sections 2 and 5 of the Voting Rights Act).

²⁷⁶ See *Anderson v. Celebrezze*; *Crawford v. Marion County*

of a filing fee.²⁷⁷ Notably, the Court did not view ballot access laws as imposing the same burden on the right to vote as it did on the candidate's ability to get on the ballot.²⁷⁸ Nevertheless, the Court recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation" so the Court chose to assess the impact of the ballot access laws on the exercise of the franchise, consistent with the rigorous analysis commanded by *Harper v. Virginia Board of Elections*.²⁷⁹

Burdick v. Takushi represented a departure from this approach, both doctrinally and theoretically. The petitioner wanted to write in Donald Duck as his candidate of choice for a congressional election, but was barred from doing so by state law.²⁸⁰ Rejecting the argument that the petitioner had a First Amendment right to write in his preferred candidate, the Court found that state law provided myriad opportunity for the petitioner to get his preferred candidate on the ballot. The idea that the petitioner's voting related harm can be vindicated by running his own candidate is a reflection of Founding era views that there should be space between the voter and the government; the ability of the voter to use the ballot as a place for dissent runs counter to this impulse. *Burdick* reaffirmed the connection between ballot access and voting, but did so in order to reinforce a fairly restrictive view of the right to vote.²⁸¹

The contrast between the framers' view of governance by elites and the democracy that persisted at the state level highlights a significant flaw in *Burdick*: the Court has interpreted the states' authority over both ballot access and voting from the

²⁷⁷ *Id.* (rejecting the State's argument that "a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition" on the grounds that it forces the candidate to bypass the primary election which "may be more crucial than the general election in certain parts of Texas"). See also *Lubin v. Panish*

²⁷⁸ 405 U.S. 134 (1972) (applying the *Harper* standard for review of ballot access laws).

²⁷⁹ *Id.*

²⁸⁰ See also *Harper* (avoiding the question of whether there is a first amendment right to vote in state elections, but grounding the right to vote in federal elections in conceptions of equal protection). But see Part IV (arguing that the popular sovereignty principle influences federal elections because of the link in Article I, Section 2 for voter qualifications in both state and federal elections).

²⁸¹ See Richard Pildes and Samuel Issacharoff. *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *Stan. L. Rev.* 643, 669 (1998) ("For the most part, ballot access restrictions represent a problem of legislative, rather than intertemporal, entrenchment. There is little reason to suppose that most voters wish to foreclose the option of expressing discontent with the traditional political parties by supporting an occasional third party or independent challenger.").

perspective of the representative government that exists at the federal level, with its initial reservations about access to the ballot, rather than from the baseline of the democratizing impulse and broad access to the franchise that has historically permeated the electoral systems of most states since the 1850s (but as early as the 1770s).²⁸² Because the constitutional text links the voter qualifications of state and federal elections, placing the onus on the states to decide who can vote, this is a significant oversight.

Consideration of the popular sovereignty principle also validates criticism offered by Professors Pildes and Issacharoff, that the Court did not properly consider the write-in ban in the broader scheme of Hawaii's electoral apparatus, but this same consideration does not necessarily lead to the conclusion that these scholars advocate: that the write-in ban impermissibly burdened the First and Fourteenth Amendment rights of the voter.²⁸³ Pildes and Issacharoff's argument that anticompetitive state action in the electoral arena is constitutionally problematic implies that the state has an affirmative obligation to ensure that its electoral apparatus is competitive.²⁸⁴ This claim can be constitutionally grounded in the popular sovereignty principle, at least to the extent that a competitive electoral structure is historically justifiable, or alternatively, was an aspect of the electoral structure in the state prior to the adoption of the contested rule,²⁸⁵ yet this does not

²⁸² I recognize that women and minorities could not vote in the 1850s, and democracy at the time was viewed as extending the vote to nonfreeholding white males and, in some cases, noncitizens, Keyssar, but "democracy" should be read in light of our evolving constitutional tradition in favor of universal access to the ballot. See U.S. Const. amends. XIV; XV; IXX; XXIV; XXVI. See also Reva Siegel, *She the People: the Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (arguing that the Fourteenth and Nineteenth Amendments have to be read together despite section 2 of the Fourteenth's language prohibition of abridgments on the right of males to vote).

²⁸³ See *id.* at 672-73 (criticizing the Court for applying "conventional individual-rights analysis" "Burdick represents a contemporary variant of *Nixon v. Herndon*. In each case, a singularly powerful political party used its control over the state electoral machinery to devise rules of engagement that prevented internal defection.") But see Christopher Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. Pa. L. Rev. 313, 353 (arguing that this criticism "goes too far" because it "was the petitioner who framed the case in 'narrow, individualistic, nonsystemic terms'").

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²⁸⁵ In other words, it depends on whether a state explicitly has embraced a democratic structure. See generally Fishkin, *supra* note , at 493 ("[D]emocracy is not about collective will formation but just a 'competitive struggle for the people's vote' to use Schumpeter's famous phrase. Legal guarantees, particularly constitutional ones, are designed to protect against tyranny of the majority. Within that constraint, all we need are competitive elections.") (citing JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY

necessarily seem to be true of Hawaii. There is no history of write in voting in the time before or since Hawaii became a state. The write-in ban litigated in *Burdick* had been in place in Hawaii since the 1890s, suggesting that the state has, historically, been less democratic than others.²⁸⁶ After Congress annexed the islands in 1898, Congress created a territorial government that had an elected legislature but an appointed governor. In addition, Congress retained the right to veto territorial legislation, a right that it never used, but nonetheless, undermined the notion that Hawaii was overly “democratic” prior to its admission as the fiftieth state in 1959.²⁸⁷ More recently, while certain counties have a limited initiative process, giving voters more direct control over policy, but there is no statewide process for ballot initiatives and referendum.²⁸⁸ Thus, on balance, voters have no reliance interest that would justify the claim that they are entitled to write-in a candidate for state elections, as Hawaii has never been a bastion of democratic participation either historically or with respect to this particular issue.

In contrast, the ban on fusion candidacies in Minnesota, which has history of being solicitous to third parties, is significantly more problematic.²⁸⁹ In *Timmons v. Twin Cities Area New Party*, the Court held that prohibiting fusion candidacies, where individuals appear on the ballot as the candidate of more than one party, did not violate the First and Fourteenth Amendment rights of the third parties because the ballot is not “fora for political expression.”²⁹⁰ Like *Burdick*, the Court ignored the

(1942)).

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²⁸⁷ JOHN S. WHITEHEAD, *COMPLETING THE UNION: ALASKA, HAWAI’I, AND THE BATTLE FOR STATEHOOD* 16 (2004).

²⁸⁸ http://ballotpedia.org/History_of_Initiative_%26_Referendum_in_Hawaii

²⁸⁹ See also Pildes and Issacharoff, *supra* note , at 683 (“The fusion strategy for third parties had its heyday at the end of the nineteenth century, particularly in the Midwest where Populists, Greenbackers, and other lesser groups used coalitions with the Democrats, the weaker of the major parties, to provide a viable electoral forum for their views. 152 To a lesser extent, Republicans in the South also used fusion candidacies. 153 The movement to ban fusion candidacies emerged as a deliberate tactic to eliminate third-party competition by locking into place the two-party structure. 154 While the antifusion movement in the Midwest worked to end effective cooperation between Democrats and third-party groups, it received support from both the Republican and Democratic Parties. 155 Both parties stood to gain from erecting barriers against third-party agitation and channeling political activity within their own internal institutional frameworks. In the aftermath of the new barriers to fusion politics, the presence of third parties dramatically dwindled in contemporary politics.”).

²⁹⁰ *Id.* at 683 (“This significant electoral strategy allows third parties to influence the positions taken by the two established parties. Cross-endorsement not only gives third parties a chance to support a candidate who might get elected, it can also give organized expression to dissenting voices within the major parties. Fusion candidacies thus influence

independent constitutional significance of voting and the ballot itself by focusing on the other avenues in which the interests of the petitioners can be vindicated.²⁹¹ Pildes and Issacharoff have criticized the Court's approach, arguing that the ban should trigger exacting judicial scrutiny because it "further entrench[es] the two dominant parties by dramatically raising additional barriers to competition. As a result of the ban on fusion strategies, third parties seeking to participate meaningfully in government must organize a party capable of displacing one of the major parties, rather than influencing one of them."²⁹²

This criticism of the ban is legitimate, not because it is anti-competitive as such, but because competition has been a legitimate feature of Minnesota politics since the post-Civil War era. In the years following the War, there was robust competition for the votes of African-American because the state extended suffrage to this group in 1867, two years before the adoption of the Fifteenth Amendment.²⁹³ A shortage of workers in its railroad, lumber, and wheat industries led Minnesota to solicit recent immigrants, and this cultural diversity contributed to its political diversity.²⁹⁴ In 1898, Minnesota voters elected a Swedish-born governor, John Lind, who ran with the endorsements of the Democrats, Silver Republicans, and Populists, displacing the Republican Party that had dominated the governorship since before the Civil War.²⁹⁵ The year 1918 marked the first time that the Farmer-Labor party appeared on the Minnesota ballot, and the party enjoyed some success in electing national candidates and competing for the governorship over the ensuing decades. In 1923, Minnesota's two U.S. Senators were members of the Farmer-Labor party.²⁹⁶ Similarly, in 1930 and 1954, respectively, Minnesota elected Farmer-Labor candidates to serve as governor, illustrating the vitality and staying power of third parties in the state.²⁹⁷ Republican Party dominance in Minnesota from 1939-1955 led to more fusion candidacies between the Farmer-Labor Party and the Democratic Party, until the two parties officially merged in 1944.²⁹⁸ Recently, the DFL has been fairly

the direction of a dominant party's platform or choice of candidates.").

²⁹¹ See Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 Alaska L. Rev. 29, 37-38 (2011) (arguing that voting is an affirmative right that requires the court "to take into account the different circumstances that voters face").

²⁹² *Id.*

²⁹³ THEODORE C. BLEGEN, *MINNESOTA: A HISTORY OF THE STATE* 289 (1975).

²⁹⁴ *Id.* at 304-313. See also *id.* at 473 (noting that, by the first world war, Minnesota's population was 70% immigrant or the children of immigrants).

²⁹⁵ *Id.* at 433.

²⁹⁶ *Id.* at 477-78 (noting that "Farmer-Labor strength was threatening the Republican control of the state").

²⁹⁷ *Id.* at 523.

²⁹⁸ <http://www.dfl.org/about-our-party/overview-dfl-history/>

successful, electing Rudy Perpich in the 1980s, the longest serving governor of Minnesota, and Paul Wellstone, who served as a U.S. Senator from 1991-2002.²⁹⁹

Given this history, what does popular sovereignty principle have to say about the standard of review that the court employs to assess the ban? It suggests that the Eighth Circuit's resolution of the fusion ban, in light of the historical importance of third parties, may have been a better approach to resolving its constitutionality than the approach taken by the Court in *Timmons*.³⁰⁰ While the fusion ban had been in place since 1900, the Democratic and Farmer-Labor parties had been unofficially aligned for almost a decade before their merger in the 1940s, suggesting that the ban had very little practical application until recently.³⁰¹ On balance, the presence of very robust and enduring third parties in the state, particularly one that successfully combined with one of the two major parties, suggests that the Court's concerns about political instability were unfounded. Moreover, the ban, which was more about stifling competition and furthering a two party system than any concern that third parties would use the ballot as a vehicle for promoting "popular slogans and catchphrases," was completely incompatible with the state's progressive political history.

The different political systems of Hawaii and Minnesota indicate balancing may be more appropriate to assess the restrictions because the test does not obscure the inquiry into the legitimacy of the voter's interest, as strict scrutiny would in this circumstance by calling every state regulation of the right to vote into question.³⁰² Instead, the popular sovereignty principle would require that courts meaningfully assess the interests on both sides, rather than employ absolute deference to the state interest which is how balancing has played out in recent cases. State courts have proven that they can employ this measured and reasoned analysis to their own state

²⁹⁹ *Id.* at 577. See also *id.* at 588 (noting that, in 1962, Democratic-Farmer-Labor candidates won three state offices, including Walter Mondale, who served as vice president under Jimmy Carter and would later run for president in 1984). See also WILLIAM E. LASS, MINNESOTA: A HISTORY 280 (1998) (discussing the DFL politicians who have served in important national positions including Hubert H. Humphrey, who was vice president under Lyndon B. Johnson; Eugene McCarthy, who served as a U.S. Senator; and Coya G. Knutson, a congresswoman who served from 1954-58). *Id.* at 299-300.

³⁰⁰ Blegin, *supra* note , at 525 (noting that the Olson, the Farmer-Labor governor of Minnesota during the depression, made "no overt effort to unite Farmer-Laborites and Democrats, but he did not hid his friendly feeling for Roosevelt and the emerging New Deal").

³⁰² See, e.g., *Bullock v. Carter*, 405 U.S. 134, 143 (1972), quoted with approval in *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (noting that "it is essential to examine in a realistic light the nature [322] and extent ... of [the] impact [of ballot-access restrictions] on voters.").

constitutional provisions regulating the right to vote. In *Miller v. Treadwell*, the Alaska Supreme Court held that voters who misspelled the name of write-in U.S. Senate candidate, Lisa Murkowski, should have their ballots counted because the court has a “strong and consistently applied policy of interpreting statutes in order to effectuate voter intent.”³⁰³ Notably, these write-in ballots were responsible for Murkowski’s win in the Alaska Senate race in 2010, and it is not surprising that, in addition to Alaska’s history of political inclusion,³⁰⁴ the court gave considerable weight to both the expressive harm of discarding the ballots as well as its protective democracy foundations,³⁰⁵ noting that state law is “is designed to ensure that ballots are counted, not excluded. And this inclusiveness is consistent with the overarching purpose of an election: ‘to ascertain the public will.’”³⁰⁶

Reconceiving of elections as vehicles for ascertaining the public will, rather than as mere creatures of the regulatory whims of the state, sheds new light on the legitimacy of certain state interests. In *Burdick*, the state claimed that it was trying to prevent party raiding and unrestrained factionalism, interests that are legitimate but only if they are actual, rather than hypothetical in light of the burdens placed on the right to vote. Hawaii’s one party system was designed to freeze out third parties and independent candidates, making such raiding and factionalism unlikely; on the other hand, voters had never enjoyed a high level of democratic participation in Hawaii’s electoral scheme, making it difficult to conceptualize the ability to cast a write in ballot as integral to their popular sovereignty rights.

While the popular sovereignty principle arguably requires that infringements of the right to vote address an actual problem, it does so with the assumption that these burdens infringe on participatory rights that the people had long retained in the state.³⁰⁷ Minnesota had long enjoyed a political environment in which third parties

³⁰³ 245 P.3d 867, 869.

³⁰⁴ *Id.* at 870 (“Alaskan voters arrive at their polling places with a vast array of backgrounds and capabilities. Some Alaskans were not raised with English as their first language. Some Alaskans who speak English do not write it as well. Some Alaskans have physical or learning disabilities that hinder their ability to write clearly or spell correctly. Yet none of these issues should take away a voter’s right to decide which candidate to elect to govern. We must construe the statute’s language in light of the purpose of preserving a voter’s choice rather than ignoring it.”).

³⁰⁵ *Id.* at 868-69 (“The right to vote ‘is fundamental to our concept of democratic government.’ [It] encompasses the [voter’s] right to express [the voter’s] opinion and is a way to declare [the voter’s] full membership in the political community.’ We articulated this principle over three decades ago...recognizing the profound importance of citizens’ rights to select their leaders”).

³⁰⁶ *Id.* at 870.

³⁰⁷ Pildes and Issacharoff, *supra* note , at 674 (“The State’s ability to recite abstract state interests in political stability, avoidance of factionalism, or prevention of party

were competitive, a fact that overshadows the legitimacy of the ban, no matter how longstanding, because the state's interest in the political stability of the two party system is contrary to its historical reality. Thus, in weighing the equities under *Burden's* sliding scale scrutiny, one cannot critique the strength of the state interest without properly considering whether the voters have a reliance interest in the level of participation that they had prior to the implementation of the offending state law.³⁰⁸ Of course this interest can be subordinate to the state's attempt to address a real problem in its electoral system, but the Court would no longer be able to rely on abstract generalities such as those offered in *Burdick* and *Timmons* to justify the state laws challenged there.³⁰⁹ Because of the focus on structure of the state's electoral apparatus historically, this analysis also opens the door for a sound constitutional framework to assess the harm from anticompetitive electoral structures, a foundation that had been missing up to this point.³¹⁰

B. Reassessing the Validity of Voter Identification Laws in Light of the Popular Sovereignty Principle: A Nod to the State's Prior Regime

Voter qualification requirements predate the union, and like access to the ballot, have evolved over the past two centuries. For example, the 1843 Constitution of Rhode Island had extensive qualification requirements for those seeking to vote in its elections, including age, residency, and registration requirements, and it also required that individuals be current on their property taxes in order to exercise the franchise.³¹¹ Other states constitutions, including those written during the

raiding, should hardly obstruct more penetrating judicial analysis of the actual anticompetitive effects.”).

³⁰⁸ This would be in addition to, not in place of, other factors that courts should look to in determining whether a regulation burdens the right to vote. See, e.g., Tokaji, *supra* note , at 387 (arguing that “courts should attend not merely to the number of voters affected by a particular practice and the degree to which those voters' participation is burdened, but also to their skewing effect—that is, the extent to which they are likely to impose a differential burden on certain classes of voters.”)

³⁰⁹ See *id.* at 387 (arguing that courts must assess whether the state's justification for maintaining a particular electoral practice is “real or pretextual”).

³¹⁰ Compare Issacharoff with Persily

³¹¹ The Rhode Island Constitution of 1843, Sec. 2, available at <http://www.wordservice.org/State%20Constitutions/usa1031.htm>:

Every male native citizen of the United States, of the age of twenty -one years, who has had his residence and home in this state two years, and in the town or city in which he may offer to vote, six months next preceding the time of voting, whose name is registered pursuant to the act calling the convention to frame this constitution, or shall be registered in the office of the clerk of such town or city at least seven days before the time he shall offer to vote, and before the last day of December in the present year ; and who has paid or shall pay a tax or taxes assessed upon his estate within this state,

Revolution and revised in the early decades of the Founding, were less specific, declaring only that all elections “be free” and that all men be able to participate so long as they have a sufficient interest.³¹² However, like Rhode Island, it was not uncommon for many state constitutions to include registration requirements in additions to restrictions based on age, residency, citizenship and property ownership in order to exercise the franchise.³¹³ As Part II shows, these requirements have loosened considerably over the past two centuries, with most states eliminating freehold requirements in the eighteenth century and Supreme Court and constitutional amendment eradicating the poll tax in the 1960s. Nevertheless, many voter qualification requirements remain, and are assumed to be constitutional under current precedent.³¹⁴

Given the state’s authority to impose voter qualifications, most litigation strategies challenging voter identification laws on constitutional grounds have focused on equating voter id to other disfavored voter qualification methods—namely, the poll tax—rather than assessing their validity standing alone.³¹⁵ In *Crawford v. Marion*

and within a year of the time of voting, to the amount of one dollar, or who shall voluntarily pay, at least seven days before the time he shall offer to vote...shall have a right to vote in the election of all civil officers, and on all questions, in all legally organized town or ward meetings...

³¹² See, e.g., The Pennsylvania Constitution 1776; The North Carolina Constitution of 1776.

³¹³ The Constitution of New York 1777, Art. VII, available at <http://www.wordservice.org/State%20Constitutions/usa1032.htm> (“That every male inhabitant of full age, who shall have personally resided within one of the counties of this State for six months immediately preceding the day of election, shall, at such election, be entitled to vote for representatives of the said county in assembly; if, during the time aforesaid, he shall have been a freeholder, possessing a freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to this State.”).

³¹⁴ See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (rejecting plaintiffs claim that they had a right to vote because they lived outside of the municipal boundaries of Tuscaloosa and therefore were not bona fide residents). See also *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (challenging the requirements that residents had to own or lease taxable property in the district or be parents of children enrolled in public school in order to vote in school district elections, but not the age, citizenship, or residency requirements); *Gaunt v. Brown*, 341 F.Supp.1187 (S.D. Ohio 1973), aff’d 409 U.S. 809 (1972) (seventeen year olds who would turn eighteen by the election had no right to vote in primary elections).

³¹⁵ Indeed, there is an argument that voter identification laws are “manner” regulations or alternatively, “proof” requirements to verify voter qualifications, rather than voter qualifications themselves, an argument I explore in *The Spectrum of Congressional Authority over Elections*, and has come front in center in the litigation challenging Texas’s

County, the Supreme Court rejected a facial challenge to Indiana's voter identification law on the grounds that the plaintiffs had not shown that providing identification was a severe burden on the right to vote.³¹⁶ To the extent that the burden on some voters is severe, the Court noted that this burden is mitigated by the fact that they can cast provisional ballots.³¹⁷

Crawford does not touch on the issue of whether particular types of voter identification laws can pose a severe burden. Indiana required state issued photo identification that the state issued the ids free of charge. Voters who could not obtain the identification could cast a provisional ballot.³¹⁸ In the years since *Crawford* validated photo identification requirements, states have gotten more restrictive in the types of identification that is acceptable for use at the polls, a factor which may not raise concerns if assessed under the equal protection, *Burdick/Anderson* style balancing, but would raise concerns under the popular sovereignty approach. Under the latter, the prior regime that existed in the state would be the baseline for determining the level of participation that voters enjoyed prior to the change, and departures from this baseline would be assessed based on the problem the law is trying to address. Even if a state did not have a voter identification law in place prior to its adoption, states are not prohibited from adopting such a rule if it is designed to address a specific problem. For example, voter fraud was a prominent feature of the 2004 gubernatorial election in Washington state, where the election was decided by a 133 vote margin, and the superior court determined that 1678 illegal votes were cast including by felons, unregistered, and deceased voters.³¹⁹ Thus, Washington would be well within its authority to adopt a voter identification law in light of its documented history of

voter identification law. This does not, however, preclude a successful challenge of a voter identification law on state constitutional grounds. *See, e.g.,* <http://www.pacourts.us/assets/files/setting-647/file-3490.pdf?cb=a5ec29>.

³¹⁶ 553 U.S. 181 (2008).

³¹⁷ *Id.* at 199 (2008) (“Because Indiana’s cards are free, the inconvenience of going to the Bureau of Motor Vehicles, gathering required documents, and posing for a photograph does not qualify as a substantial burden on most voters’ right to vote, or represent a significant increase over the usual burdens of voting. The severity of the somewhat heavier burden that may be placed on a limited number of persons—e.g., elderly persons born out of State, who may have difficulty obtaining a birth certificate—is mitigated by the fact that eligible voters without photo identification may cast provisional ballots that will be counted if they execute the required affidavit at the circuit court clerk’s office.”).

³¹⁸ need more specifics

³¹⁹ H.R. Rep. No. 109-666, at 7 & n.16 (citing Transcript of Court's Oral Decision, *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. June 6, 2005), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/oraldecision.pdf>).

voter fraud. This law would further the state's interest in election integrity because the risk of fraud is actual rather than speculative.

In contrast, if the state is worried about the perception of fraud, rather than actual fraud, in voting, the state can legitimately address this concern through a more limited voter identification law to mitigate the burdens on the right to vote.³²⁰ In cases dealing with perception rather than actual fraud, the law has to have a minimal effect on the composition of the electorate relative to the psychic benefits that the state hopes to derive by having the law in place. Thus, partisan purpose would be more relevant under the popular sovereignty approach in determining whether the burden is justified, a factor that was not dispositive in *Crawford*.³²¹ The popular sovereignty principle would require, for example, that a state come forward with a nonpartisan justification for its use of only limited forms of IDs and its refusal to give voters the option of presenting a broader swath of official identification that would similarly establish their identity.

Arguably, limiting the forms of identification that voters could use would have the effect of constricting the electorate for reasons that are unrelated to the advancement of any legitimate state interest.³²² Pennsylvania's law, for example, allows voters to present identification that has a photo of the voter, conforms to the voter's name on the rolls, is issued by an acceptable authority (the US government, PA, a PA city to an employee of that municipality, a PA college, or a PA care facility), and, with only a few exceptions, is not expired.³²³ In contrast, Texas law only allows a handful of identifications in order to vote: "(1) a driver's license or personal ID card issued by the Texas Department of Public Safety (DPS); (2) a license to carry a concealed handgun, also issued by DPS; (3) a U.S. military ID card; (4) a U.S. citizenship certificate with photograph; or (5) a U.S. passport." Texas law provides that acceptable IDs may be expired, but must have expired no more than 60 days before their attempted use. Voters may get a personal ID card issued by the state, which does not require the payment of a fee, but does require multiple other forms of identification that cost money, like a certified copy of a birth certificate.

Unlike traditional equal protection analysis, in which the partisan motivations of the legislature would have minimal significance because knowledge of a voter ID law's potential disproportionate impact does not equate to discriminatory purpose

³²⁰ See, e.g., *Miller v. Treadwell*, 245 P.3d 867, 876 (Alaska 2010) (noting that Alaska's voter identification requirement can be waived if "the voter is known to the official").

³²¹

³²² See *Cox v. Larios*. But see *Crawford*.

³²³ *Applewhite v. Pennsylvania*

under the current caselaw,³²⁴ the popular sovereignty analysis would take such motivations into consideration in determining whether the burden on the electorate is justified.³²⁵ This is a function of the duality of the analysis—considering both the voter’s interest and the state’s interest—rather than deferring entirely to the state, as has been the Court’s practice for many of the cases in this area. With respect to Texas’s voter identification law, there is a credible argument that the types of identifications that voters can be present correlate to the partisan leanings of the electorate.³²⁶ Absent an alternative justification for the pool of acceptable ids, this aspect of Texas’s law would be unconstitutional under my proposed approach.

To the extent that the constitutionality of voter ID law turns on the availability of provisional voting,³²⁷ there are constitutional constraints on a state’s ability to make provisional voting more difficult. Pennsylvania law has an affidavit option for voters indigent or otherwise unable to obtain an ID (like religious objectors). Voters who forget to bring ID to the polls, but cannot swear such an affidavit may vote provisionally and bring appropriate ID to the county board within 6 days in person or via fax.³²⁸ This law is considerably more permissive than some of the other states surveyed here, and with the in person or fax option for provisional voters, it is flexible enough that it allows those who were unable to get an ID prior to the election have meaningful options for having their vote counted.³²⁹ Like Pennsylvania, Texas voters must present acceptable ID within six days of casting the provisional ballot, or the ballot will be discarded, but there is no “fax” option, making it significantly less flexible than Pennsylvania. Texas’s affidavit option is

³²⁴ Crawford; Feeney. Partisanship, unlike race, also is not a suspect class sufficient to trigger strict scrutiny. See generally Veith.

³²⁵ Cf. *White v. Regester*; *Whitcomb v. Chavis* (determining discriminatory purpose in redistricting by reference to a list of factors). See also Franita Tolson, *What is Abridgment? A Critique of Two Section Twos* (arguing that discriminatory intent in the context of voting rights does not mean that actions have to be taken “because of, rather than in spite of” their effect on a minority group).

³²⁶

³²⁷ See Crawford

³²⁸ *Applewhite v. Pennsylvania* challenged Act 18 based on state law and the PA Constitution. The case began in the Commonwealth Court, appealed to the Pennsylvania Supreme Court, and was remanded. The law has been met with several temporary injunctions, one in which parties stipulated that PA poll workers may ask for ID but voters need not show it, and poll workers were to tell voters that they would need ID in the election. Given the nature of the case, the current preliminary injunction modified the previous one slightly: poll workers are now to tell voters that they will need to comply with ID requirements at some point in the future.

³²⁹

more restrictive than the Pennsylvania law. Voters without acceptable ID may cast regular ballots upon swearing an affidavit explaining that they have a religious objection to being photographed or have lost their photo ID in a presidentially- or gubernatorially-declared natural disaster occurring within 45 days of the election.³³⁰ Given that Texas makes the universe of acceptable IDs much smaller than other states, its limitations on provisional voting would be constitutionally problematic because it significantly more burdensome than its prior law (any photo identification, a utility bill, official mail, a paycheck, or a birth certificate) without adequate justification.³³¹

Texas aside, states still retain broad authority to implement voter identification laws, consistent with the popular sovereignty principle. For example, South Carolina's R54 requires photo ID for in person voters, in the form of a South Carolina driver's license, a state motor vehicle office- or county election office-issued ID card, a passport, or a military ID. The law removed the existing fee for motor vehicle office IDs and provided for a new photo voter registration card available for no charge at county election offices. Prior to 2011, South Carolina required a driver's license or written notification of voter registration from the county board of election registration, so its voter identification law, while more stringent, is less problematic than if the prior rule had required voters to simply affirm their name and address.

In addition, South Carolina's law contained a "reasonable impediment provision" more robust than the usual affidavit and provisional ballot option. R54 requires election officials to count the ballots of voters who presented a previously acceptable non-photo form of ID and signed affidavits indicating a reason for not having acceptable identification. When the District Court for the District of Columbia considered whether R54 should be precleared under section 5 in October of 2012, the three-judge panel found that the reasonable impediment provision made R54 flexible enough so that the law would not have the purpose or effect of denying or abridging the right to vote on account of race, or have a discriminatory retrogressive effect.³³²

³³⁰ *Texas v. Holder*, 888 F. Supp. 2d 113, 115 (D.D.C. 2012) vacated and remanded, 133 S. Ct. 2886 (2013). The Attorney General filed suit, challenging Texas's voter identification law under section 2 of the Voting Rights Act. *United States v. Texas, ELECTION LAW AT MORITZ* (Aug. 27, 2013), <http://moritzlaw.osu.edu/electionlaw/litigation/USv.Texas.php> (last visited Jan. 4, 2014).

³³¹ Tx. Stat. § 63.0101.

³³² However, since the decision was issued just before the November elections, the Court granted preclearance for 2013 and not 2012, so that elections officials might have enough time to properly implement the new IDs and "reasonable impediment provision" and educate voters about them.

In contrast, North Carolina's voter identification law is an amalgamation of all of the issues that raises red flags under the popular sovereignty analysis: limited forms of acceptable ids; burdensome provisional voting; a significantly more democratic baseline in the prior regime; and systemic changes that, in their totality, arguably have the effect of constricting the relevant electorate. Prior to the adoption of its omnibus election bill in 2013, North Carolina required voters to state their name and address, and then sign a poll book.³³³ The new law—which requires must be issued by either the state or the federal government, or alternatively, be military id, is significantly more stringent than the prior rule. House Bill 589 provides that North Carolina voters must present an unexpired form of acceptable photo identification such as a passport or ID issued by the US military or Department of Veterans Affairs, a federally- or North Carolina-recognized tribe, or another state if the voter's registration falls within 90 days of the election. If a voter does not possess proper ID on election day, he or she may vote provisionally and return with an acceptable ID before canvassing to have his or her provisional ballot counted.³³⁴ Applying the popular sovereignty analysis to North Carolina's law likely would result in its invalidation given that the law is: more burdensome than the prior practice; limits the pool of acceptable ids; was passed for partisan reasons; and requires voters to travel to the county canvassing board in order to have their provisional ballot counted.³³⁵

CONCLUSION

There is no explicit constitutional right to vote in state elections, yet the U.S. Constitution links suffrage in federal elections to those that exist “for the most numerous branch of the state government.” The Court has dealt with this strange turn of events by treating the right to vote in state elections as an equal protection fundamental right, which has, over time, allowed the Court to be outcome driven rather than recognizing that the strength of the right depends on the election at issue. Outside of the unique context of presidential elections, an equal protection

³³³ N.C. § 163-166.7.

³³⁴ See *Currie v. North Carolina*, ELECTION LAW AT MORITZ (Aug. 15, 2013), <http://moritzlaw.osu.edu/electionlaw/litigation/CurrieV.NC.php> (last visited Jan. 1, 2014). Much like the Section 2 case in Texas, the North Carolina plaintiffs point to state changes in voting beyond voter ID, like the reduction of early voting days notoriously used by black, church-going voters, to make the case for discriminatory purpose. The parties seek relief in the form of enjoining HB 589 from going into effect in 2016 and bailing North Carolina in to Section 5 coverage under Section 3(c) of the VRA.

³³⁵ While the voter identification law does not go into effect until 2016, starting in 2014, the new law also does not count provisional ballots filed by individuals who vote at the wrong precinct. N.C. § 163-166.11.

conception allows the Court to draw lines in any way that it sees fit, so long as those harmed can be lumped in an identifiable class of individuals whose interests are sufficiently strong that their disenfranchisement is constitutionally suspect, yet it is this view of the right, driven by standards developed in a fairly unorthodox context—presidential elections—that has inappropriately determined the substantive contours of the right to vote as it applies to every election. More important, the standard relieves the Court of the affirmative obligation to decide what voting requires, and it places the onus on the political branches should the right to vote ever be retracted. Exacerbating this problem is that state courts have latched on to the equal protection conception of the right to vote in interpreting their own state constitutions, but have ignored the popular sovereignty foundations of the right that survived the Founding.

The equal protection framework obscures that the right to vote is mandatory for state elections because it is part and parcel of the reserve sovereign authority that people retain under the Ninth and Tenth Amendments. Consistent with the natural law right that the people had to alter or abolish their state governments at the founding, voting is the predecessor of this authority and now stands as the vehicle through which the people express their sovereign authority. Thus, this Constitution's delegation to the states of determining the qualifications of electors also incorporates state level understandings that government is based on consent of the governed, defined by suffrage as well as the rights of assembly, speech, and petition, rights that were reserved to the people upon the ratification of the Constitution. This view of the right to vote as firmly rooted in the reserve rights principles of the Ninth and Tenth Amendments is more consistent with historical understandings of the right to vote than its current home in the Equal Protection Clause of the Fourteenth Amendment, a historical framework that requires that judicial assessments of state regulations that constrict the right to vote be more rigorous than they had been under the Court's current approach.