

THE REGULATION OF PRESIDENTIAL ELECTIONS

LORI A. RINGHAND*

There is an unresolved dispute lingering just beneath the surface of a host of laws regulating our elections: Does Congress have power under Articles I and II of the Constitution to legislate the nuts-and-bolts rules governing presidential elections? The issue exists because of a textual gap in congressional authority. Article I, Section 4 of the Constitution gives Congress the power to override a state's choices about the "times, places, and manner" of congressional elections held in the state. Article II, Section 1 gives each state legislature the power to determine the "manner" in which its presidential electors are appointed but grants no additional authority to Congress or the states to regulate presidential elections themselves. Congress plainly has the power to regulate many aspects of these elections under the enforcement clauses of the Reconstruction Amendments. But what power, if any, does Congress have under the original Constitution to regulate those elections once a state legislature has opted to use popular elections to appoint the state's presidential electors?

The Supreme Court has upheld congressional authority to regulate presidential elections under the original Constitution in several contexts, but the issue has gained new salience in recent years because of a long running dispute in Arizona about whether the state can require voter registrants to present documentary proof of citizenship, contrary to federal law. This dispute has presented the current Court with an opportunity to reconsider those earlier opinions and reshuffle the division of power between states and Congress in this realm.

This Essay approaches this issue through a new lens. It begins by exploring the conflict in Arizona that has brought the issue back to the Supreme Court. It then explains the background or "default" rules governing the distribution of power between Congress and the states, and why those rules are inapplicable in this context. It does so by examining both the 1787 Constitution's division of power over federal elections and several judicial opinions discussing and applying the resulting constitutional provisions. It concludes by arguing that this history, as well as multiple precedents of the Supreme Court, affirm that Congress has ample authority to regulate presidential elections once a state has chosen that method of appointing its electors.

* J. Alton Hosch Professor of Law and Josiah Meigs Distinguished Teaching Professor, University of Georgia School of Law. Many thanks to the participants and discussants at the 2024 *Wisconsin Law Review* Symposium, at which an early draft of this piece was presented. Thanks also to Dan T. Coenen, whose work, especially a draft book manuscript tentatively titled *The Common-Market Constitution: Text, History, and the 'Dormant Commerce Clause' Rule*, was very helpful in developing portions of the argument set out here, and to Savanna Nolan and Quillen Vaughn for their research assistance. Mistakes are of course my own.

Introduction	510
I. The Arizona Dispute	511
II. Enumerationism, (Un)reserved Powers, and the Original Constitution	516
A. Enumerationism and Its Limits	516
B. The Electors Clause	521
III. Supreme Court Precedents	524
A. <i>Burroughs v. United States</i>	524
B. <i>U.S. Term Limits v. Thornton</i>	525
C. <i>Trump v. Anderson</i>	526
Conclusion	528

INTRODUCTION

Like so many things in our constitutional system, authority over our elections is constitutionally divided between the states and the federal government. The most well-known constitutional provisions governing this division are the Fifteenth, Nineteenth, and Twenty-Sixth Amendments. These Amendments prohibit discrimination in voting on the basis of race, sex, and age, and give Congress explicit authority to enact legislation enforcing those prohibitions. The Fourteenth Amendment further limits the ability of states to impose certain burdens or inequities on the right to vote and includes a similar grant of power to Congress to enforce its provisions.

Each of these Amendments gives Congress significant authority to enact rules regulating both state and federal elections. But the original Constitution also allocated authority over federal elections. It did so through three lesser-known constitutional provisions: The Elections and Qualification Clauses of Article I and the Electors Clause of Article II. Together, these clauses structure the original division of power between states and the federal government in regard to federal elections.

These clauses differ in important ways. The Elections Clause (Article I, Section 4) affirmatively authorizes states to make rules governing the “times, places, and manner” of congressional elections but also explicitly grants to Congress the power to override the states’ choices on those matters.¹ The Qualifications Clause (Article I, Section 2) allows states to determine the “qualifications” of voters in elections for the House of Representatives but requires those qualifications to be the same as that used by the state in elections for the most numerous branch of its own government. (The Seventeenth Amendment, mandating

1. U.S. CONST. art. I, § 4.

the direct election of U.S. Senators, includes an identical provision.²) Unlike the Elections Clause, the Qualifications Clause has no congressional override, making states the final deciders of the “qualifications” of votes in congressional elections as long as they are the same as those used in state legislative races and do not run afoul of other parts of the Constitution. Finally, the Electors Clause (Article II, Section 1) does not speak to “elections” at all. Instead, it permits state legislatures to choose the manner of appointing the state’s presidential electors while also laying out certain rules about how and when the electors’ votes are cast and counted.³

The combined effect of these provisions is as follows. States get the final say over two components of federal elections. They determine the qualifications of voters for congressional elections (barring other constitutional limitations), and they determine the method the state will use when appointing presidential electors. Congress, in turn, has explicit power to override state choices about the times, places, and manner of congressional elections, and some authority over how and when presidential electors cast their ballots. But the text is silent on where power lies to regulate presidential elections themselves—the popular elections held in the states *after* a state legislature chooses that manner of appointing the state’s electors. That gap in textual authority over presidential elections gave rise to the ongoing dispute in Arizona that has put the issue of congressional authority over presidential elections back on the Supreme Court’s agenda.

I. THE ARIZONA DISPUTE

Arizona’s current battle against congressional regulation of its elections goes back to the early 2000s and was first addressed by the Supreme Court in 2013 in *Arizona v. Inter Tribal Council of Arizona*,⁴ which involved the National Voter Registration Act (NVRA). Among other things, the NVRA created a standardized, nationwide process voters can use to submit their voter registration forms by mail.⁵ The NVRA allows voters across the country to register to vote by completing a particular form, called the Federal Form, and sending it to whoever in their state is charged with processing voter registrations.⁶ The NVRA requires all states to accept and use this form when registering voters for federal elections.⁷

2. *Id.* art. I, § 2; *id.* amend. XVII.

3. *Id.* art. II, § 1.

4. 570 U.S. 1 (2013).

5. *Id.* at 5.

6. *Id.* at 5–6.

7. *Id.* at 5.

The dispute in *Inter Tribal* arose because Arizona was unsatisfied with the way the Federal Form allows registrants to prove they are U.S. citizens. There is no evidence that noncitizen voting is a serious problem in our elections, and it was (and remains) illegal under both federal and Arizona state law.⁸ So the dispute in *Inter Tribal* was not about that prohibition itself, but rather about how a prospective voter verifies their citizenship. The Federal Form does so by requiring registrants to check a box on the form attesting under penalty of perjury and deportation that they are, in fact, U.S. citizens.⁹ Arizona thought this was insufficient, so it passed a state law requiring applicants to provide documentary proof of citizenship, such as a birth certificate or passport, when submitting their voter registration forms.¹⁰

This created a potential conflict between the state and federal laws. Much of *Inter Tribal* was about whether the two laws actually did conflict (the Court determined they did¹¹). But the case also raised a question about the reach of congressional power under the Elections Clause. Under the Elections Clause, Congress has authority to override Arizona's choices about the times, places, and manner of congressional elections. How registrants prove their citizenship is this type of regulation—it is about *how* a qualification is proven, not what the qualification is—which gives Congress authority to make rules regarding it. Arizona did not dispute that, arguing instead that requiring the state to accept proof of citizenship through attestation on the Federal Form unconstitutionally infringed its power to enforce its citizenship qualification. So, what the Court had to address in *Inter Tribal* was the extent to which Congress can use its times, places, and manner power in ways a state argues hinders its own constitutional right to exercise the power given to it under the Qualifications Clause.

Justice Antonin Scalia wrote the decision for the Court. He first underscored the sweeping nature of congressional power under the Elections Clause. The Supreme Court, Justice Scalia wrote, has repeatedly held that “Times, Places, and Manner” are “comprehensive words” that “embrace authority to provide a complete code for congressional elections,” including how to register voters.¹² Rules about how a voter demonstrates their citizenship are well within the scope of that power.¹³ So *Inter Tribal* makes clear Congress's Elections Clause

8. *Inter Tribal*, 570 U.S. at 6; 18 U.S.C. § 611.

9. *Inter Tribal*, 570 U.S. at 4–5.

10. *Id.* at 6.

11. *Id.* at 15 (“[T]he fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is ‘inconsistent with’ the NVRA’s mandate that States ‘accept and use’ the Federal Form.”).

12. *Id.* at 8–9 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

13. *See id.*

power is and remains broad. But Justice Scalia went on to agree with Arizona that the interplay between the Elections Clause and the Qualification Clauses nonetheless does impose some restrictions on Congress's power. Specifically, Congress cannot use its constitutional power to regulate congressional elections in a way that negates the ability of the states to enforce their constitutionally granted authority to define (within other constitutional limits) the qualifications of their voters.¹⁴

This is a common form of constitutional argument. Even when the Constitution clearly grants power to a particular official or governmental branch to do something, that entity cannot use that power to nullify the ability of a different part of government to exercise its own constitutionally granted powers. So, for example, Congress unequivocally has the power to determine how to spend federal revenues—it writes the budget. But it cannot use that power to completely defund the executive branch, because doing so would leave the President unable to exercise the power the Constitution gives them to fulfill the duties of their office.¹⁵ Arizona argued that this is exactly what the federal law did by forcing it to accept the attestation of citizenship used on the Federal Form.¹⁶ By prohibiting the state from also requiring documentary proof of citizenship at the time of registration, Arizona argued, it was unable to enforce its citizenship qualification, which it was constitutionally entitled to do.¹⁷

Justice Scalia appeared sympathetic to this argument but pointed out that it had not been adequately raised or developed in the case before the Court.¹⁸ So Arizona lost the case, and a lower federal court in a subsequent case examined that issue and found using the Federal Form did not in practice unconstitutionally infringe on Arizona's ability to enforce its qualification.¹⁹ But Arizona did not give up on its quest to require documentary proof of citizenship prior to voting. Instead, Arizona opted to use a two-tiered registration system: Voters showing documentary proof of citizenship are registered to vote in both state and federal elections, but those using the Federal Form and only attesting to citizenship are registered as "federal only" voters and are not permitted to vote in state or local elections unless other documentary proof of citizenship is available.²⁰ Then, in the leadup to the 2024 presidential election, Arizona went even further and announced its intention to

14. *Id.* at 17.

15. *Morrison v. Olson*, 487 U.S. 654, 693–96 (1988).

16. *See Inter Tribal*, 570 U.S. at 17–18.

17. *Id.*

18. *Id.* at 19–20.

19. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1187–88 (10th Cir. 2014).

20. *Mi Familia Vota v. Fontes*, 111 F.4th 976, 986 (9th Cir. 2024) (Bumatay, J., dissenting).

enforce a provision of its law that excluded voters who had registered using the Federal Form from voting not just in congressional elections but also in the presidential election.

That choice that brought the Arizona law back to the Supreme Court in 2024, in *Republican National Committee v. Mi Familia Vota*.²¹ The dispute had gone through many iterations in the intervening years, and the actual registration rules applied in Arizona after years of litigation and multiple related settlements were complicated. But the upshot for current purposes is that Arizona was in part asking the Supreme Court to permit it to use its documentary proof of citizenship law to prohibit a subset of voters who registered using the Federal Form from voting in the presidential election. The heart of the State's argument on this point was that whatever authority Congress has under the Elections Clause to regulate congressional elections does not extend to presidential elections.²² Therefore, Arizona argued, voters who registered using the Federal Form could be prohibited from voting in the presidential election, even though *Inter Tribal* required the state to allow those voters to vote in the state's congressional elections.²³

In a summary order, the Court rejected this part of Arizona's argument.²⁴ But the dispute is not over. The procedural posture of the case in *Mi Familia Vota* was an application for emergency relief.²⁵ The Court had not held oral arguments or enjoyed the benefit of full briefing on the issue. So it should not be surprising that the Court would decide against making such a consequential decision on such a sparse record just months before the presidential election (the Supreme Court issued its order in the case on August 22, 2024).²⁶ Despite this, three of the Justices (Justices Thomas, Alito, and Gorsuch) were willing to grant Arizona's request in full.²⁷ Their apparent receptivity to Arizona's arguments, combined with Arizona's ongoing insistence on enforcing its documentary proof of citizenship rule in presidential elections, virtually ensures the issue will return to the Court in the near future.

21. 145 S. Ct. 108 (2024).

22. Reply in Support of Emergency Application for Stay at 10–12, *Mi Familia Vota*, 145 S. Ct. 108 (No. 24A164), 2024 WL 3893996.

23. *Id.* at 12. This provision appears to have affected just under 35,000 (of more than 4.4 million) registered voters in the state, many of whom were Native American voters, college students, and homeless individuals. Kae Petrin & Jen Fifiield, *Who Are the Arizona Voters Without Proof of Citizenship? They May Surprise You.*, VOTEBEAT ARIZ., <https://www.votebeat.org/arizona/2024/12/13/arizona-voter-citizenship-proof-law-shows-groups-struggling-to-provide-it/> (Dec. 16, 2024, 3:00 AM).

24. *Mi Familia Vota*, 145 S. Ct. at 108 (mem.).

25. *Id.*

26. *Id.*

27. *Id.*

When it does, the Court should reaffirm the power of Congress to regulate presidential elections once a state has decided to appoint their electors through a popular vote. As we will see below, this is not a novel claim. The Court first upheld congressional power over presidential elections almost one hundred years ago and has affirmed that decision in related cases multiple times since. Scholars, in turn, have supported those decisions by persuasively arguing that Congress has the authority to regulate presidential elections under both the Necessary and Proper Clause and the enforcement provisions of the post-Civil War Amendments.²⁸

This Essay reaches the same result through a different path. With a few exceptions, existing scholarly defenses of congressional power over presidential elections have started from the premise that Congress must point to an enumerated power authorizing it to regulate presidential elections.²⁹ This Essay argues that starting point is unnecessary. The Supreme Court has long understood that powers never possessed by the states in the first place are not reserved to them under the Constitution. These powers—sometimes described as implied powers or powers inherent in the very nature of a national government—properly lie with the federal government unless specifically delegated to the states. This is particularly true of those powers, like elections for the President of the United States, which implicate uniquely national interests.

This Essay reframes the debate about congressional power to regulate presidential elections through this lens. It does so by first explaining the doctrine of “enumerationism” and why the assumptions embedded in that doctrine are inappropriate when evaluating congressional power to regulate presidential elections. It then explains how, once the presumption of enumerationism is removed, the history of the Elections, Qualifications, and Electors Clauses strongly support recognizing congressional power over presidential elections. Finally, the Essay draws on the Supreme Court’s existing caselaw for additional support, itemizing the multiple ways the Court has both accepted the limits of enumerationism in evaluating congressional authority over federal elections and affirmed Congress’s authority specifically over presidential elections. It concludes by arguing that as seen through this lens, Congress has ample authority under the 1787 Constitution to

28. See generally Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV., 851, 881–82, 916–17 (2002).

29. Larry Schwartz, *Congress’s Power over the Electoral Count*, 78 VAND. L. REV. (forthcoming 2025) (discussing the work of scholars skeptical of congressional power over most aspects of the presidential election system). See also Coenen & Larson, *supra* note 28, at 876–79, 892 (questioning if the implied power to protect presidential elections is as extensive as that given to Congress under the Elections Clause).

regulate presidential elections after state legislatures have chosen that method of appointing the state's electors.

II. ENUMERATIONISM, (UN)RESERVED POWERS, AND THE ORIGINAL CONSTITUTION

A. Enumerationism and Its Limits

It is a widely accepted tenet of our constitutional system that the federal government is a government of limited powers. Sometimes referred to as “enumerationism,”³⁰ the basic premise of the idea is that Congress can only exercise those powers granted to it by the Constitution, while states can exercise any powers the Constitution does not take away from them. There is also, though, an equally long-standing and almost as well-accepted caveat to enumerationism: States did not and could not reserve powers they never possessed in the first place. Those powers, consequently, must be affirmatively granted to states by the Constitution if they are to be exercised by them, while the federal government can exercise such powers even without explicit textual authority. In other words, the presumption of enumerationism in such cases is flipped.

This is sometimes referred to as a type of implied or inherent federal power.³¹ The core idea is that powers which are themselves creations of the Federal Constitution could not have been reserved to the states, either because states never enjoyed them in the first place or because they are inherent in the very nature of a national government.³² In the words of the well-respected (and frequently cited) nineteenth century jurist Justice Joseph Story, writing in his influential work *Commentaries on the Constitution*: “[S]tates can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them.”³³ For this category of powers, the states only have regulatory authority when the Constitution affirmatively delegates it to them. Otherwise, authority over such things properly rests with the federal government.³⁴

30. Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971 (2024).

31. *See id.* at 1031.

32. *See Juilliard v. Greenman*, 110 U.S. 421 (1884).

33. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 626, at 101 (Boston, Hilliard, Gray & Co. 1833).

34. This need not mean states cannot regulate in this realm at all. State and federal powers may at times overlap, enabling states to regulate in areas touching even on exclusive federal powers, in the absence of preemptive federal legislation. Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1720 (2011) (“Congress and the states may act on the same activity and

The Supreme Court has repeatedly recognized this limitation on enumerationism. Chief Justice John Marshall invoked it in *McCulloch v. Maryland*³⁵ when he argued that states had no reserved power to tax a national bank.³⁶ Justice George Sutherland, not generally a proponent of expansive federal power, relied on it in 1934 in *Burroughs v. United States*³⁷ (discussed further below) to uphold congressional power specifically over presidential elections.³⁸ He did so again two years later, in *United States v. Curtiss-Wright Export Corp.*,³⁹ when he rejected the notion that the federal government needed enumerated authority to engage in foreign affairs.⁴⁰ Since states had never possessed such powers, he wrote for the Court in that case, the states could not have reserved these powers, and so they rested instead with the federal government.⁴¹ The Court has likewise recognized enumerationism's limits in cases involving the management of the nation's finances, territorial expansion, internal improvements, and immigration.⁴²

Regulatory authority over presidential elections after states have selected that method of appointing their presidential electors is precisely the type of power recognized by this doctrine. The Electoral College system, perhaps more than any other part of our system of government, is exquisitely a creation of the Federal Constitution. Nothing remotely like it existed before the ratification of that Constitution. The Electoral College is born, fulfills its function, and dies within the confines of that document. Every four years, electors are appointed, they cast their votes, and they disperse. They have no other constitutional duties and play no other constitutional role. Electors are not officers of the federal government, but their sole function is to “cast, certify, and transmit”

may even adopt laws of a similar character, but Congress's power derives from one source and the states' from another.”); Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1913 (2011) (“[S]imply because a state lacks a certain power does not mean that it does not retain other powers which might allow it to act in an identical manner.”). Chief Justice Marshall used this reasoning in early dormant commerce clause cases such as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829). Absent congressional preemption, a court is likely to take a similar approach here.

35. 17 U.S. (4 Wheat.) 316 (1819).

36. *Id.* at 436.

37. 290 U.S. 534 (1934).

38. *See infra* Section III.A.

39. 299 U.S. 304 (1936).

40. *Id.* at 315–16.

41. *Id.* at 316.

42. For a discussion of these cases, *see* Coan & Schwartz, *supra* note 30, at 994, 1030 & n.240.

presidential and vice-presidential votes.⁴³ In addition, as the Court put it recently, presidential elections “implicate a uniquely important national interest” because the President, unlike any other figure, represents the people of the nation as a whole.⁴⁴

Reframing the question of congressional power to regulate presidential elections without the presumption of enumerationism clarifies federal authority in this realm. Since any power over the presidential election process could not exist and therefore could not have been reserved to the states under Articles I or II of the 1787 Constitution, any power states have in this realm must be affirmatively delegated to them by the Constitution itself.⁴⁵ But the only such power given to the states is to choose the manner in which the state’s electors are appointed. Once a state opts to appoint its electors through a popular vote, no additional power to regulate *that* election is granted by any provision of the Constitution. Nor could such a power have been reserved, since the mechanism of electing the President through an electoral college system is entirely created by the Constitution itself. The presidential election process, in short, is wholly a creation of the Federal Constitution and implicates a uniquely national interest. Regulation over presidential elections, consequently, resides firmly in the hands of Congress, should it choose to exercise it.

This result is fully consistent with—if not indeed dictated by—the text and history of the Elections, Qualifications, and Electors Clauses, as well as the Supreme Court decisions which have, for almost a century, affirmed congressional power over presidential elections.

A. *The Qualifications and Election Clauses*

At the time of the Constitutional Convention, the states had different rules governing who was eligible to vote in each state. In addition to age, race, and gender restrictions, many states also limited the franchise to property owners.⁴⁶ These property requirements varied across the states. Some allowed the payment of a tax or ownership of forms of property

43. *In re Green*, 134 U.S. 377, 379–80 (1890) (recognizing the power of states to choose the manner of appointing their presidential electors and affirming the ability of states, acting in the absence of federal law, to punish voter fraud in presidential elections).

44. *Trump v. Anderson*, 144 S. Ct. 662, 670 (2024) (per curiam) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983)).

45. This appears to be broadly accepted. See, e.g., Michael T. Morley, *The Independent State Legislatures Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8–9 (2020) (“States lack inherent power to regulate federal elections, since the U.S. Constitution creates all federal offices. Accordingly, the Elections Clause and Presidential Electors Clause are the only sources of states’ authority to conduct and regulate nearly all aspects of federal elections.”).

46. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 5 (rev. ed. 2009).

other than land to meet the relevant qualification, but others did not.⁴⁷ The states that imposed these limitations also varied significantly in how much property or wealth a man had to hold, or how much tax he had to pay, to be eligible to vote.⁴⁸

These variations created a problem for the drafters of the 1787 Constitution. Many delegates at the Convention believed that economic independence of the sort they personally enjoyed was essential for the responsible exercise of the franchise.⁴⁹ But they were unsure of exactly what restrictions should be imposed on the federal franchise to facilitate that goal. White men in the South were generally wealthier than their Northern counterparts, so a dollar amount that would be appropriately exclusionary (in their view) in the South would be too broad in the North.⁵⁰ Likewise, any federally imposed property qualification other than the most lenient would disenfranchise existing voters in states with lower qualifications.⁵¹ Leaving voter qualifications up to each individual state would solve some of these problems, but the Framers were leery of giving state legislatures, who they generally viewed as corrupt, this type of control over federal elections.⁵²

Their solution was the Qualifications Clause. States would be permitted to define voter qualifications for federal elections, but the Qualifications Clause required those qualifications be the same as used by the state to define eligibility to vote for members of the most numerous branch of the state legislature. The idea was that state legislators would be less likely to manipulate the federal franchise if doing so would affect their own elections as well.⁵³ Debates regarding the Qualifications Clause show the Framers' unwillingness to leave voter qualifications entirely up to the states, because they did not want states to manipulate federal elections by creating separate groups of voters for state and federal

47. MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 178–80 (2016).

48. KEYSSAR, *supra* note 46, at 5; KLARMAN, *supra* note 47, at 179–80.

49. See *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION* 135–37 (Ralph Ketcham ed., 1st Signet Classics prtg. 2003) [hereinafter *THE CONSTITUTIONAL CONVENTION DEBATES*]; KLARMAN, *supra* note 47, at 178–81.

50. KLARMAN, *supra* note 47, at 179, 181.

51. *Id.* at 179.

52. See *THE CONSTITUTIONAL CONVENTION DEBATES*, *supra* note 49, at 142–48.

53. The Supreme Court has not viewed this as requiring absolute symmetry between the state and federal electorates but rather as creating an enfranchisement “floor” below which a state cannot restrict access to the federal ballot. See Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 *BROOK. L. REV.* 441, 482 (2016) (discussing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986)).

elections.⁵⁴ Allowing states to determine (within other constitutional constraints) voter qualifications in the state but also requiring those qualifications to be the same used to elect the state legislature itself was their way of resolving this problem.⁵⁵

The allocation of authority over congressional elections set forth in the Elections Clause resulted from similar concerns. The Convention and ratification debates show considerable concern among supporters of the new Constitution that hostile state legislatures might kneecap the federal government by refusing to hold congressional elections at all, preventing Congress from functioning.⁵⁶ The Elections Clause addressed this concern by allowing states to make rules governing congressional elections in the first instance but giving Congress a sweeping power to override those rules to prevent states from misusing that authority.

Giving Congress this power was controversial, but supporters of the 1787 Constitution consistently defended it as absolutely essential if Congress was going to exist as an independent body. James Wilson believed the provision was essential to “the very existence of the federal government.”⁵⁷ Rufus King said the provision was necessary so Congress could prevent rogue states from cancelling federal elections.⁵⁸ Alexander Hamilton, writing in *Federalist* 59, agreed: “I am greatly mistaken . . . if there be any article in the whole plan more completely defensible than this.”⁵⁹ The propriety of the provision, Hamilton argued, rested on the “plain proposition” that every government needs to be able to ensure its own preservation.⁶⁰

This brief history of the Qualifications and Elections Clauses makes three things clear: The drafters of the 1787 Constitution wanted to prevent states from creating separate enfranchisement rules for state and federal elections; they wanted to ensure Congress had power to protect federal elections from manipulation by state legislatures; and they understood both of these things were critical to protecting the new federal government from that type of state-by-state interference.

54. See, e.g., THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 49, at 135–37; KLARMAN, *supra* note 47, at 179.

55. THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 49, at 135.

56. KLARMAN, *supra* note 47, at 342.

57. PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 114 (2010) (citing 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 565 (Merrill Jensen ed., 1976)).

58. *Id.* at 173.

59. THE FEDERALIST NO. 59, at 360 (Alexander Hamilton) (Clinton Rossiter ed., 1st Signet Classic prtg. 2003).

60. *Id.*

B. The Electors Clause

The Electors Clause evinces similar concerns, albeit in a different way. Unlike the Qualifications and Elections Clauses, which address congressional elections, the Electors Clause does something entirely new: It sets out the “electoral college” system used to elect the President of the United States. As originally articulated in Article II, Section 1:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.⁶¹

The 1787 Framers were not all sold on this system (James Madison said it was the result of “hurrying influence, produced by fatigue and impatience”⁶²) and considered several alternatives before settling on it. Some delegates at the Constitutional Convention argued the President should be elected directly by the people through a national popular vote.⁶³ But this raised concerns about whether voters in far-flung states would know enough about candidates outside of their own region to cast their votes knowledgeably, or whether instead they would just cast their votes for their own state’s “favorite sons.”⁶⁴ The delegates also considered having Congress or the state legislatures choose the President.⁶⁵ But there were objections to those methods as well. A chief executive dependent on Congress for his position would lack the independence needed to check congressional power.⁶⁶ Selection by the state legislatures, in turn, would stymie a main goal of the new Constitution, which was to create a stronger federal government free from the stifling control states had exercised over it under the Articles of Confederation.⁶⁷

Their solution, with a few tweaks, is the one we are familiar with today. Neither voters, state legislatures, nor Congress would be given

61. U.S. CONST. art. II, § 1.

62. EDWARD B. FOLEY, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE* 27–28 (2020) (citing Letter from James Madison to George Hay (Aug. 23, 1823), in 9 *THE WRITINGS OF JAMES MADISON*, 1819–1836, at 147, 147 (1910)).

63. William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 152 (1996); ROBERT M. ALEXANDER, *REPRESENTATION AND THE ELECTORAL COLLEGE* 49–51 (2019).

64. ALEXANDER, *supra* note 63, at 50–51, 63. See also Josephson & Ross, *supra* note 63, at 152–53.

65. ALEXANDER, *supra* note 63, at 49.

66. *Id.* at 50.

67. *Id.* at 66 (“Madison stated that ‘the President is to act for the people, not for States.’”).

power to directly elect a president. Instead, a brand-new group of voters, created out of thin air by the authors of the 1787 Constitution, would be tasked with that duty. These “electors” would be allocated among the states based on each state’s representation in Congress, and the legislature of each state was given authority to choose how to appoint that state’s electors.⁶⁸ That power is exclusive: The legislature of each state decides how that state’s electors will be appointed (assuming compliance with other applicable constitutional provisions). But the Constitution is silent as to any other rules governing elections for the electors after a state opts for that method of appointment.

The reason for that silence is simple. The Framers’ vision of how presidential elections would work was fundamentally different than ours. The “manner” in which the electors would be appointed was assumed to leave to states the choice of the method of appointment—would they be chosen by the state legislature directly, through special or existing districts, or through some other mechanism?⁶⁹ If a state’s voters were to play a role in this system, it would only be an indirect one. They would vote for electors based on the elector’s reputation, and then the individual electors would use their own judgment when casting their votes for President and Vice President.⁷⁰ Many states at first did not even allow voters that limited role, opting instead to let the state legislature appoint the state’s electors directly.⁷¹

Nothing in this text or history compels or even indicates that the 1787 Constitution affirmatively grants states rather than Congress the final say over the regulation of presidential elections after a state has made the choice to appoint its electors through a statewide popular vote. The Constitution, in other words, gives states authority over presidential *electors*, not presidential *elections*.⁷² Unlike the broad power over

68. The test of the Electors Clause on this matter echoes the Articles of Confederation, which stated that delegates to the Confederate Congress “shall be annually appointed in such manner as the legislature of each state shall direct.” ARTICLES OF CONFEDERATION of 1781, art. V, para. 1.

69. See KEYSSAR, *supra* note 46, at 4. See also *McPherson v. Blacker*, 146 U.S. 1, 28 (1892) (“The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed.”).

70. See, e.g., Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 926–27 (2017).

71. KEYSSAR, *supra* note 46, at 20. See also *McPherson*, 146 U.S. at 29–35 (discussing the changing procedures used by each state in our earliest presidential elections).

72. Justices Thomas and Gorsuch, who reject the caveat to enumerationism discussed above, nonetheless accept an even more limited reading of the textual grant of authority to state legislatures to determine the “manner” of appointing electors. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2330 (2020) (Thomas, J., concurring) (“Historical evidence from the founding also suggests that the ‘Manner’ of appointment refers to the

elections granted to Congress in the Elections Clause, a state's power to choose the manner of appointing electors under the Electors Clause is exhausted once a state chooses to appoint its electors using a popular vote within the state.⁷³

Opponents of Congress's regulatory authority over presidential elections appear to recognize this and do not for the most part argue that the Electors Clause is itself an express grant of power to states to regulate presidential elections. Rather, their argument against congressional authority relies on a negative inference grounded in textual differences between the Electors and Elections Clauses.⁷⁴ As we have seen, the Electors Clause, unlike the Elections Clause, lacks an express grant of power to Congress to regulate the times, places, and manner of presidential elections. Opponents of congressional power over presidential elections use that difference between the clauses to infer that Congress has no similar authority over the regulation of presidential elections.⁷⁵ But as we have seen, this type of negative inference based on an enumerationist reading of the Constitution is inappropriate here, where the power under consideration is itself wholly a creation of the Constitution and the object of the regulation involves issues of unique importance to the nation as a whole. It also has been repeatedly rejected by the Supreme Court.

method for selecting electors, rather than the substantive limitations placed on the position. . . . In context, it is clear that the Framers understood 'Manner' in the Article II, § 1 to refer to the mode of appointing electors—consistent with the plain meaning of the term.”). Justice Thomas draws the wrong conclusion from this, however, because he assumes the meaning of “manner” in the Elections Clause must have the same limited scope. That is not correct. The Elections Clause gives Congress authority to regulate the times, places, and manner “of holding Elections.” The Electors Clause, in contrast, grants states power only over the manner of appointment of electors. The word “manner” as used in these two clauses modifies two different things (elections versus appointments) and therefore naturally has a different scope.

73. This result cannot be evaded by arguing that voters in presidential elections vote for electors, not presidential candidates or officeholders, for the simple reason that it is not true. In every state, voters in presidential elections mark their ballots for presidential candidates, not electors. ALEXANDER, *supra* note 63, at 127–29. Presidential candidates, not electors, file nomination papers, qualify for ballot access, and fulfill myriad other ballot access rules in their own names.

74. Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 108 (2017).

75. *Id.* See also *U.S. Term Limits v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) (“Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. . . . And where the Constitution is silent, it raises no bar to action by the States or the people.”).

III. SUPREME COURT PRECEDENTS

A. *Burroughs v. United States*

The Supreme Court first rejected this argument in the context of presidential elections almost a hundred years ago in *Burroughs v. United States*.⁷⁶ *Burroughs* involved the Corrupt Practices Act, enacted by Congress in 1925. This Act regulated political committees organized for the purpose of influencing the election of presidential or vice-presidential electors in two or more states.⁷⁷ *Burroughs*, charged with violating the Act, challenged it as beyond the scope of congressional authority.⁷⁸ *Burroughs*'s argument was the same as that made by Arizona in *Mi Familia Vota*: Congress had no power to regulate the election of electors, even after states had made the choice to appoint their electors through a popular vote.⁷⁹

The Supreme Court rejected this argument: "So narrow a view of the powers of Congress in respect of the matter," Justice Sutherland wrote for the Court, "is without warrant."⁸⁰ His reasoning supports the argument made thus far in this Essay.

First, the Court recognized that choosing the manner in which electors are appointed is distinctly about the *method* of appointment, not the *mechanics* of popular elections. Congressional action preserving the "purity" of presidential elections does not, the Court held, interfere in any way with a state's Electors Clause power to appoint electors in the manner the state sees fit.⁸¹ That choice had already been made. So, the federal law at issue "in no sense invades any exclusive state power."⁸²

Second, the *Burroughs* Court understood that the Constitution preserved to the federal government the power to safeguard federal elections, including elections for President and Vice President. While presidential electors are not officers of the federal government, the Court reasoned, they exercise federal functions using authority exclusively conferred by the Federal Constitution. Echoing the Framers, Justice Sutherland stressed the importance to the national interest in ensuring Congress, not the states, had power to safeguard federal elections. "Congress," he wrote, "undoubtedly . . . possesses every other power essential to preserve the departments and institutions of the general

76. 290 U.S. 534 (1934).

77. *Id.* at 540–41.

78. *Id.* at 544.

79. *Id.*

80. *Id.*

81. *Id.* ("Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made.").

82. *Id.* at 545.

government from impairment or destruction, whether threatened by force or corruption.”⁸³

B. U.S. Term Limits v. Thornton

The modern Court reaffirmed *Burroughs*’s rejection of enumerationism in the context of federal elections in 1983 in *U.S. Term Limits v. Thornton*.⁸⁴ *Term Limits* involved an effort by Arkansas to impose term limits on members of the House of Representatives elected from that state. The problem for Arkansas was that the Constitution itself defines the qualifications of House members: Article I, Section 2 of the Constitution states that Representatives must be at least twenty-five years old, must have been a citizen for seven years, and must live in the state that elects them.⁸⁵ No additional qualifications are listed, and states have no explicit textual authority to add more. Arkansas nonetheless argued it could impose term limits as an additional qualification because nothing in the text deprived states of that power.⁸⁶ Consequently, the State claimed, enumerationism meant the power to do so was reserved to the states.

The Supreme Court disagreed. Although *Term Limits* involved state power under the Qualifications Clause, the Court’s reasoning regarding the inapplicability of enumerationism in regard to federal elections overall was more comprehensive. Any ability to impose qualifications on candidates for the House of Representatives would, Justice John Paul Stevens wrote for the Court, be a “new” power arising out of the Constitution itself.⁸⁷ Consequently, the states could not have “reserved” it under the Tenth Amendment. The text of the Elections, Qualifications, and Electors Clauses, Justice Stevens wrote, all demonstrate the Framers’ understanding that any authority the states possessed over federal elections had to be *affirmatively granted* by the Constitution.⁸⁸

Because such powers were not possessed by the states prior to ratification, they were not among the powers reserved by them. Instead,

83. *Id.* The Court supported its decision by citing yet an earlier case, *Ex Parte Yarbrough*, 110 U.S. 651 (1884). The prosecution’s challenge in *Yarbrough* involved interference with a congressional election, but as the *Burroughs* Court correctly noted, the *Yarbrough* Court repeatedly referred to elections for presidential electors as well as congressional elections without making any distinction between congressional authority to regulate one versus the other. See *Burroughs*, 290 U.S. at 545–46 (citing *Yarbrough*, 110 U.S. at 657–58, 663, 666–67).

84. 514 U.S. 779 (1995).

85. U.S. CONST. art. I, § 2, cl. 2.

86. *Term Limits*, 514 U.S. at 800. The challenged law rendered ineligible any person who had served more than three House or two Senate terms. *Id.* at 784.

87. *Id.* at 805.

88. *Id.* at 800–01.

they had to be “delegated to, rather than reserved by, the States.”⁸⁹ As we have seen, the constitutional clauses governing federal elections did so in two specific and limited ways: States were authorized to make times, places, and manner regulations governing congressional elections, and they were required to determine how their state would appoint its presidential electors. Additional powers—such as the power to add new qualifications for House members—were neither granted nor reserved. If such powers existed, Justice Stevens wrote for the Court, they belonged not to the states, but to the people of the nation as a whole acting the only way they collectively can: through the national government.⁹⁰

Justice Stevens also used the drafting history of the Qualifications Clause to support the Court’s decision. That history, he reasoned, made clear that the 1787 Framers had discussed the qualifications of federal officeholders at great length. Those discussions had included considering and rejecting the option of letting each state determine the applicable qualifications for their state.⁹¹ Their doing so, Justice Stevens concluded, makes clear that the Framers rejected the type of “patchwork” outcome Arkansas’s law would enable and intended instead to divest states of any such powers, even the absence of an explicit constitutional provision doing so.⁹² Notably, the Court reached this conclusion even though the Arkansas law would have had a limited effect on other states—certainly much less than a state’s choices about presidential elections. Under *Term Limits*, then, enumerationism plainly has no role in this realm.

C. *Trump v. Anderson*

Enumerationism in the context of the regulation of federal elections returned to the Supreme Court yet again more recently, and was once again rejected, in *Trump v. Anderson*.⁹³ *Anderson* involved an effort in Colorado to deny ballot access to then-presidential candidate Donald J. Trump in the 2024 Republican primary in that state. Colorado claimed it had authority to do so under Section 3 of the Fourteenth Amendment, which disqualifies from holding federal office people who, having formerly taken an oath of office to support the United States, subsequently engaged in an insurrection against it.⁹⁴ The text of Section 3 grants Congress power to remove this disqualification, and the Fourteenth Amendment overall grants power to Congress to enforce its

89. *Id.* at 804.

90. *Id.* at 803–04.

91. *See id.* at 822.

92. *Id.*

93. 144 S. Ct. 662 (2024) (per curiam).

94. *Id.* at 664–65.

terms.⁹⁵ But nothing in Section 3 expressly prohibits states from also enforcing the provision, so Colorado claimed it had authority to do so despite the lack of a specific textual grant authorizing state regulation in this realm.⁹⁶

The Court again disagreed. The per curiam opinion, unanimous on this first point, first acknowledged the enumerationist theory of the Constitution. “In our federal system,” the Court wrote, “the National Government possesses only limited powers; the States and the people retain the remainder.”⁹⁷ But the Court went on to stress the critical limitation of enumerationism in the context of federal, and specifically presidential, elections. The states’ reserved powers, the Court wrote, “do[] not extend to federal officeholders and candidates.” Citing *Term Limits*, the Court affirmed that because federal officers, including the President, owe their “existence and functions” to the people of the nation collectively, “powers over their elections and qualifications must be specifically ‘delegated to, rather than reserved by, the States.’”⁹⁸ Since nothing in the Constitution expressly delegated enforcement power over Section 3 to the states, it was not retained by them under the Elections, Qualifications, or Electors Clauses.

The per curiam opinion also and repeatedly affirmed the self-preservation interest, articulated by Hamilton and other Framers, necessitating federal control over candidates for elections for federal offices, especially the presidency. Citing *Anderson v. Celebrezze*,⁹⁹ the Court warned of “heightened concerns”: “[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest.”¹⁰⁰ As the Court recognized, Hamilton’s “plain proposition” on that point has been validated repeatedly. The Court did so in *Ex Parte Yarbrough*¹⁰¹ (recognizing that the federal government has inherent power to protect “the elections on which its existence depends”¹⁰²); in *The Legal Tender Cases*¹⁰³ (recognizing the power of self-preservation inherent in national sovereignty¹⁰⁴); and again here in *Trump v. Anderson*.¹⁰⁵ A state-by-state resolution of questions like

95. U.S. CONST. amend. XIV, §§ 3, 5.

96. *Id.* at 665.

97. *Id.* at 667.

98. *Id.* at 667–68 (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 803–04 (1995)).

99. 460 U.S. 780 (1983).

100. *Anderson*, 144 S. Ct. at 670 (alterations in original) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)).

101. 110 U.S. 651 (1884).

102. *Id.* at 658.

103. 79 U.S. 457 (1870).

104. *Id.* at 529.

105. *Anderson*, 144 S. Ct. at 670–71 (quoting *Celebrezze*, 460 U.S. at 795).

those posed by Section 3, the Court wrote, would conflict with the “basic principle that ‘the President . . . represent[s] *all* the voters in the nation.’”¹⁰⁶ So, citing *Term Limits*, the Court again rejected state-by-state rulemaking over presidential elections as an unworkable patchwork that would deprive the people of the nation as a whole of the right to elect the president. “Nothing in the Constitution,” the Court wrote, “requires that we endure such chaos”¹⁰⁷

And let there be no doubt, allowing states to exercise a nontextual power to impose unique rules on presidential elections in their states would produce chaos. Like Arizona, states could assert power to manipulate the rules applicable to presidential elections to create different groups of voters for state and federal elections, something the Framers vehemently opposed. They also could attempt to create distinct registration, voting, and counting rules applicable only in presidential election, require voters to fill out multiple ballots for different elections using different procedures, and ignore federal law ensuring overseas and military voters are able to vote in presidential elections. As we have seen, this type of state-by-state manipulation of election rules sows distrust in our entire electoral system. Our Constitution does not require—and cannot tolerate—such machinations in the election of the one federal officer uniquely responsible to the people of the nation as a whole.

CONCLUSION

In support of congressional power over presidential elections, this Essay offers an alternative framework for evaluating the constitutional division of authority over such elections. In doing so, it makes three key points.

First, enumerationism, even to those accepting its basic premise, does not mean that all power which the Constitution does not expressly grant to the federal government or deny to the states belongs to the states. For more than two centuries, the Supreme Court and prominent commentators such as Alexander Hamilton and Justice Joseph Story have understood that the presumption of enumerationism is not applicable in regard to powers created in their entirety by the Constitution itself or inherent in the nature of a national government. Having never possessed such powers, the Constitution did not reserve them to states, so they are instead presumptively located in the federal government.

Second, nothing in the Constitution expressly delegates to states power over presidential elections after the states have used their Electors Clause power to choose to appoint their presidential electors through a popular vote. Permitting states to choose the “manner” of appointment

106. *Id.* at 670.

107. *Id.* at 671.

of those electors does not constitute an express delegation of power over the “manner” of the elections then held. The appointment power was understood at the framing as giving to states the choice of what method would be used to appoint electors. The 1787 Constitution is therefore silent about who as between Congress and the states has final authority over any resultant presidential elections, as opposed to presidential electors.

Third, the choices the Framers did make about the division of authority between Congress and the states provide persuasive evidence that courts in the face of this silence should err in favor of federal power over presidential elections. The history of both the Elections Clause and the Qualifications Clause evidence significant Founding-era concerns about leaving states free to manipulate the franchise for federal elections and federal officeholders. The Framers wanted to prevent states from having different electorates for state and federal offices and to ensure that Congress had the power to protect the integrity and operation of federal elections. Affirming congressional power to regulate presidential elections once a state has opted for that method of appointing its presidential electors respects this principle.

This approach will not resolve all conflicts between state and federal power over presidential elections. As in *Inter Tribal*, whether Congress has used its power to regulate presidential elections in a way that unconstitutionally infringes on a state’s power to choose the method of appointing electors will be a matter of degree, albeit one that must be evaluated with a close eye toward the Framers’ insistence that states not be permitted to create separate bodies of voters for state versus federal elections. But, as the Court put it in *Anderson*, nothing in the Constitution requires we endure the chaos a different choice would breed.

* * *