REGULATION OR QUALIFICATION: THE QUALIFICATIONS CLAUSE, THE ELECTIONS CLAUSE, AND FEDERAL REGULATION OF MAIL-IN BALLOTS

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INTRODUCTION

The 2020 election revolutionized 232 years of American voting procedure. Voter turnout surged to its highest level in over a century, and those ballots were cast using a wider variety of methods than ever before.[1] This historic participation may have been partly due to states temporarily changing their rules for "nontraditional" voting (not voting in-person on election day) in response to the COVID-19 pandemic. 69% of the total vote was cast through "nontraditional" voting measures—shattering the previous record of 40% set in the 2016 presidential election.[2] Research into whether this increased use of "nontraditional" voting, specifically mail-in voting, affected the results of the 2020 election has been mixed.[3] What is undisputed, however, is that these voting

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1. Kevin Schaul et al., *2020 Turnout is the Highest in over a Century*, WASH. POST (Nov. 5, 2020), https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/?tid=a_inl_manual. Despite the 66.3% turnout in 2020, the United States still lags behind many other peer nations in voter turnout rates. *See* Drew DeSilver, *In Past Elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RSCH. CTR. (Nov. 3, 2020), https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/.

2. Zachary Scherer, *Majority of Voters Used Nontraditional Methods to Cast Ballots in 2020*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html.

3. *See, e.g.*, Alan I. Abramowitz, *Assessing the Impact of Absentee Voting on Turnout and Democratic Vote Margin in 2020*, UVA CTR. FOR POL. (Feb. 25, 2021), https://centerforpolitics.org/crystalball/articles/assessing-the-impact-of-absentee-voting-on-turnout-and-democratic-vote-margin-in-2020/ (arguing that eased vote-by-mail restrictions contributed to overall voter participation). *But see, e.g.*, Daniel M. Thompson et al., *Universal Vote-by-Mail Has No Impact on Partisan Turnout or Vote Share*, 117 PROC. NAT'L ACAD. SCIS. U.S. 14052 (2020) (arguing that universal vote-by mail does not increase turnout).

procedure changes have led to a wide-ranging national debate over how future elections should be run and who has authority over how they are conducted.

In 2021, thirty-six states enacted laws regarding the expansive "nontraditional" voting changes made before the 2020 election: eleven placed restrictions on voting, seventeen made expansions, and eight did a mixture of both.[4] In response to this flurry of state legislation, the House of Representatives passed two bills, which were later consolidated into House Bill 5746, the *Freedom to Vote: John R. Lewis Act*—which, as of this writing, has been filibustered in the Senate.[5]

Were this bill to be passed, it would serve as an unprecedented exercise of federal election power and vastly change voting and campaign finance procedure in every state. Of particular note in the *Freedom to Vote: John R. Lewis Act* is Section 1301, which would make no-excuse absentee mail-in voting mandatory in every state for all future federal elections.[6] The provision would mandate that "[i]f an individual in a State is eligible to cast a vote in an election for Federal office, the State may not impose any additional conditions or requirements on the eligibility of the individual to cast the vote in such election by absentee ballot by mail."[7]

The statutory text of House Bill 5746 claims authority to enact the legislation pursuant to Article I, Section 4 of the Constitution (the Elections Clause), which grants Congress wide latitude to supersede state election procedure.[8] However, Section 1301 creates potential conflict with Article I, Section II (the Qualifications Clause), which grants the states exclusive authority to set voting qualifications for their elections.[9] The question of where this federal mail-in voting mandate falls in relation to these two provisions is critical in determining its constitutionality.

Supreme Court jurisprudence has viewed the Elections Clause as giving Congress the authority to either supplement state election law or "provide a complete [federal] code for congressional elections."[10] Both of these actions give Congress the power to pre-empt state voting procedure law at its discretion.[11] Unlike other federal pre-emptions of state law, where courts start with the assumption that state power is "not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress,"[12] state power is at its

4. *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021.

5. Carl Hulse, *After a Day of Debate, the Voting Rights Bill is Blocked in the Senate*, N.Y. TIMES (Jan. 19, 2022), https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html.

6. H.R. 5746, 117th Cong. § 1301 (2022).

7. *Id.*

8. U.S. CONST. art. I, § 4, cl. 1

9. U.S. CONST. art. I, § 2, cl. 1.

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

11. *See id.* at 366–67.

12. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

weakest under the Elections Clause.[13] The Court's jurisprudence supports this view and has held that "there is no compelling reason not to read Elections Clause legislation simply to mean what it says,"[14] or, in other words, that the federal power under the Elections Clause is a plenary one.[15]

While "the Elections Clause empowers Congress to regulate *how* federal elections are held," its powers do not reach the setting of qualifications for "*who* may vote in [federal elections]."[16] That power is reserved to the states through the Qualifications Clause, which ties the qualifications to vote in a federal election to the qualifications needed to vote in the state election for "the most numerous Branch of the State Legislature."[17] This issue of competing authority between the Elections Clause and the Qualifications Clause was nearly reached in *Arizona v. Inter Tribal Council of Arizona, Inc.*, but the Court has never addressed how it would resolve that question.[18] The Court did note, however, that if the question were reached, conflict between the clauses would "raise serious constitutional doubts."[19]

This Note focuses on the resolution of those "serious constitutional doubts" which arise in the conflict between the Qualifications Clause and the Elections Clause, using Section 1301 of the *Freedom to Vote: John R. Lewis Act*'s "no-excuse" absentee voting requirement as a lens for that debate. Were this question addressed, as it almost certainly would need to be in the case of Section 1301, the Qualifications Clause's exclusive grant of authority as well as the Court's general deferential approach to state power would likely favor state authority. Such a direct rebalance of power would foreseeably have ripple effects on the overall power of Congress to regulate elections in the states and introduce a new factor in the interpretation of future federalism conflicts in election law litigation.

This Note proceeds in five parts. Part I surveys the text, history, and interpretation of both the Elections Clause and the Qualifications Clause and determines the limit of each Clause's competing reach. Part II summarizes the history of absentee voting in the United States, surveys the disparate requirements for voting absentee in the states, analyzes two states' "excuse-required" absentee voting laws, and argues that Section 1301's mandate implicates the power granted to the states through the Qualifications Clause. Part III considers the competing sources of federal and state law that grant authority to set voting qualifications and procedure and concludes that the Qualifications Clause, and its interest in maintaining state sovereignty over voting qualifications, outweigh the federal election regulation under the Elections Clause and finds Section 1301 to be an unconstitutional exercise of federal power. Part

13. *See* Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 14–15 (2013).

14. *Id.* at 15.

15. *Ex parte* Siebold, 100 U.S. 371, 388 (1879).

16. *Inter Tribal Council*, 570 U.S. at 16.

17. U.S. CONST. art. I, § 2, cl. 1.

18. 570 U.S. at 17–18.

19. *Id.* at 17.

IV responds to arguments that Section 1301's constitutionality still could be upheld under either the Elections Clause or the Equal Protection Clause of the Fourteenth Amendment. This Note concludes by considering this more limited understanding of the federal election power under the Qualifications Clause within the context of current political battles over voting procedure and discusses future implications of a more robust Qualifications Clause.

I. CONSTITUTIONAL AND HISTORIC UNDERPINNINGS

The *Freedom to Vote: John R. Lewis Act* relies on three provisions of the Constitution for its authority: the Elections Clause, the Guarantee Clause, and the Fourteenth Amendment.[20] This Note focuses on the federal authority granted through the Elections Clause, where the power to enact Section 1301 is most firmly rooted. Section A will examine the text, history, and interpretation of the Elections Clause and the Qualifications Clause. Section B will describe the tensions between these two clauses and contextualize these competing interests within the mandate of Section 1301 of the *Freedom to Vote: John R. Lewis Act* imposes.

A. The Constitution and the Federal Election Power

1. The Elections Clause

On its face, the plain text of the Elections Clause is explicit. State legislatures have the power to set the "[t]imes, Places and Manner of holding Elections for Senators and Representatives," but "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."[21] Under the Clause, the federal government has a plenary power to set procedural regulations for federal elections that supersede any state regulation.[22] The Seventeenth Amendment, which provided for the direct election of Senators, expanded the federal power over Senate election procedure to the same level of power Congress has to regulate House elections under the original Clause.[23]

The justifications offered for the Elections Clause during the ratification debate support this broad view of its power which the Court currently recognizes. The Framers intended the Elections Clause to address two concerns about state election regulation: representation and fears of abuse of authority by state lawmakers.[24] They were particularly focused on avoiding the legislative

20. H.R. 5746 § 3.

21. U.S. CONST. art. I, § 4, cl. 1.

22. *Ex parte* Siebold, 100 U.S. 371, 388 (1879).

23. U.S. CONST. amend. XVII; Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16 (2013) (holding the Seventeenth Amendment makes Congress's authority over Senate elections under the Elections Clause concurrent with its authority over House elections).

24. Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1002 (2021).

malapportionment that had plagued the English Parliament.[25] After its proposal, the Elections Clause received considerable criticism from anti-federalists who argued it would give Congress "omnipotent" power over elections.[26] The Federalists countered that such power was necessary to maintain uniformity and balance in federal representation.[27] Despite this clash over the need for the Elections Clause, even its proponents were clear that they intended the scope of its power to be "expressly restricted to the regulation" of election mechanics and not to extend to voter qualification requirements.[28]

The first exercise of the federal Elections Clause power was through the Apportionment Act of 1842, which mandated that states elect their federal House members from single-member districts.[29] The constitutionality of this action was controversial at the time, given the conception of the scope of federal power under the Elections Clause in the early 1800s.[30] But even the most expansive understanding of the Clause's authority was narrower than the authority it would later be given by the Court and future Congresses.

The Elections Clause first reached the Court thirty-seven years later in *Ex parte Siebold*.[31] In *Siebold*, petitioners asked for a writ of habeas corpus, claiming that their detention pursuant to their violation of election laws enacted under the Enforcement Acts (which federally criminalized election interference during the Reconstruction period) was unconstitutional.[32] The Court denied the petitioners' writ, finding that the Enforcement Acts were constitutional under the Elections Clause.[33] In the process of denying the writ, the Court expounded on the federal power over election procedure pursuant to the Elections Clause, finding that "Congress has plenary and paramount jurisdiction over the whole subject."[34] The Court also found that when state and federal election procedure law

25. *Id.* at 1012. At the time of the debates the issue of malapportionment was already apparent in South Carolina where representation was disproportionally centered in Charleston. *Id.* These fears also proved prescient as evidenced by the current political debates over gerrymandering which culminated in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which explicitly authorized Congress to address federal gerrymandering through legislation pursuant to the Elections Clause.

26. Sweren-Becker & Waldman, *supra* note 24, at 1013.

27. THE FEDERALIST NOS. 59, 61 (Alexander Hamilton).

28. THE FEDERALIST NO. 60 (Alexander Hamilton).

29. Apportionment Act of 1842, ch. 47, 5 Stat. 491 (1842) (current version at 2 U.S.C. § 2a). Prior to this act, some states, notably Pennsylvania and New York, elected representatives in urban areas through a general election with representation determined by proportional vote share. Robert E. Ross & Barrett Anderson, *Single-Member Districts Are Not Constitutionally Required*, 33 CONST. COMMENT. 261, 268 (2018).

30. Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 349 (2019).

31. *Ex parte* Siebold, 100 U.S. 371 (1879).

32. *Id.* at 377–79.

33. *Id.* at 399.

34. *Id.* at 388.

conflicts, "the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them."[35]

In the century and a half following *Siebold*, this federal power over election procedure pursuant to the Elections Clause has been consistently reaffirmed.[36] It also has been expanded beyond the reach of its plain text application to general elections to cover topics such as the date of runoff elections,[37] primary elections,[38] and campaign finance legislation.[39] However, as noted in *Arizona v. Inter Tribal Council of Arizona, Inc.*, the scope of the Elections Clause power is not unlimited. As described by Justice Antonin Scalia, that power is restricted to the "manner" of federal elections and does not reach the determination of "who may vote in [federal elections]."[40] The power to decide "who may vote" is left to the states through the Qualifications Clause.

2. The Qualifications Clause

Under the Qualifications Clause, voters in federal elections held "in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[41] This means that in all but one state, the qualifications to vote in a federal election hinge on a voter's eligibility to vote in the state election for the lower house of that state's legislature.[42] The ratification debates explain the Framers' rationale for the Constitution's explicit and deliberate exclusion of authority to regulate voter qualification from the general, more plenary, federal power to control state election procedure.

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35. *Id.* at 384.

36. The most recent affirmation of this was in *Arizona v. Inter Tribal Council of Arizona, Inc.*, which restated *Siebold*'s finding that federal election legislation is "paramount" and that the "regulations effected supersede those of the State which are inconsistent therewith." Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 9 (2013) (quoting *Siebold*, 100 U.S. at 392).

37. *See* Foster v. Love, 522 U.S. 67 (1997) (invalidating a Louisiana law which set the dates of Senate and House elections in October, with the possibility of a runoff election in November, because it conflicted with a federal law setting elections for federal offices on the first Tuesday in November).

38. *See* United States v. Classic, 313 U.S. 299 (1941) (holding that the Elections Clause allows federal legislation to regulate ballot counting in primary elections and overturning *Newberry v. United States*, 256 U.S. 232 (1921), which held that the Elections Clause did not reach that far).

39. *See* Burroughs v. United States, 290 U.S. 534 (1934) (upholding the Federal Corrupt Practices Act as applied to campaign finance).

40. *Inter Tribal Council*, 570 U.S. at 15.

41. U.S. CONST. art. I, § 2, cl. 1. While this power originally only extended to elections for the House of Representatives because senators were chosen by state legislatures, the authority of this clause was extended to elections for senators after the passage of the Seventeenth Amendment in 1913. *Inter Tribal Council*, 570 U.S. at 16.

42. The sole exception is Nebraska, which has a unicameral legislature. *Unicam Focus*, NEB. LEGISLATURE, https://nebraskalegislature.gov/education/lesson3.php#:~:text=The%20state%20of%20Nebraska%20is,the%20Unicameral%20are%20called%20senators (last visited May 8, 2022).

The proposition that the Qualifications Clause cabins federal election power solely to regulation of election mechanics is supported by the Framers' rejection of an amendment to the Elections Clause, which would have expanded the federal authority over elections to encompass setting voter qualifications.[43] Opposition to this amendment was so strong that only one state, Delaware, supported its addition to the Elections Clause at the Constitutional Convention.[44] Even the original proponents of a robust Elections Clause recognized that the federal power over regulating voter qualification is discrete and separate from the power to control voting procedure. James Madison explained this thinking, writing in the Federalist Papers that "[t]o have left [voter qualification] open for the occasional regulation of the Congress, would have been improper,"[45] because "the definition of the right of suffrage is . . . a fundamental article of republican government."[46] In an attempt to obstruct potential state abuse of the power to set voter qualifications, the Constitution places a single limitation on its exercise: that the voting qualifications a state sets for federal elections must be the same qualifications the state uses in its own legislative elections.[47]

As a result, in the pre-Civil War period, the Qualifications Clause was seen as giving "[s]tates . . . nearly complete control over voter qualifications."[48] In the post-Civil War period, this "nearly complete control" has been limited through the "Suffrage Amendments," which made it illegal to limit the franchise on account of race,[49] sex,[50] the ability to pay poll taxes or other taxes,[51] and age (over the age of eighteen).[52] Additionally, one statute, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), imposes a restriction on a state's authority to create voter qualifications by making it a crime for any noncitizen to vote in a federal election.[53] While this statute is incompatible with understandings of the Qualifications Clause, its constitutionality has never been

43. *See* Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 484–85 (2017) (discussing the Morris Amendment to the Elections Clause, which would have given the federal government power over regulating voter qualifications, which was ardently opposed by Benjamin Franklin and James Madison).

44. *Id.* at 485.

45. THE FEDERALIST NO. 52 (James Madison).

46. *Id.* Madison also explained that vesting all election power in Congress would have been unsatisfactory to the states and the reverse, vesting all election power in the states, would have created too much federal dependency on state law. Thus, the separate realms of state and federal authority were the best compromise that the Framers could find. *See id.*

47. *See* Mortellaro, *supra* note 43, at 485. The thinking was that "[i]f the states could trust these qualified voters to elect their own state legislators, then the states could also trust these voters to elect House members who would not use the Elections Clause to undermine state sovereignty." *Id.*

48. Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 28 (2013) (Thomas, J., dissenting).

49. *See* U.S. CONST. amend. XV, § 1.

50. *See* U.S. CONST. amend. XIX.

51. *See* U.S. CONST. amend. XXIV, § 1.

52. *See* U.S. CONST. amend. XXVI, § 1.

53. *See* 18 U.S.C. § 611 (1996).

litigated by courts.[54] This lack of legal challenge may change in the coming years as municipalities and states move toward granting noncitizens voting rights in local and state elections.[55]

Like the Elections Clause, the Qualifications Clause has seldom been interpreted by courts and has even more rarely been litigated. Most scholarship focuses on state qualifications toward qualifying candidates for federal office rather than voters.[56] The first substantial judicial interpretation of the Qualifications Clause came in 1986 in *Tashjian v. Republican Party*, where the Court interpreted the Clause to mean that a complete symmetry of voting requirements in all state and federal elections was not necessary and that qualifications for voting in federal elections only needed to mirror the qualifications for voting for "members of the more numerous branch of the state legislature."[57]

Further interpretation of the Qualifications Clause came in *Arizona v. Inter Tribal Council of Arizona, Inc.*, where the Clause's total guarantee of state power over voter qualifications was contrasted with the Elections Clause, which cabins state authority to regulate voting procedure.[58] The most recent case in which the Court addressed the Qualifications Clause was *Husted v. A. Philip Randolph Institute*, where the Court found that the Qualifications Clause's guarantee of state authority prevented the Court from examining an Ohio law that took voters off the voting rolls for failing to send back a return card verifying that they currently resided at their voting address.[59]

The most thorough examination of the full breadth of the Qualifications Clause by any member of the Court comes from a pair of Justice Clarence

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54. This lack of challenge likely stems from the lack of people who have standing to challenge the law because no state currently allows noncitizens to vote in statewide elections. *See* Kimia Pakdaman, *Noncitizen Voting Rights in the United States*, BERKELEY PUB. POL'Y J., Spring 2019, at 33, 35. Prior to the 1920s, twenty-two states and territories allowed noncitizens to vote in their state elections. *See id.*

55. Some municipalities currently allow noncitizens to vote in local elections. *See* Jeffery C. Mays & Annie Correal, *New York Moves to Allow 800,000 Noncitizens to Vote in Local Elections*, N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/nyregion/noncitizen-voting-rights-nyc.html. There are several cities and states with current bills pending which, if enacted, would do the same. *See id. See* Mortellaro, *supra* note 43, for an analysis of the constitutionality of IIRIRA.

56. This is especially true in the wake of *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), which held that the Constitution provided the exclusive list of qualifications for federal office, and thus states could not impose their own term limits for their senators or representatives. *See generally, e.g.*, Ashley Oravetz, Note, *Congressional Term Limits: The Right Idea, the Wrong Numbers. A Proposal in Favor of Increased Term Limits for Congress*, 46 U. DAYTON L. REV. 55 (2020); Polly J. Price, *Term Limits on Original Intent? An Essay on Legal Debate and Historical Understanding*, 82 VA. L. REV. 493 (1996).

57. Tashjian v. Republican Party, 479 U.S. 208, 229 (1986). This decision built off the ruling in *Oregon v. Mitchell*, 400 U.S. 112 (1970), which found that a federal law setting a minimum voting age of eighteen did not mean that states needed to adopt the same minimum voting age for their state elections. While this issue creates one like that of IIRIRA, it was never litigated and became moot with the passage of the Twenty-Fifth Amendment in 1972.

58. *See* Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16 (2013).

59. *See* Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1846 (2018).

Thomas's dissents in *Thornton* and *Inter Tribal Council of Arizona*. In *Thornton*, Justice Thomas built on the reasoning of *Tashjian* and found that states "enjoy 'reserved' powers over the selection of their representatives in Congress" and that the Court "may not override the decision of the people of [the states] unless something in the Federal Constitution deprives them of the power."[60] He then concluded that the Qualifications Clause, supported by years of state law practice, allowed different states to have different voter eligibility requirements.[61]

In *Inter Tribal Council of Arizona*, Justice Thomas built on his *Thornton* dissent and found that "Congress has no role in setting voter qualifications, or determining whether they are satisfied, aside from the powers conferred by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments"[62] and that the power to set voter qualifications was "instead expressly reposed in the States."[63] He concluded by finding that "[b]oth text and history confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied."[64]

The Court's majority analyses of the Qualifications Clause in *Inter Tribal Council of Arizona* and *Husted,* as well as Justice Thomas's more in-depth explorations of the Clause in his dissents in *Thornton* and *Inter Tribal Council of Arizona,* point to the same conclusion: the latitude of states to set voter qualifications is quite broad. States have a plenary power to set their own qualifications for voting, as long as those qualifications do not fall below the "floor" guaranteed by the Constitution.

Historical practice by the states strongly supports this proposition. Prior to the Civil War and the Fifteenth Amendment, while suffrage for Black men was not allowed in the South, Black men were legally allowed to vote on the same footing as White men in the states of Maine, Massachusetts, Vermont, Rhode Island, and New Hampshire.[65] A similar phenomenon existed in the area of women's suffrage. For example, in New Jersey, women were allowed to vote in all elections from the ratification of the New Jersey Constitution until the early

60. *Thornton*, 514 U.S. at 865 (Thomas, J., dissenting).

61. *See id.* at 872 (applying this logic to argue that different eligibility requirements are allowed for Congressional candidates).

62. *Inter Tribal Council*, 570 U.S. at 26 (Thomas, J., dissenting). The Amendments referenced are the "Suffrage Amendments" which mandated equal protection under law and prohibited discrimination by race, gender, ability to pay poll or other taxes, and age (above eighteen), respectively. *See* U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV, § 1; U.S. CONST. amend. XXVI, § 1.

63. *Inter Tribal Council*, 570 U.S. at 26 (Thomas, J., dissenting).

64. *Id.* at 29. Again this "exclusive" authority is cabined by the protections offered by the Suffrage Amendments.

65. *See* Bennett Liebman, *The Quest for Black Voting Rights in New York State*, 11 ALB. GOV'T L. REV. 386, 387 (2018). Additionally, during the pre-Civil War period, voting rights for Black men existed but were later rescinded or were conditioned on property ownership in Connecticut, Pennsylvania, Maryland, and New Jersey. *Id.* at 386.

nineteenth-century when that right was rescinded.[66] By the time of the Nineteenth Amendment's ratification in 1919, women had full or partial voting rights in twenty-seven states.[67] Additionally, prior to the Twenty-Sixth Amendment's ratification in 1971, a number of states had already allowed those under the national voting age of twenty-one to vote in state, federal, or state and federal elections for years.[68]

In sum, historical context, text, and practice all seem to concur that states have autonomy over their own election qualifications that rarely can be overruled by the federal election power.

B. The Intersection of the Qualifications Clause and the Elections Clause

The Court has recognized that there may be instances where the authority of the federal government under the Elections Clause may conflict with federalism and the autonomy granted to states under the Qualifications Clause. Such a conflict, the Court noted, would "raise serious Constitutional doubts."[69] Any litigation of this intersection of authority would need to determine the limits of both clauses and what to do in the case of overlap.

In *Cook v. Gralike*, the Court defined the scope of the Elections Clause as encompassing "matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'"[70] In 2020, the Texas Court of Appeals in *Mason v. State* found that federal power under the Elections Clause "does not authorize Congress to determine voter qualifications, that is, who can vote."[71] Going further, the Texas Appellate Court found that "nothing in [the Elections Clause] lends itself to the view that voting qualifications in federal elections are to be set by Congress."[72] This implies that the act of "[p]rescribing voting qualifications 'forms no part of the power to be conferred upon the national government' by the Elections Clause."[73] The power to determine qualifications is delegated to the states under the Qualifications Clause as "[o]ne cannot read the Elections Clause as treating implicitly what [the Qualifications Clause] regulate[s] explicitly."[74]

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66. *See* Tracy Thomas, *Reclaiming the Long History of the "Irrelevant" Nineteenth Amendment for Gender Equality*, 105 MINN. L. REV. 2623, 2628 (2021).

67. *See id.* at 2640–42.

68. For a discussion of youth suffrage prior to the Twenty-Sixth Amendment and the fight for ratification, see Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1182–95 (2012).

69. Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013).

70. Cook v. Gralike, 531 U.S. 510, 523–24 (2001) (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)).

71. Mason v. State, 598 S.W.3d 755, 781 (Tex. App. 2020).

72. *Inter Tribal Council*, 570 U.S. at 16 (quoting Oregon v. Mitchell, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part)).

73. *Id.* at 17 (quoting THE FEDERALIST NO. 59 (Alexander Hamilton)).

74. *Id.* at 16.

As for the Qualifications Clause, its grant of state power "gives States the authority not only to set qualifications but also the power to verify whether those qualifications are satisfied,"[75] because "the power to establish voting requirements is of little value without the power to enforce those requirements."[76]

There must be a strict line where the power to regulate elections ends and the power to set voter qualifications and verify those standards begins. In *Arizona v. Inter Tribal Council of Arizona*, the Court addressed a conflict between a federal law that required states to "accept and use" a uniform federal voting registration form and an Arizona law that required any application to be rejected unless it also contained proof of citizenship.[77] There, the Court declined to address the conflict and instead found an alternate method for Arizona to enforce its voting laws that avoided the qualification versus procedural aspect of the question.[78]

Although the issue was fairly avoided in *Inter Tribal Council of Arizona*, Section 1301 of the *Freedom to Vote: John R. Lewis Act* would entail a procedural requirement (the availability of absentee voting in federal elections to all registered voters) mixed with a qualifications requirement (the fact that states would be required to change their voting qualifications to allow all voters to vote absentee if they so choose) making the constitutional conflict unavoidable.[79]

II. VOTING BY MAIL AND SECTION 1301 AS A QUALIFICATIONS CLAUSE ISSUE

Under Section 1301 of the *Freedom to Vote: John R. Lewis Act*, every state would be required to change its qualifications for absentee voting eligibility and thus its general voting qualifications. Section A will give a brief overview of the history of absentee voting provisions in the United States and survey the disparate rules among the states. Section B will examine a few examples of state "excuse" requirements to vote absentee and argue that changing these requirements pursuant to federal statute under the federal elections power would pose an issue under the Qualifications Clause.

75. *Id.* at 28 (Thomas, J., dissenting).

76. *Id.* at 17.

77. *Id.* at 4.

78. The Court used the avoidance rule of statutory interpretation, set forth in *Crowell v. Benson*, that states that the Court should "'ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Id.* at 18 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)) (emphasis omitted). Under the rule, the Court interpreted the statutory provision as requiring the state of Arizona to request that the federal government amend the form to include their citizenship question. *Id.* at 19.

79. *See* H.R. 5746, 117th Cong. § 1301 (2022).

A. A Brief History and Survey of Voting by Mail in the United States

Absentee voting in the United States first began during the Civil War.[80] In response to many voting-age men being on the battlefront (men were a larger proportion of the electorate at that time, because only they could vote), states had to make accommodations to their voter requirements to allow soldiers access to a ballot.[81] Under these new rules, absentee voters had to vote under the supervision of a clerk or state official.[82]

Over the next century, the supervision requirements slowly fell away, but generally states still required an excuse to cast a ballot absentee.[83] It wasn't until 1978 that California became the first state to allow no-excuse absentee voting (what Section 1301 of the *Freedom to Vote: John R. Lewis Act* would require every state to do).[84] As of 1986, after the passage of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), all states are required to offer absentee voting for military and overseas voters.[85]

While states are only required under federal law to offer absentee voting for military and overseas voters, some states go further. Oregon, for example, held its first all-mail (absentee) federal election in 1996, and eight states currently hold their elections wholly by mail.[86] Apart from those eight states, twenty-six states and the District of Columbia offer "no-excuse" absentee voting, and the other sixteen states require an excuse in order to vote absentee.[87] This patchwork of voting laws creates asymmetrical qualifications for exercising the right to vote absentee depending on which state a voter registers in.

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80. *See* Olivia B. Waxman, *Voting by Mail Dates Back to America's Earliest Years. Here's How It's Changed Over the Years*, TIME (Sept. 28, 2020), https://time.com/5892357/voting-by-mail-history/.

81. *See id.* States' responses to these challenges also provide some of the best precedent for the Independent State Legislature Doctrine, which says that the use of the word "legislature" in the Elections Clause means that state legislatures have autonomous power over state procedural regulations unless superseded by federal law. The best example is *In Re Opinions of Justices*, 45 N.H. 595 (N.H. 1864), where the New Hampshire Supreme Court held that the state legislature could ignore a state constitutional provision which mandated in person voting. For a history and interpretation of the Independent State Legislature Doctrine, see Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020).

82. *See* Waxman, *supra* note 80.

83. *See id.*

84. *See id.*

85. *See* 52 U.S.C. § 203 (1986).

86. *See id.* Those states are Alaska, California, Colorado, Hawaii, Nevada, Oregon, Utah, Vermont, and Washington. *See Table 1: States with No-Excuse Absentee Voting*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 3, 2022), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx.

87. See *Table 1: States with No-Excuse Absentee Voting*, *supra* note 86, for a list of state which offer no-excuse mail-in voting or conduct elections wholly by mail. For a list of states that require some sort of excuse to vote by mail, see *Table 2: Excuses to Vote Absentee,* NAT'L CONF. OF STATE LEGISLATURES (Jan. 3, 2022), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx.

On the surface, these variations seem like the multitude of procedural differences in voting procedure that historically have been present among the states – ranging from the large-scale, such as access to the secret ballot, which states individually adopted during the nineteenth and twentieth centuries, to the small-scale, such as how candidate names appear on the ballot.[88] While the aforementioned regulations pertain to the process of voting and are wholly justified under the Elections Clause, Section 1301's mandate relates not only to how a voter may access a ballot but who may do so.

B. Section 1301 as a Qualification to Vote

There has never been a successful challenge to the constitutionality of the single piece of federal law on the subject of absentee voting, the UOCAVA, which first established a federal right to a mail ballot.[89] This lack of challenge stems not from any determination of a federal right to vote absentee, but rather from the difficulty of establishing standing to sue.[90] The lack of standing results from the law's primary effect of giving a benefit (the ability to vote) to those targeted by the law, so any potential harm stemming from UOCAVA's mandate would be hard to distinguish as particularized.[91] Using the underlying constitutional challenges to UOCAVA as a guide, Section 1301 of the *Freedom to Vote: John R. Lewis Act* may be fairly qualified as a federal mandate of voting qualification, which runs counter to the Qualifications Clause.

At first glance, Section 1301 appears to be a procedural requirement, merely prescribing that states make a method of voting available to all voters. However, the consequences of the procedural mandate bleed into the states' authority under the Qualifications Clause to qualify voters and fails the "symmetry" requirement from *Tashjian v. Republican Party*.[92] Were the mandate enacted, states that restrict access to mail-in voting would no longer be able to apply those restrictions to registered voters in federal elections, creating a divergence in the qualification to vote in federal and state elections. While "Congress can step in to enforce other constitutional requirements that the states might violate, . . . even then the Qualifications Clauses' symmetry requirement remains[.]"[93] This resulting violation of the symmetry requirement is illustrated by an exploration of

88. *See* Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1258–60 (11th Cir. 2020). Prior to the adoption of the "Australian Ballot," voting was a much more public act. In some jurisdictions voters would have to orally inform the clerk which candidates they intended to vote for. *See* Derek T. Muller, *Weaponizing the Ballot*, 48 FLA. ST. U. L. REV. 61, 96 (2020).

89. *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, 498 (2016). For an examination of the unconstitutionality and difficulty of achieving judicial review of UOCAVA, see *id.*

90. *See id.*

91. *Id.* For a recent example of failure to establish standing while challenging UOCAVA, see Reeves v. Nago, 535 F. Supp. 3d 943, 954–55 (D. Haw. 2021) (finding that the plaintiff could not establish the "redressability" element of standing).

92. Tashjian v. Republican Party, 479 U.S. 208, 229 (1986).

93. Kalt, *supra* note 89, at 479.

the absentee voting laws of two states that currently have requirements to access a mail-in ballot: New York and Mississippi.

In New York, a voter's qualification to vote is contingent upon their "presence" at a polling place on election day, subject to some exceptions. These exceptions are set out under New York Election Law § 8-400, which requires that in order to qualify to vote absentee, a voter must meet one of a long list of exceptions. Those possible exceptions are that a voter:

> expects to be absent from their voting county (or borough if living in New York City) on election day;
>
> expects to be unable to go to their polling place on election day because of "illness or physical disability or duties related to the primary care of one or more individuals who are ill or physically disabled, or because he or she will be or is a patient in a hospital;"
>
> is currently a resident or patient of a Veterans Administration Hospital, or
>
> is currently on trial or in jail either awaiting action from a grand jury or on a non-felony conviction.[94]

Without New York Election Law § 8-400 in place, the individuals covered by it would not be eligible to vote in any election, because they would not be "present" at a polling place on election day. Therefore, were Section 1301 of the *Freedom to Vote: John R. Lewis Act* passed, the "presence" qualification to vote in an election would be superseded by federal law in violation of the Qualifications Clause, and the symmetry requirement of *Tashjian* would be violated because the voter could vote in federal elections but not in state elections.

The situation is similar in Mississippi. Under Mississippi law, the same "presence" requirement evident under New York law is also readily apparent. Mississippi's exceptions are more expansive than New York's. To have access to an absentee ballot, a voter must:

> be temporarily residing outside their voting county;
>
> be temporarily or permanently disabled;
>
> be over the age of sixty-five, or
>
> have a parent, spouse, or dependent who is temporarily or permanently disabled who the voter anticipates being with on election day and who either lives outside the voter's county or more than fifty miles away from the voter's polling place.[95]

As with the New York law, Mississippi has a "presence" qualification to vote to which the statute creates exceptions. Again, under House Bill 5746 these qualifications would be superseded. Were Section 1301 the *Freedom to Vote: John R. Lewis Act* passed, Mississippi's "presence" qualifications to vote would be superseded by federal law for federal elections but not for state elections. This would violate both the Qualifications Clause and the symmetry requirement articulated in *Tashjian*.

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94. *See* N.Y. ELEC. LAW § 8-400 (Consol. 2022).

95. *See* MISS. CODE ANN. § 23-15-715 (2022).

As the absentee voting requirements in New York and Mississippi show, requirements to access an absentee ballot vary among states that have "excuse"-required absentee voting, but all are similar in that the laws act as voter qualifications by creating exceptions to the requirement that voters be "present" on election day. Along with the other fourteen states that require an excuse not to vote in person on election day, the enactment of Section 1301 would unbalance the structure of these states' voting laws, which violates the Qualifications Clause.[96]

More alarming, constitutionally speaking, than the *Freedom to Vote John R Lewis Act*'s disregard of states' statutes is its explicit violation of the "symmetry requirement the Court found in *Tashjian*.[97] Under the new election structure that would be imposed, voters who would not be able to access a ballot in state legislative elections would be able to do so in federal elections. Take, for example, the Mississippi requirement that voters be "temporarily" outside of their voting county to vote-by-mail on election day.[98] Under the new federal law that passage of House Bill 5746 would create, any voter registered to vote in a county would be able to qualify for a mail ballot regardless of whether that absence is temporary or permanent, because access is conditioned on whether "an individual in a State is eligible to cast a vote in an election for Federal office."[99] This mandate creates federal eligibility by requiring states to "not impose any additional conditions or requirements," which is exactly what any absentee voting requirement does.[100]

Of course, to be able to vote in an election, a voter must meet all eligibility requirements imposed by state and federal law, including being "present" on election day. If the voter is not able to be present at a polling place on election day, they are not able to vote unless they meet an "excuse" enumerated in state elections codes. Although "presence" is not one of the requirements explicitly listed on the voting application form, it is a required qualification to vote in any state that has "excuse" absentee voting.[101] By providing exceptions to the "presence" requirement in the form of absentee voting laws, these states acknowledge that "presence" is needed to cast a ballot.

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96. These other thirteen states are: Alabama, Arkansas, Connecticut, Delaware, Kentucky, Louisiana, Massachusetts, Missouri, New Hampshire, South Carolina, Tennessee, Texas, and West Virginia. *Table 2: Excuses to Vote Absentee*, *supra* note 87.

97. *See* Tashjian v. Republican Party, 479 U.S. 208, 229 (1986).

98. MISS. CODE ANN. § 23-15-715(b) (2022).

99. H.R. 5746, 117th Cong. § 1301 (2022).

100. *Id.*

101. The forms and eligibility requirements for voting in the three sample states (New York, Mississippi, and Indiana) which have been examined here can be found at: N.Y. STATE, *Register to Vote*, https://www.elections.ny.gov/VotingRegister.html (last visited May 9, 2022) (for New York); MISS. SEC'Y OF STATE, MISSISSIPPI MAIL-IN VOTER REGISTRATION APPLICATION, https://www.sos.ms.gov/sites/default/files/election_and_voting/Voter_Registration.pdf (last visited May 9, 2022) (for Mississippi); and IND. SEC'Y OF STATE, *Voter Registration and Absentee Forms*, https://indianavoters.in.gov/MVPHome/PrintDocuments (last visited May 9, 2022) (for Indiana).

The federal mandate imposed by the *Freedom to Vote: John R. Lewis Act* disrupts that process. The requirement of "presence," or meeting one of the statutory exceptions to that "presence" requirement, is superseded by federal law and thereby negated. Accordingly, Section 1301 changes the qualification for voting in states that require excuses to vote absentee. This places Section 1301's mandate squarely within the power that the Qualifications Clause reserves to the States.

III. SECTION 1301 AND RESOLUTION OF THE CONFLICT BETWEEN THE QUALIFICATIONS CLAUSE AND THE ELECTIONS CLAUSE

Having established that Section 1301 of the *Freedom to Vote: John R. Lewis Act* involves state authority under the Qualifications Clause, the question remains how the mandate would be treated by the Court, if challenged. This Part discusses how the constitutional conflict would likely be addressed by analyzing how the Court has addressed similar issues.

In *Oregon v. Mitchell*, the Court nearly mooted conflict between the Qualifications Clause and the Elections Clause.[102] There, the Court addressed two provisions of the Voting Rights Act: one which set a minimum voting age for state and federal elections, and another which established nationwide residency rules for presidential elections.[103] In a plurality opinion, with Justice Hugo Black announcing the judgment, the laws were upheld.[104] In a four-justice concurrence with the judgment, the Court said that the Fourteenth Amendment gave Congress the authority to set voting qualifications nationwide.[105] That issue was later nullified by the passage of the Twenty-Sixth Amendment, and the opinions in *Mitchell* were later held by the Court to have "minimal precedential value" because of the fractured nature of the opinion.[106]

In areas of mixed federal and state authority, the Court historically tries to construe federal statutes narrowly with a "presumption against pre-emption," unless there is clear intent by Congress to pre-empt.[107] This presumption has been held to apply "with full force when Congress legislates in a 'field which the States have traditionally occupied.'"[108] As the *Freedom to Vote: John R. Lewis Act* would be only the second piece of legislation (UOCAVA was the first) to address absentee voting, the presumption likely would be in force here. In *Arizona v. Inter Tribal Council of Arizona*, the Court held that this presumption does not apply to Elections Clause cases, because the plain text of the Constitution confers the power to pre-empt, meaning any "statutory text accurately communicates the

102. Or. v. Mitchell, 400 U.S. 112 (1970).

103. *Id.*

104. *Id.* That reasoning was not binding because Justice Black wrote separately only agreeing in the judgment, not the reasoning behind the other four justices' concurrence.

105. *See id.* at 135–40 (Douglas, J., concurring).

106. Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16 (2013).

107. *Id.* at 13 (referencing Gregory v. Ashcroft, 501 U. S. 452, 460–61 (1991)).

108. *Id.* at 40 (Thomas, J., dissenting) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1942)).

scope of Congress's pre-emptive intent."[109] Under a Qualifications Clause question, this presumption would shift the other way because the power to set voter qualifications is exclusively vested in the States.[110]

A framework for decision in cases of conflict between the two provisions can be found in Justice Thomas's dissent in *Inter Tribal Council of Arizona*. In his reading, a state's Qualifications Clause power to have the "exclusive authority to set voter qualifications" cannot be interfered with by a federal election regulation pursuant to the Elections Clause.[111] In *Inter Tribal Council of Arizona*, Justice Thomas wrote that, if the issue was reached, a federal law that impeded a state's authority to enforce its voting qualifications could not stand as it violated the Qualifications Clause.[112]

Were the framework from Justice Thomas's dissent in *Inter Tribal Council of Arizona* applied to Section 1301, there would likely be the same result because the mandate pushes the disconnect between the Qualifications Clause and the Election Clause further. Section 1301 would not merely obstruct a state's right to verify voter qualifications it has set—it would supersede it.

Even if Justice Thomas's reasoning for his interpretation of the supremacy of the state's authority pursuant to the Qualifications Clause was not accepted, the Court's general approach to federalism in other voting-rights cases would support the same outcome in this constitutional conflict. This is best illustrated by the Court's 2013 ruling in *Shelby County v. Holder*, where the Court held that the 1965 Voting Rights Act's preclearance requirement was unconstitutional.[113] There, the Court acknowledged that "States have 'broad powers to determine the conditions under which the right of suffrage may be exercised.'"[114] If the Court in *Shelby County* found that state sovereignty trumped federal authority to regulate elections (even with the existence of the Fourteenth Amendment's equal protection guarantee weighing on the side of the federal government), then the Court would likely also find for the states in a case involving Section 1301, because that law interferes with the states' exclusive authority to regulate under the Constitution.

The deference given to state Voter ID laws by the Court also supports the inference that Section 1301 would be found unconstitutional. For example, in

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109. *Id.* at 14.

110. *But see, e.g.*, Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171, 180 (2021) (arguing that the gray area between the Qualifications Clause and the Elections Clause should be construed in favor of the Elections Clause because it is unencumbered from federalism constraints).

111. Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 29 (2013) (Thomas, J. dissenting).

112. *Id.* at 23–47.

113. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 542–44 (2013) (discussing state sovereignty in the area of election administration).

114. *Id.* at 543 (quoting Carrington v. Rash, 380 U.S. 89, 91 (1965)). *But see* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012) (arguing that the Court's traditional deference to states should not apply in Elections Clause cases because the plain text of the Election Clause upsets the traditional balance of federalism by explicitly allowing Congress to supersede state authority).

Harper v. Virginia State Board of Elections, the Court found that while a state has authority to set voter qualifications, "the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate."[115] However, in *Crawford v. Marion County Election Board*, the Court noted "that 'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy the standard set forth in *Harper*."[116] Under that interpretation, an Indiana statute requiring government-issued photo ID to vote was upheld because it was "justified by the valid interest in protecting 'the integrity and reliability of the electoral process.'"[117] Much the same logic would apply in this case, as the qualifications are evenhanded and do not "invidiously" discriminate against one of the classes of voters protected under the Constitution.

The Court's scant interpretations of conflicts between the Qualifications Clause and the Elections Clause as well as its deference to neutral, state-set voting restrictions point toward the same outcome: a successful challenge to the constitutionality of Section 1301 of the *Freedom to Vote: John R. Lewis Act*. The Constitution grants states autonomy to set their own qualifications for elections. By requiring a state to alter those qualifications, Congress would upset the balance which the Constitution creates, and the Court, with the deference it has shown towards state qualifications and verification requirements, would be unlikely to step in on the side of the federal government.

IV. POTENTIAL CHALLENGES TO THIS DEFERENTIAL APPROACH TO STATE-MADE VOTING QUALIFICATIONS

Although a state's voting qualifications would likely be upheld in a head-to-head conflict between the Qualifications Clause and the Elections Clause, two complicating factors could change the calculus of a ruling on the constitutionality of Section 1301. The first is whether Section 1301, which implicitly changes voting procedure, could be fairly classified as falling squarely under the Elections Clause. The second complicating factor is whether Section 1301 could be considered a protection of "Equal Rights" under the Fourteenth Amendment. Part A will address the Elections Clause argument and conclude that the effects of the legislation would fairly classify the legislation as fully implicating the Qualifications Clause. Part B will address the Fourteenth Amendment question and conclude that Section 1301 could not be upheld under the Fourteenth Amendment, because it does not "invidiously discriminate," and thus does not meet the standard to be struck down set forth in *Harper*.[118]

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115. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966). The Court went on to note that "qualifications" which are "wealth based" such as a poll tax violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 669.

116. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–90 (2008) (quoting Anderson v. Celebrezze, 460 U.S. 780 (1983)).

117. *Id.* at 204.

118. *Harper*, 383 U.S. at 666.

A. Section 1301 as Procedural Regulation of Elections to Avoid Constitutional Conflict

The plain text of Section 1301 does not explicitly supersede any state voter qualification law. It merely requires that a state allow all voters eligible to cast ballots under state law to have the ability to do so through an absentee ballot in federal elections.[119] As no state explicitly requires "presence" at a voting location as a qualification to vote, it might be argued that there is no change to voting qualification under this law, making it fall outside of the "exclusive" authority states have to set voter qualifications under the Qualifications Clause.[120] Additionally, the Court has recognized that there is a legitimate federal interest in having a level of uniformity in qualifications for federal office.[121]

The effects of this legislation, regardless of its ambiguous text and the recognized federal interest in uniformity, cannot avoid conflicting with the Qualifications Clause because it necessitates a change in the voting qualifications extant in several states. The procedural aspect of the legislation is inextricably intertwined with the qualification requirement due to the inherent "presence" qualification requisite to vote in all states that have excuse-required absentee voting.

When squared with the Court's scant jurisprudence on the Qualifications Clause, it is evident that even if Congress' authority to enact Section 1301 were considered under the Elections Clause, its effect on voting qualifications requires consideration under the Qualifications Clause too. If, as the Court made clear in *Inter Tribal Council of Arizona*, a statute that causes a state to be "precluded from obtaining information necessary for enforcement" of its voting qualifications "would raise serious constitutional doubts," because it conflicts with the Qualifications Clause, a statute that "precludes" a state from establishing those qualifications would warrant more scrutiny.[122]

Additionally, it would be much harder for the Court to avoid the issue as it did in *Inter Tribal Council of Arizona,* because unlike in that case, where there was an option to construe the federal statute to accommodate a state's verification authority,[123] Section 1301 is a zero-sum proposition. Either Section 1301 supersedes a state's inherent "presence" requirement or it does not.

B. Section 1301 as Guaranteeing "Equal Protection" Under the Fourteenth Amendment

One approach which side-steps conflict between the Qualifications Clause and the Elections Clause would be consideration of Section 1301 as furthering

119. H.R. 5746, 117th Cong. § 1301 (2022).

120. Ariz. v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 29 (2013) (Thomas, J., dissenting) (finding that states have "exclusive" authority to set voter qualifications).

121. *See* United States Term Limits v. Thornton, 514 U.S. 779 (1995) (upholding uniform qualifications for federal office). This interest in uniformity was also expressed by the Framers in the debate over the ratification of the Elections Clause at the Constitutional Convention. *See* Becker & Waldman, *supra* note 24, at 1012–17 (discussing the Federalist concerns for uniform voting requirements).

122. *Inter Tribal Council*, 570 U.S. at 18–19.

123. *Id.* (offering a different construction of the federal law to avoid the constitutional issue).

the Fourteenth Amendment's guarantee of "equal protection." In fact, House Bill 5746 claims the Fourteenth Amendment gives Congress the authority to enact the legislation pursuant to protecting the right to vote.[124] However, to succeed in such a claim, it would need to be shown that a state with excuse-required absentee voting was imposing a burden on the right to vote that is an "invidious discrimination." That burden would be difficult to prove in the context of Section 1301.

To make a claim that excuse-required absentee voting violates the Fourteenth Amendment, the voter would first need to prove that excuse-required voting was an "invidious discrimination."[125] In order to avoid being classified as an "invidious discrimination," the law must be "rational," and there must be a compelling state interest at stake (here related to enforcing voter qualifications).[126] Under this standard, some residency requirements have previously been struck down. For example, the Texas Constitution's provision that prohibited current U.S. armed forces members who moved to the state during their service to vote,[127] or a Tennessee law that required one year's residency in the state before voting there.[128] On the surface, these rulings may seem to cover the inherent "presence" requirement with excuse-required absentee voting, but closer analysis shows that this is not the case.

In *Carrington v. Rash*, the Court's decision that the armed forces residency voting exclusion violated the Fourteenth Amendment was based upon the fact that there was a discriminatory purpose in the Texas Constitution provision in question.[129] That said, the *Carrington* Court emphasized that "mere classification" of a group under state voting laws "does not of itself deprive a group of equal protection."[130] Additionally, in *Dunn v. Blumstein*, the Court, in its ruling against the Tennessee one-year residency requirement, was explicit that it did not intend to prohibit all residency requirements, only durational ones.[131] In its opinion in *Dunn*, the Court noted that "[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny."[132] This likely would cover a uniform, state-wide, absentee voting law.

The holdings in *Dunn* and *Carrington* carve out sufficient space for excuse-based absentee voting requirements to withstand scrutiny under the Fourteenth

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124. H.R. 5746 § 3(A).

125. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

126. Crawford v. Marion Cnty. Elections Bd., 553 U.S. 181, 189 (2008).

127. *See* Carrington v. Rash, 380 U.S. 89 (1965) (Texas Constitution provision on armed forces members voting).

128. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (Tennessee law creating a one-year residency requirement to vote).

129. *Carrington*, 380 U.S. at 96.

130. *Id.* at 92.

131. *Dunn*, 405 U.S. at 343–44.

132. *Id.* at 343–44.

Amendment. In fact, inability to access an absentee ballot when meeting all other voting qualifications has been held constitutionally permissible by the court in *McDonald v. Board of Elections Commissioners*.[133] There, the Court found that a voter's inability to access an absentee ballot under Illinois law because he was incarcerated at the time of the election did not infringe his Fourteenth Amendment rights, as "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote."[134]

These cases imply that a conditioned ability to access an absentee ballot does not raise a question under the Fourteenth Amendment, causing the argument that Section 1301 is a remedy to ensure Equal Protection to fall apart. Without a voting impediment to warrant the infringement upon the Qualifications Clause, there is no case to claim Section 1301 is authorized pursuant to the Fourteenth Amendment.

CONCLUSION

Were the Qualifications Clause regularly used and enforced, there would be little change to existing election law. Other than the "Suffrage Amendments," which stand on equal footing with the Qualifications Clause, and thus would not be affected, there are few extant statutes that could be challenged on Qualification Clause grounds.[135] While these challenges would impede federal authority to oversee voting rights protections, some theorize a more robust Qualifications Clause enforcement would enhance voter protection on the state level, because the Clause is seen as imposing on the states a duty to safeguard voting rights.[136]

The most lasting legacy of a more robust Qualifications Clause doctrine would likely be a shift in authority over elections back to the states with more limited federal oversight. Given the increased political polarization around election mechanics, such a shift would have a chilling effect on further federal legislation to control the voting process and help lower the temperature of the political discourse. In the past year, the United States has seen members of both major political parties claim that without the passage of different federal elections legislation the legitimacy of future election results could be in doubt.[137] A

133. *See* McDonald v. Bd. of Elections Comm'rs, 394 U.S. 802 (1969).

134. *Id.* at 807.

135. See Kalt, *supra* note 89, for a discussion of how UOCAVA is currently unconstitutional under the Qualifications Clause. With a more robust Qualifications Clause doctrine, this law could be struck down.

136. *See generally* Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159 (2015) (arguing that the Qualifications Clause mandates strict scrutiny of state voting laws).

137. *See, e.g.*, Meredith McGraw, *Trump Allies Eye Election Law Push Should He Be Reelected*, POLITICO (Oct. 15, 2021, 11:01 A.M), https://www.politico.com/news/2021/10/15/trump-allies-election-law-reelection-516077 (discussing former President Donald Trump's desire to push federal

stronger Qualifications Clause not only could discourage partisan efforts to takeover states' constitutional election authority, but it might also ensure greater stability in the federal oversight of voting rights.

election reform if re-elected in 2024); *see also* Hulse, *supra* note 5 (describing Democrats' prediction that without passage of the *Freedom to Vote: John R. Lewis Act* "democracy is at stake").