Rethinking the Right to Vote Under State Constitutions

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I. INTRODUCTION

Professor Joshua A. Douglas's intriguing article in the *Vanderbilt Law Review* provides much-needed focus on the largely overlooked provisions in state constitutions that establish voting-related rights.[1] He points out that the United States Supreme Court's ruling in *Crawford v. Marion County Election Board*[2] makes it difficult for plaintiffs to prevail in federal constitutional challenges to state laws that regulate the electoral process, such as voter identification requirements.[3] Consequently, plaintiffs seeking to

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1. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014).

2. 553 U.S. 181 (2008).

3. Douglas, *supra* note 1, at 92–93.

challenge electoral regulations have begun to pursue claims under state constitutions instead.

Professor Douglas argues that state constitutional provisions concerning voting and elections generally provide greater protection against election regulations or voting requirements than the U.S. Constitution,[4] which does not expressly address most types of election-related rights with the same specificity.[5] Douglas contends that, when a state court declines to provide greater protection for voting rights under its own constitution than under the U.S. Constitution, it typically is because the court is erroneously construing the documents in "lockstep" with each other, effectively ignoring the state constitution's additional voting-related provisions.[6] He argues that a state election law which establishes requirements that a person must satisfy in order to vote imposes "additional qualification[s]" for voting, is presumptively invalid, and generally should be struck down under the state constitution.[7]

I respectfully disagree with Professor Douglas's analysis in several respects. State constitutions—and in particular their qualifications clauses—generally do not provide stronger protection for voting rights than the U.S. Constitution. Moreover, contrary to Professor Douglas's contentions, the congruence between state and federal constitutional protections for voting is not the result of states reading their constitutions in lockstep with the U.S. Supreme Court's interpretation of the U.S. Constitution. If anything, the opposite is true. The standards that the modern Supreme Court has adopted for determining the constitutionality of election laws are consistent with over a century-and-a-half of state constitutional precedents that long predate most federal voting rights cases.

Most state courts have long interpreted their constitutions in general, and qualifications clauses in particular, as permitting legislatures to impose reasonable regulations on the voting process to

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4. *Id.* at 104–05; *cf.* Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 504–05 (1977) (arguing that the U.S. Supreme Court's interpretation of the U.S. Constitution is not "mechanically applicable . . . when interpreting counterpart state [constitutions'] guarantees").

5. The U.S. Constitution specifies that any person who is qualified to vote for "the most numerous Branch of the State Legislature" must also be deemed qualified to vote in elections for the House of Representatives and Senate. U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII. It also imposes penalties on states that deny or abridge the right to vote, *id.* amend. XIV, § 2, and provides that people may not be deprived of the right to vote based on certain specified grounds. *See id.* amend. XV (race); amend. XIX (gender); amend. XXIV (failure to pay poll tax); amend. XXVI (age, for people who are at least 18 years old).

6. Douglas, *supra* note 1, at 106, 110, 124.

7. *Id.* at 137–38.

ensure the integrity of elections. They consistently have held that qualified electors who fail to comply with statutory processes or requirements for voting may be required to vote provisionally or else be prohibited from participating in an election; such requirements do not constitute impermissible new "qualifications."[8] This approach appropriately balances the two equally important and complementary aspects of the fundamental right to vote: the "affirmative" right to cast a ballot, and what may be considered the "defensive" right to have that ballot counted and be given full effect, without being diluted by fraudulent or otherwise improper votes.[9] Thus, due to well-established state-level precedents that are unrelated to the Supreme Court's interpretation of the U.S. Constitution, the pivot to state constitutional challenges to election laws is unlikely to succeed.

Additionally, even when state constitutions provide greater protection for the right to vote than the U.S. Constitution, they cannot limit the scope of a legislature's authority to regulate federal elections. The U.S. Constitution confers the power to regulate federal elections directly on state legislatures—not on states as a whole—rendering state constitutions legally incapable of imposing substantive restrictions on the scope of that authority. A state constitution may not limit a power that originates in the U.S. Constitution. Thus, even where voter identification laws or other election restrictions might violate state constitutions as applied to state and local elections, they remain valid and enforceable under the U.S. Constitution as applied to federal elections.

II. State Constitutions, Federal Constitutional Doctrine, and Voter "Qualifications"

Although most state constitutions contain numerous clauses expressly relating to voting, they generally do not provide substantially greater protection for the right to vote than the U.S. Constitution. This is especially true of state constitutions' qualifications clauses, upon which Professor Douglas primarily rests his argument.[10] This congruence between state and federal constitutions is not the result of state courts choosing to interpret their constitutions in "lockstep" with the U.S. Constitution, as

8. *See, e.g.*, *infra* notes 23–29 and accompanying text.

9. Anderson v. United States, 417 U.S. 211, 226 (1974); Reynolds v. Sims, 377 U.S. 533, 555 (1964); Baker v. Carr, 369 U.S. 186, 208 (1962).

10. Douglas, *supra* note 1, at 132–33, 136–38.

Professor Douglas maintains.[11] Rather, the test that the Supreme Court has adopted is consistent with the standards that most states have adopted over the past century and a half. State courts have long recognized that, consistent with their respective constitutions, qualified electors may be required to comply with a range of requirements and processes to maintain good order, promote efficiency, engender public confidence, and preserve the integrity of the electoral process.

As Professor Douglas recognizes,[12] the Supreme Court's rulings in *Anderson v. Celebrezze*[13] and *Burdick v. Takushi*[14] establish the modern standard for determining the permissibility of most election laws under the First and Fourteenth Amendments of the U.S. Constitution. The *Anderson-Burdick* test provides that laws imposing "severe restrictions" on voters are subject to strict scrutiny and generally invalid.[15] In all other cases, the Court balances the interests that an election regulation seeks to promote against the burden it imposes on constitutional rights.[16]

The *Anderson-Burdick* test recognizes that the "government must play an active role in structuring elections" and impose "substantial regulation . . . if they are to be fair and honest and [reflect] some sort of order, rather than chaos . . . ."[17] Election laws "will invariably impose some burden upon individual voters," but such burdens do not render them unconstitutional.[18] Under the *Anderson-Burdick* standard, most election laws are constitutionally permissible.[19]

The Supreme Court's relative permissiveness toward election regulations is consistent with its recognition that the fundamental right to vote is comprised of two components: the "affirmative" right to vote, or the right to cast a ballot, and what may be considered the "defensive" right to vote, which is a person's right to have his or her ballot be counted and "given full value and effect, without being

11. *Id*. at 106, 110, 124.

12. *Id*. at 98.

13. 460 U.S. 780, 789 (1983).

14. 504 U.S. 428, 434 (1992).

15. *Id*. (internal quotation marks omitted); *Anderson*, 460 U.S. at 793.

16. *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789.

17. *Burdick*, 504 U.S. at 433 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

18. *Id*.

19. *Id*. at 434 ("[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." (quoting *Anderson*, 460 U.S. at 788)).

diluted or distorted by the casting of fraudulent" or otherwise invalid ballots.[20] The Supreme Court has recognized that a person's right to vote is "denied by a debasement or dilution of the weight of [his or her] vote just as effectively as by wholly prohibiting the free exercise of the franchise."[21] Although the need to protect the "defensive" right to vote is likely at its apex with regard to absentee ballots, which are especially susceptible to fraud,[22] this right extends to all votes, regardless of the medium through which they are cast.

In rulings dating back to the 1800s, many states have interpreted their respective constitutions—and, in particular, their qualifications clauses—as imposing restrictions similar to the *Anderson-Burdick* standard. These rulings generally are not the result of "lockstepping" with the U.S. Constitution, but rather stem from independent determinations of the scope of state legislatures' authority to regulate the conduct of elections.

For example, the Iowa Supreme Court held in 1869:

> Th[e] section of the Constitution [which] defines who shall be an elector . . . fixes the minimum age of voters, and the minimum length of residence. The legislature cannot change these particulars . . . . Whoever possesses the qualifications there mentioned is an elector; and his right to vote . . . [cannot be] divest[ed]. . . . [I]t is equally clear . . . that the legislature may regulate the exercise of this right, leaving the right itself untouched. . . . Every citizen who is entitled to vote is interested in having excluded from the box the ballots of those not entitled. To prevent fraudulent voting, to insure the purity of the ballot-box, are objects which fall properly within the province of legislative power and duty. . . . [T]he legislature, while it must leave the constitutional qualifications intact, and cannot add new ones, may, nevertheless, prescribe regulations to determine whether a given person who proposes to vote possesses the required qualifications.[23]

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20. Anderson v. United States, 417 U.S. 211, 226 (1974).

21. Reynolds v. Sims, 377 U.S. 533, 555 (1964); *see also Baker*, 369 U.S. at 208 (holding that the right to vote is violated by "dilution" of a person's votes through means such as "stuffing of the ballot box").

22. *See, e.g.*, U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 6 (2006); NAT'L COMM'N ON FED. ELECTION REFORM, TO ENSURE PRIDE AND CONFIDENCE 44 (2001); John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 512–13 (2003); William T. McCauley, *Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy*, 54 U. MIAMI L. REV. 625, 632 (2000); Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People With Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015, 1043 (2007); Tova Andrea Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 SEATTLE U. L. REV. 353, 389–90 (2005).

23. Edmonds v. Banbury, 28 Iowa 267, 271–72 (1869); *see also* Lane v. Mitchell, 133 N.W. 381, 382 (Iowa 1911) ("[S]uch provision undoubtedly leaves it to the Legislature to regulate the exercise of the right, and to provide a method for determining whether persons offering to vote possess the required qualifications.").

Likewise, the Delaware Chancery Court explained in 1922, "When we speak of the qualifications of a voter, we mean to refer to those things which must exist as going to make of him a voter, as conferring on him the absolute right to be placed among the class of persons which the law creates and calls voters."[24] Statutes that simply require people to provide "evidenc[e]" that they are qualified to vote are "an entirely different thing."[25]

Such rulings are fairly representative of how courts throughout the nation historically have construed their constitutions' qualifications clauses. The Kentucky Supreme Court, for example, writes that a "qualified" voter will not be "disenfranchise[d]" if election officers require "proof of his identity."[26] According to the Massachusetts Supreme Judicial Court, "[w]hile the Legislature cannot change in any particular the qualifications required to enable one to vote, it may make reasonable rules and regulations for ascertaining those who possess such qualifications."[27] Likewise, under Kansas Supreme Court precedent, requiring people to provide "proof" so that election officials may "ascertain who and who are not entitled to vote" is "not in any true sense imposing an additional qualification."[28] Thus, it is broadly recognized that, under state constitutions' qualifications clauses, there is an important distinction between laws that "add to the constitutional qualifications of voters" and those that "merely prescribe a procedure by which frauds may be prevented and mistakes avoided on election day."[29] These standards seem largely consistent with the Supreme Court's *Anderson-Burdick* test.

The voter identification cases from Pennsylvania and Wisconsin, upon which Professor Douglas primarily relies,[30] further bolster this point. In *Applewhite v. Commonwealth*, the Pennsylvania Commonwealth Court of Appeals upheld the constitutionality of Pennsylvania's voter identification law[31] in a ruling that the

24. McComb v. Robelen, 116 A. 745, 747 (Del. Ch. 1922).

25. *Id.* (holding that laws requiring otherwise eligible voters to register before voting do not improperly establish new "qualifications" for voting); *see also* Brennan v. Black, 104 A.2d 777, 786 (Del. 1954) (distinguishing between a "qualification" for voting and a requirement that people provide "evidence of qualification").

26. Yates v. Collins, 82 S.W. 282, 284 (Ky. 1904).

27. *In re* Opinion of the Justices, 143 N.E. 142, 144 (Mass. 1924).

28. State v. Butts, 2 P. 618, 621 (Kan. 1884).

29. Duprey v. Anderson, 518 P.2d 807, 808–09 (Colo. 1974).

30. Douglas, *supra* note 1, at 106.

31. No. 330 M.D. 2012, 2012 Pa. Commw. Unpub. LEXIS 757 (Pa. Commw. Aug. 15, 2012), *vacated* 54 A.3d 1 (Pa. 2012), *modified on reh'g,* 2012 Pa. Commw. Unpub. LEXIS 749 (Oct. 2, 2012).

Pennsylvania Supreme Court later vacated for further factfinding.[32] Professor Douglas contends that, although the Commonwealth Court "discussed various Pennsylvania cases, it consistently fell back on [the U.S. Supreme Court's voter identification ruling in] *Crawford* for its substantive analysis."[33] He goes on to maintain that the court "implicitly used the lockstep approach to reject the plaintiff's challenge to the voter [identification] law."[34]

I read *Applewhite* differently. The court begins its discussion of the voter identification law's constitutionality with a detailed, nineteen-page analysis of eight state court precedents dating back to 1868 that specifically construe the state constitution.[35] Quoting the Pennsylvania Supreme Court's 1869 ruling in *Patterson v. Barlow*, the Commonwealth Court held:

> The power to legislate on the subject of elections, to provide the boards of officers, and to determine their duties, carries with it the power to prescribe the evidence of the identity and the qualifications of the voters. The [plaintiffs'] error is in assuming that the true electors are excluded, because they may omit to avail themselves of the means of proving their identity and their qualifications.[36]

Thus, *Applewhite* rests primarily on longstanding state court precedents, not the U.S. Supreme Court's interpretation of the U.S. Constitution.

Professor Douglas also cites the trial court's injunction of Wisconsin's voter identification statute in *League of Women Voters Education Network, Inc. v. Walker* as an example of a state court properly affording state constitutional provisions "primacy" over the U.S. Constitution's right to vote.[37] That ruling was subsequently

32. Applewhite v. Commonwealth, 54 A.3d 1, 5 (Pa. 2012). The Pennsylvania Supreme Court was concerned that the Pennsylvania Department of Transportation was not making free voter identification cards freely available, as the voter identification statute expressly required. *Id.* at 2–3 (quoting Act of Mar. 14, 2012, P.L. 195, No. 18, § 2 (codified at Pa. Stat. § 2626(b))).

33. Douglas, *supra* note 1, at 107.

34. *Id.* at 108.

35. *Applewhite*, 2012 Pa. Commw. Unpub. LEXIS 757, at *33–51 (citing Mixon v. Commonwealth, 759 A.2d 442, 445, 449–50 (Pa. Commw. 2000) (en banc); Martin v. Haggerty, 548 A.2d 371, 374 (Pa. Commw. 1988) (en banc); Ray v. Commonwealth, 442 Pa. 606 (1971); Winston v. Moore, 91 A. 520, 522 (Pa. 1914); *In re* Independence Party Nomination, 57 A. 344, 345 (Pa. 1904); Patterson v. Barlow, 60 Pa. 54, 83 (1869); McCafferty v. Guyer, 59 Pa. 109, 111 (1868); Page v. Allen, 58 Pa. 338, 347 (1868)).

36. *Applewhite*, 2012 Pa. Commw. Unpub. LEXIS 757, at *38–39 (quoting *Patterson*, 60 Pa. at 83).

37. League of Women Voters Educ. Network, Inc. v. Walker, No. 11-CV-4669, 2012 WL 763586 (Wis. Cir. Ct. Mar. 12, 2012), *rev'd*, 834 N.W.2d 393 (Wis. Ct. App. 2013), *aff'd*, 851 N.W.2d 302 (Wis. July 31, 2014).

repudiated, however, by both the Wisconsin Court of Appeals and the Wisconsin Supreme Court.[38]

The appellate rulings in *League of Women Voters* upholding the state's voter identification law were not based on federal courts' narrow interpretations of the right to vote under the U.S. Constitution, but rather long-established Wisconsin cases construing the state constitution.[39] The Court of Appeals relegated *Crawford* to a footnote, stating that it saw "no reason to discuss" the ruling,[40] while the Wisconsin Supreme Court briefly touched on *Crawford* only after a detailed and much lengthier discussion of its own precedents.[41]

Both appellate courts placed special emphasis on a Wisconsin Supreme Court ruling from 1859 that the trial court failed to discuss: *State ex rel. Cothren v. Lean*.[42] *Cothren* upheld the constitutionality of a state law permitting election officials at a polling place to challenge a person's eligibility to vote and question her about it.[43] The court held that the law did not "prescrib[e] any qualifications for electors different from those provided for in the constitution," but instead enabled election officials "to ascertain whether the person offering to vote possessed the qualifications required by [the constitution]."[44] Holding that the legislature was "certainly . . . competent" to enact such a law, the court explained:

> The necessity of preserving the purity of the ballot box, is too obvious for comment, and the danger of its invasion too familiar to need suggestion. While, therefore, it is incompetent for the legislature to add any new qualifications for an elector, it is clearly within its province to require any person offering to vote, to furnish such proof as it deems requisite, that he is a qualif[i]ed elector.[45]

Based on precedents such as this, both the Wisconsin Court of Appeals and Wisconsin Supreme Court concluded that the trial court's attempt to afford "primacy" to the state constitution by

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38. *Id.* In a companion case, the Wisconsin Supreme Court held that the State may not refuse to issue a voter identification card to a person on the grounds that he or she has not paid for a birth certificate, effectively requiring the State to eliminate fees for birth certificates. Milwaukee Branch of the NAACP v. Walker, 851 N.W.2d 262, 279–80 (Wis. July 31, 2014).

39. *League of Women Voters*, 834 N.W.2d at 405–13; *League of Women Voters*, 851 N.W.2d at 307–311.

40. *League of Women Voters*, 834 N.W.2d at 398 n.2.

41. *See League of Women Voters*, 851 N.W.2d at 314–16.

42. *See League of Women Voters*, 834 N.W.2d at 406 (citing State *ex rel.* Cothren v. Lean, 9 Wis. *279, *283–84 (1859)); *League of Women Voters*, 851 N.W.2d at 310–11 (citing *Cothren*, 9 Wis. at *283–84).

43. *Cothren*, 9 Wis. at *283.

44. *Id.*

45. *Id.* at *283–84.

construing it more broadly than the U.S. Constitution ran afoul of over 150 years of contrary state law.[46]

Thus, while exceptions exist,[47] most state constitutions grant legislatures the same authority to establish mandatory procedures and requirements for voting as the Supreme Court's *Anderson-Burdick* test. Such interpretations are not the result of state courts' "lockstep" adherence to federal court rulings, however. Instead, they trace back to longstanding state court precedents that balance the two complementary aspects of the fundamental right to vote: the "affirmative" right to cast a vote and the "defensive" right to have that vote be given full effect, without being diluted or nullified by fraudulent or otherwise improper ballots.

These cases also call into question Professor Douglas's broad interpretation of state constitutions' qualifications clause provisions. He contends that "courts should deem a law that adds an additional voter qualification beyond what the state constitution allows to be presumptively invalid."[48] Courts therefore should "require states to justify burdens on the right to vote with specific evidence tied to the legislature's authority under the state constitution."[49] As discussed above, however, the simple fact that a voter must comply with a statute in order to vote in a particular election—for example, by showing up at the correct polling location or arriving before closing time—does not mean that the law establishes a new voter

46. *See, e.g.*, State *ex rel.* Small v. Bosacki, 143 N.W. 175, 176 (Wis. 1913) ("It is competent for the legislature to prescribe reasonable rules and regulations for the exercise of the elective franchise. To do so infringes upon no constitutional rights."); State *ex rel.* Wood v. Baker, 38 Wis. 71, 87 (1875) ("The voter may assert his right [to vote], if he will, by proof that he has it; may vote, if he will, by reasonable compliance with the law. His right is unimpaired; and if he be dis[en]franchised, it is not by force of the statute, but by his own voluntary refusal of proof that he is enfranchised by the constitution."). *See also* State *ex rel.* O'Neill v. Trask, 115 N.W. 823, 825 (Wis. 1908) (upholding voter registration requirements because "they are not unreasonable and are consistent with the present right to vote as secured by the Constitution"); *cf.* Dells v. Kennedy, 49 Wis. 555, 558 (1880) (holding that an election requirement which "deprive[s] a fully qualified elector of his right to vote at an election, without his fault and against his will, and require[s] of him what is impracticable or impossible" is "as void[] as if it directly and arbitrarily disfranchised him . . . or required of an elector qualifications additional to those named in the constitution"); State *ex rel.* Knowlton v. Williams, 5 Wis. 308, 315–16 (1856) ("[B]y requiring a residence of thirty days in the town where the elector offers to vote, the legislature have added a qualification not contained in the constitution, and which is repugnant to its provisions.").

47. *See, e.g.*, Weinschenk v. State, 203 S.W.3d 201, 212 (Mo. 2006) ("Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart.").

48. Douglas, *supra* note 1, at 94.

49. *Id.* at 95.

"qualification."[50] Thus, to the extent plaintiffs wish to challenge election regulations under state constitutions, they generally should rely on provisions other than qualifications clauses.[51]

III. STATE CONSTITUTIONS, STATE LEGISLATURES, AND FEDERAL ELECTIONS

Another concern with Professor Douglas's call to challenge state election laws under state constitutional provisions is that a state constitution cannot limit the substantive scope of a legislature's authority to regulate federal elections. Even if a state election law violates a state constitutional provision, it remains valid as applied to federal elections.[52]

The U.S. Constitution expressly grants state *legislatures* (rather than the States themselves) the power to "prescribe[ ]" the

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50. *See, e.g.*, *supra* notes 20–25 and accompanying text; *cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835 (1995) (stating that provisions which "regulate[] election procedures . . . [do] not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position" or public office).

51. For example, fourteen constitutions contain provisions, which lack an express analogue in the U.S. Constitution, stating that "no power, civil or military, shall at any time interfere with the right of suffrage." ARIZ. CONST., art. II, § 21; ARK. CONST., art. III, § 2; COLO. CONST., art. II, § 5; IDAHO CONST., art. I, § 19; MO. CONST., art. I, § 25; MONT. CONST., art. II, § 13; N.M. CONST., art. II, § 8; OKLA. CONST., art. II, § 4; *id.* art. III, § 5; PA. CONST., art. I, § 5; S.C. CONST., art. II, § 2; S.D. CONST., art. VI, § 19; *id.* art. VII, § 1; UTAH CONST., art. I, § 17; WASH. CONST., art. I, § 19; WYO. CONST., art. I, § 27.

52. A law that violates a state constitutional provision may not be enforced during elections where only state or local offices are on the ballot. In contrast, when both state and federal offices are on the ballot, the law may be applied to the federal races, and voters may be permitted or required to comply with it to vote for federal offices. Because the law may not be applied to the state and local offices in that election, some people may be permitted to vote only for certain offices. *See, e.g.*, *In re* Act Providing for Soldiers' Voting, 37 Vt. 665 (1864) (holding that a state law allowing soldiers stationed outside of the State to cast absentee ballots violated the state constitution as applied to elections for state and local offices, but was constitutional and enforceable as applied to congressional and presidential elections). *Compare In re* Opinion of Justices, 44 N.H. 633, 636 (1863) (holding that state law permitting soldiers stationed outside the state to cast absentee ballots for state and local offices violated the state constitution and was unenforceable), *with In re* Opinion of Justices, 45 N.H. 595, 601 (1864) (holding that state law permitting soldiers stationed outside of the state to cast absentee ballots for federal offices was valid under the U.S. Constitution and enforceable). *Cf.* Ariz. Op. Att'y Gen., No. I13-011, at 2 (Oct. 7, 2013), *available at* https://www.azag.gov/sites/default/files/sites/all/docs/Opinions/2013/I13-011.pdf, *archived at* http://perma.cc/852G-E3J9 (concluding that voters who registered pursuant to forms that satisfied federal requirements, but not state requirements, were eligible only to vote in federal races, and not state or local races); *Kobach: Some Kansans Will Vote for Federal Candidates Only*, TOPEKA CAPITAL J., June 10, 2014, *available at* http://cjonline.com/news/state/2014-06-10/kobach-some-kansans-will-vote-federal-candidates-only, *archived at* http://perma.cc/CDD2-7ZQ7 ("Kansas voters who registered using a national form without providing proof of U.S. citizenship will be given full provisional ballots during the Aug. 5 primary elections—but only the votes they cast in federal races will actually be counted . . . .").

"times, places and manner of holding elections for Senators and Representatives."[53] It likewise provides that "[e]ach State shall appoint" presidential electors (i.e., members of the Electoral College) "in such manner as the Legislature thereof may direct."[54] These "express delegations of power" specifically to state legislatures[55] grant them the "authority to provide a complete code" for federal elections, including but not limited to laws for the "protection of voters" and the "prevention of fraud and corrupt practices."[56] Thus, when a legislature enacts a law that applies to federal elections, it "is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority" under these federal constitutional provisions.[57]

A state legislature's power under the U.S. Constitution to regulate federal elections is, of course, subject to various substantive limitations set forth throughout that document,[58] such as the Fourteenth Amendment, as well as Congress's constitutional authority to override states' decisions and impose uniform procedures and requirements for federal elections.[59] Additionally, a state legislature must exercise its power "in accordance with the method which the State has prescribed for legislative enactments,"[60] meaning that state laws governing federal elections are subject to gubernatorial veto[61] or even being overruled by popular referendum,[62] to the extent the state constitution includes those contingencies in its legislative process.

Although laws governing federal elections must be enacted through the "legislative process" set forth in the state constitution,[63] that principle does not suggest that a state constitution may impose substantive restrictions on the content of such statutes.[64] The

53. U.S. CONST., art. I, § 4, cl. 1 (hereafter, "Elections Clause").

54. *Id.* art. II, § 1, cl. 2 (hereafter, "Presidential Electors Clause").

55. *U.S. Term Limits, Inc.*, 514 U.S. at 805.

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

57. Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000); *see also* Cook v. Gralike, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [federal] elections . . . only within the exclusive delegation of power under the Elections Clause.").

58. Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986).

59. *See* U.S. CONST., art. I, § 4, cl. 1 (congressional elections); Oregon v. Mitchell, 400 U.S. 112, 124 (1970) (presidential elections).

60. *Smiley*, 285 U.S. at 367.

61. *Id.* at 368.

62. Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 568 (1916).

63. *Smiley*, 285 U.S. at 368.

64. *See* James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962) ("[S]tate legislatures are

Supreme Court has declared that the U.S. Constitution's delegation of power specifically to state legislatures to regulate federal elections "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power," including through "any provision in the state constitution in that regard."[65] That is, a state constitution cannot restrict the scope of the power and discretion that the U.S. Constitution bestows on the state legislature to regulate the manner in which federal elections are conducted.[66]

State courts have upheld and enforced state laws governing the conduct of federal elections under the U.S. Constitution's Elections Clause and Presidential Electors Clause, despite the fact that those laws squarely violated state constitutional provisions. In *In re Plurality Elections*, for example, the Rhode Island Supreme Court considered whether candidates for presidential elector and the U.S. House of Representatives needed to receive a plurality or a majority of votes in order to win.[67] Article VIII, Section 10 of the Rhode Island Constitution provided that a majority of votes was necessary for a candidate to be declared the winner "in all elections."[68] State law, however, permitted candidates for federal office to prevail upon receiving only a plurality of votes.[69]

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limited by constitutional provisions for veto, referendum, and initiative in prescribing the manner of choosing presidential electors, but . . . state constitutional provisions concerning suffrage qualifications and the manner of choosing electors do not limit the substantive terms of legislation.").

65. McPherson v. Blacker, 146 U.S. 1, 25 (1892); *see* Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219, 1234 (2002) ("*McPherson v. Blacker* . . . had suggested (without deciding) that state constitutions are *not* authorized to constrain state legislatures in the special context of choosing presidential electors." (emphasis in original)); Joseph R. Wyatt II, *The Lessons of the Hayes-Tilden Election Controversy: Some Suggestions for Electoral College Reform*, 8 RUTGERS-CAMDEN L.J. 617, 624 n.30 (1977) ("Although the states are limited in their regulation of the manner of selecting electors, language in *McPherson v. Blacker* indicates that a state constitution may not circumscribe the legislature's range of choice." (internal citation omitted)).

66. *See Notes*, 37 COLUM. L. REV. 77, 87 (1937) ("Since the grant of power [over federal elections] is derived from the [U.S.] Constitution, not even the provisions of the state constitutions can limit the state legislatures in their selection of presidential electors or in their control over the election of national legislators." (internal citation omitted)); Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737, 741 (1917) ("[T]he exercise of such power [to regulate presidential elections] is given to the state legislature subject to no restriction from the state constitution."). *But see* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001) (arguing that there is neither an originalist nor normative basis for permitting a state legislature to act independently of its state constitution with regard to presidential elections).

67. *In re* Plurality Elections, 8 A. 881, 881 (R.I. 1887).

68. *Id.* at 882 (quoting R.I. CONST., art. VIII, § 10).

69. *Id.*

The state supreme court concluded that a candidate for presidential elector or Congress needed to receive only a plurality of votes to prevail, even though the Rhode Island Constitution purported to require a majority.[70] It held that Article VIII, Section 10 of the Rhode Island Constitution violated the U.S. Constitution's Elections Clause and Presidential Electors Clause as applied to congressional and presidential elections and therefore was "of no effect" with regard to such races.[71] The court explained that the state constitution improperly "impose[d] a restraint upon the power of prescribing the manner of holding [federal] elections[,] which is given to the legislature by the Constitution of the United States without restraint."[72] Because state laws regulating federal elections are enacted under a state legislature's power directly from the U.S. Constitution, they are valid and enforceable "regardless of" any contrary provision in a state constitution.[73]

Likewise, in *State ex rel. Beeson v. Marsh*, the Nebraska Supreme Court discussed a provision of the Nebraska Constitution that provided, "All elections shall be free; and there shall be no hindrance or impediment to the right of qualified voter to exercise the elective franchise."[74] The court held that it was "unnecessary . . . to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature and th[at] state constitutional provision."[75] It explained that, under the Presidential Electors Clause, a state constitution "may not operate to 'circumscribe the legislative power' granted by the Constitution of the United States."[76]

Several state courts reached the same conclusion regarding laws that permitted members of the military who were serving away from home on Election Day to cast absentee votes. The New Hampshire Supreme Court held that the state constitution could pose no obstacle to a state law authorizing absentee voting in presidential and congressional elections, because:

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70. *Id*. at 881–83.

71. *Id*.

72. *Id*. at 881.

73. *Id*.; *see also* PG Publ. Co. v. Aichele, 902 F. Supp. 2d 724, 747–48 (W.D. Pa. 2012) (noting that the Pennsylvania legislature's authority to regulate the manner in which congressional and presidential elections are conducted stems from the U.S. Constitution and "is not circumscribed by the Pennsylvania Constitution").

74. State *ex rel.* Beeson v. Marsh, 34 N.W.2d 279, 286–87 (Neb. 1948) (quoting NEB. CONST. art. I, § 22).

75. *Id*.

76. *Id*. (quoting McPherson v. Blacker, 146 U.S. 1 (1892)).

> [t]he authority of the State legislature to prescribe the time, place and manner of holding elections for representatives in Congress, is derived from [the U.S. Constitution's Elections Clause]. Their action on the subject is not an exercise of their general legislative authority under the Constitution of the State, but of an authority delegated by the Constitution of the United States . . . . The constitution and laws of this State are entirely foreign to the question, except so far as they are referred to and adopted by the Constitution of the United States.[77]

Similarly, the Kentucky Court of Appeals noted that several other courts had upheld state laws authorizing absentee voting by military members, at least as applied to federal elections, despite state constitutional provisions requiring that all votes be cast in person.[78] The court explained that, since a legislature's power to regulate federal elections stems from the U.S. Constitution's Elections Clause and Presidential Electors Clause, "the limitations and restrictions of the state constitutions (except so far as they may be expressly or by construction adopted by the U.S. Constitution, or Congressional legislation) are held not to apply" to elections for federal officers.[79]

Both the U.S. House of Representatives and the U.S. Senate's Committee on Privileges and Elections also have concluded that state constitutions cannot limit the power to regulate federal elections that the U.S. Constitution's Elections Clause and Presidential Electors Clause grant to state legislatures. In 1866, in the election contest *Baldwin v. Trowbridge*,[80] which the U.S. House of Representatives adjudicated according to its exclusive constitutional authority,[81] the House concluded that a state constitution may not limit a legislature's authority to enact laws governing the time, place, and manner of federal elections.[82]

The Michigan Constitution contained a provision that the Michigan Supreme Court had construed as requiring people to cast their votes in person in the township or ward in which they resided.[83] The Michigan legislature nevertheless passed a law contrary to this provision, allowing a qualified member of the military to vote

77. *In re* Opinion of Justices, 45 N.H. 595, 601 (1864).

78. *See* Commonwealth. *ex rel.* Dummit v. O'Connell, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944).

79. *Id.* (quotation marks omitted).

80. Baldwin v. Trowbridge, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866).

81. *See* U.S. CONST., art. I, § 5, cl. 1.

82. 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, § 856 (1907), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPREC-HINDS-V2/pdf/GPO-HPREC-HINDS-V2.pdf, *archived at* http://perma.cc/44NP-NVBV.

83. *Id.*; *see also* People *ex rel.* Twitchell v. Blodgett, 13 Mich. 127, 145–46 (1865) (Campbell, J.).

"whether at the time of voting he shall be within the limits of this State or not."[84]

After the law's enactment, a congressional election was held. If votes from out-of-state members of the military were counted pursuant to the state statute, candidate Trowbridge would have been the winner.[85] If such votes were excluded pursuant to the Michigan Constitution, then candidate Baldwin would have prevailed.[86] The U.S. House Committee on Elections concluded that the Michigan Constitution could not limit the power of the legislature to regulate a federal election, and that the state law authorizing members of the military to vote absentee was therefore enforceable, notwithstanding the contrary provision of the Michigan Constitution.[87] The U.S. House of Representatives, adopting the majority view of the Committee, voted to approve a resolution declaring Trowbridge the winner.[88]

The House reaffirmed this conclusion in 1880 in approving the resolutions proposed by the House Committee on Elections in *In re Holmes*.[89] The committee had stated, "[t]he provisions of the constitution of a State can not take th[e] power" to determine the time of elections for Members of Congress "from the legislature of a State . . . . [T]he time of electing Members of Congress cannot be prescribed by the constitution of a State, as against an act of the legislature . . . ."[90] The House approved the committee's conclusion, reaffirming that "[t]he constitution of a State may not control its legislature in fixing under the U.S. Constitution, the time of election for Congressmen."[91]

The Senate Committee on Privileges and Elections reached a similar conclusion in a report concerning potential reforms to the Electoral College.[92] The Committee explained that, by virtue of the U.S. Constitution's grant of authority to state legislatures to regulate the manner in which presidential electors are chosen,[93] "[t]he

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84. *Baldwin*, HINDS' PRECEDENTS, *supra* note 82.
85. *Id.*
86. *Id.*
87. *Id.* at 25–26.
88. *Id.*
89. 1 ASHER C. HINDS, HIND'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, § 525 (1907), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPREC-HINDS-V1/pdf/GPO-HPREC-HINDS-V1.pdf, *archived at* http://perma.cc/Z652-7RJP.
90. *Id.*
91. *Id.*
92. S. Rep. No. 43-395, at 9 (1874).
93. U.S. CONST., art. II, § 1, cl. 2.

appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States."[94] The Committee observed that this power:

> [C]annot be taken from [state legislatures] *or modified by their State constitutions* any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.[95]

Thus, state constitutional provisions may not be used as the basis for invalidating state laws as they apply to federal elections.

IV. CONCLUSION

Since the 1800s, most states have interpreted their constitutions to balance the two aspects of the right to vote: the "affirmative" right to cast a ballot, and the "defensive" right to have that ballot be given full effect, without dilution from fraudulent or invalid votes. In striking this balance, state courts have generally permitted legislatures to enact reasonable election rules and regulations so long as they do not disenfranchise people.

This approach is functionally similar to the standard the Supreme Court later adopted in the *Anderson-Burdick* test. Under both the U.S. Constitution and most state constitutions, the fact that a person may be prohibited from voting (or permitted only to vote provisionally) if he or she fails to follow certain procedures or requirements neither constitutes voter disenfranchisement nor imposes impermissible new "qualifications" for voting. Thus, state constitutions generally do not provide a broader basis for challenging most types of election laws than the U.S. Constitution. Moreover, because a state legislature's power to regulate federal elections stems directly from the U.S. Constitution, even if a state law violates a state constitutional provision, the law generally remains valid as applied to federal elections.

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94. S. Rep. No. 43-395, at 9 (1874).

95. *Id.* (emphasis added); *accord* McPherson v. Blacker, 146 U.S. 1, 34–35 (1892); *see, e.g.*, Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 835 (2001) ("Suppose, then, that the state constitution forbade felons to vote. If the legislature, operating under the authority granted it by Article II rather than by the state constitution, decided that this limitation should not apply in voting for presidential electors, the legislative choice should prevail."); Emory Widener, Jr., Note, *The Virginia Absent Voters System*, 8 WASH. & LEE L. REV. 36, 37 (1951) ("The provision in the United States Constitution lodging in state legislatures the power to determine the manner in which [Members of Congress and presidential electors] shall be selected serves to protect absent voters statutes from restrictive regulations in state constitutions which might otherwise apply to these federal officers.").