
IT'S ABOUT TIME (PLACE AND MANNER): WHY AND HOW CONGRESS MUST ACT TO PROTECT ACCESS TO EARLY VOTING

INTRODUCTION

In *Shelby County v. Holder*,¹ the Supreme Court ruled that states and counties that had previously been required to receive federal approval for changes to voting laws under section 5 of the Voting Rights Act of 1965² (VRA) could now alter their voting laws without federal supervision.³ In the run-up to the 2014 midterm elections, this ability to alter voting laws without federal supervision allowed states that previously had to receive preclearance for their changes to enact a number of new, restrictive voting laws.⁴

While many observers focused on these new laws due to their ties to *Shelby County*, the decisions by these states to alter their voting laws were merely part of a larger national trend.⁵ Since 2010, new restrictions on voting have been passed in at least twenty-two states.⁶ These laws have: introduced restrictive voter identification requirements;⁷ shortened or eliminated early voting periods;⁸ ended or short-

¹ 133 S. Ct. 2612 (2013).

² 42 U.S.C. §§ 1973 to 1973bb-1 (2012).

³ *Shelby Cnty.*, 133 S. Ct. at 2631.

⁴ Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were previously covered in whole by section 5 of the VRA. *Jurisdictions Previously Covered by Section 5*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Nov. 23, 2014) [<http://perma.cc/8JQV-WV56>]. Of these states, Alabama, Mississippi, South Carolina, Texas, and Virginia passed laws after *Shelby County* that would have previously required preclearance under section 5. See WENDY WEISER & ERIK OPSAL, BRENNAN CTR. FOR JUSTICE, *THE STATE OF VOTING IN 2014*, at 2 & n.1 (2014), http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf [<http://perma.cc/AFG6-LM6E>].

⁵ Indeed, the vast majority of new voting laws were passed in states where preclearance never would have been an issue. See WEISER & OPSAL, *supra* note 4, at 2 & n.1.

⁶ *Id.* at 1.

⁷ As of the time of writing, restrictive new voter identification requirements were in place heading into a major federal election for the first time in Alabama, Arkansas, Indiana, Kansas, Mississippi, New Hampshire, North Carolina, North Dakota, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. BRENNAN CTR. FOR JUSTICE, *STATES WITH NEW VOTING RESTRICTIONS SINCE 2010 ELECTION (2014)*, http://www.brennancenter.org/sites/default/files/analysis/Restrictive_Appendix_Post-2010.pdf [<http://perma.cc/TB3D-5854>].

⁸ For example, North Carolina's new voting law reduces the state's early voting period by seven days. Richard Fausset, *Judge Backs New Limits on North Carolina Voting*, N.Y. TIMES, Aug. 9, 2014, <http://www.nytimes.com/2014/08/09/us/judge-in-north-carolina-upholds-2013-voting-law.html>. Florida, Georgia, Nebraska, Ohio, Tennessee, West Virginia, and Wisconsin have also passed laws since 2010 that shorten early voting. WEISER & OPSAL, *supra* note 4, at 3 & n.16.

ened weekend voting;⁹ and placed new restrictions on voter registration.¹⁰ Whatever the motivations behind them, these new requirements have had a distinctly partisan¹¹ — and, in many cases, racial¹² — impact.

Much of the recent literature on this topic has considered state voter identification laws. Comparatively few pieces, however, appear to have analyzed the issue of state restrictions on early voting in federal elections and federal authority to legislate in this realm. This Note seeks to fill that void by highlighting how Congress's expansive power under the Elections Clause¹³ should be used to implement regulations that compel states to broadly offer early voting in federal elections. This Note also proposes the contours of such a regulatory apparatus. If legislation of this nature were to be made mandatory for all states — rather than limited to certain states like the preclearance regime struck down in *Shelby County* — it would be constitutionally permissible. Indeed, the Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*¹⁴ — announced in the same Term as *Shelby County* — reaffirmed Congress's preeminence when regulating in this realm.

Part I of this Note details the need for federal early voting legislation, reviewing the restrictions on early voting nationwide and why those restrictions are harmful. Part II considers congressional authority to pass early voting laws, focusing both on the Supreme Court's recognition in *Inter Tribal Council* of Congress's authority to legislate in this realm and on what constraints the Court's decision in *Shelby County* might place on any potential federal legislation. Part III proposes a legislative solution and suggests why the Civil Rights Division of the Department of Justice (DOJ) is the ideal body to supervise such a regulatory apparatus. Part IV responds to possible criticisms of the proposed model and concludes by emphasizing that there is an urgent need to introduce such legislation to begin a national conversation about early voting.

⁹ Laws in Florida, Georgia, North Carolina, Ohio, and Wisconsin eliminate early voting that had previously been permitted on the weekends. See BRENNAN CTR. FOR JUSTICE, *supra* note 7.

¹⁰ Laws in Florida, North Carolina, Ohio, and Wisconsin placed new restrictions on voter registration. *Id.*

¹¹ See Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. (forthcoming 2015) (manuscript at 5) (on file with the Harvard Law School Library) (“[T]he single predictor necessary to determine whether a state will impose voter access restrictions is whether there is Republican control of the ballot access process.”).

¹² See, e.g., *infra* pp. 1232–33.

¹³ U.S. CONST. art. I, § 4, cl. 1.

¹⁴ 133 S. Ct. 2247 (2013).

I. WHY DO WE NEED FEDERAL EARLY VOTING LEGISLATION?

Before considering any potential legislation to reform early voting laws, two questions must be answered: (1) why is early voting important?; and (2) why must Congress pass federal legislation to promote early voting? This Part shows that, despite the demonstrable benefits of early voting, many states either have no early voting at all, or have recently moved to curtail early voting. While litigation has been successful in preserving voting access in certain circumstances, litigation alone is insufficient to address many of the problems that currently plague access to voting. This Part concludes by explaining why the legislation proposed herein focuses on promoting early voting as opposed to lifting other voting access restrictions.

A. Restrictions on Early Voting Have Negative Effects that Demand Action

Numerous states have either minimal or no early voting; fourteen do not permit early voting in any form.¹⁵ Of the thirty-six states that permit some form of early voting, thirteen do not have early voting in the traditional sense but instead “within a certain period of time before an election . . . allow a voter to apply in person for an absentee ballot (without an excuse) and cast that ballot in one trip to an election official’s office.”¹⁶ In addition, three of the thirty-six states have all-mail voting, in which every registered voter receives a ballot in the mail around two to three weeks before the election and must return it by Election Day.¹⁷ The remaining twenty states that allow early voting include eight states that have either passed or proposed legislation to limit early voting since 2010: Florida, Georgia, Nebraska, North Carolina, Ohio, Tennessee, West Virginia, and Wisconsin.¹⁸

This curtailment of early voting comes despite the fact that early voting has numerous benefits. First, early voting is increasingly used where it is available. Experts suggest that, in the most recent presidential election, up to forty percent of eligible voters utilized early vot-

¹⁵ Alabama, Connecticut, Delaware, Kentucky, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, and Virginia do not currently allow any type of in-person early voting. *Absentee and Early Voting*, NAT’L CONF. ST. LEGISLATURES (Oct. 21, 2014), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<http://perma.cc/3A5Z-6VBJ>]. Massachusetts passed legislation in 2014 to permit early voting starting in 2016. *Id.*

¹⁶ *Id.* Those states that have so-called “in-person absentee” voting include: Idaho, Indiana, Iowa, Maine, Minnesota, Montana, New Jersey, Ohio, Oklahoma, South Dakota, Vermont, Wisconsin, and Wyoming. *Id.*

¹⁷ *Id.* Colorado, Oregon, and Washington provide all-mail voting. *Id.*

¹⁸ See WEISER & OPSAL, *supra* note 4, at 3 n.16.

ing; this percentage has increased in every presidential election since 2004.¹⁹

Expanded early voting is also one of the simplest ways to combat a problem that plagued many states in the 2012 presidential election: long lines at polling places. Analysis in Florida following the 2012 election demonstrated that at least 201,000 registered voters did not vote due to lines at their polling stations.²⁰ Similar problems were reported in, among other states, Maryland,²¹ Ohio,²² South Carolina,²³ and Virginia.²⁴ The problem of long lines at polling stations nationwide in 2012 seemed so acute, and received such national attention, that President Obama mentioned it in his 2013 State of the Union Address.²⁵ Following the State of the Union, President Obama appointed a bipartisan commission to investigate this issue and make recommendations for improving state voting systems.²⁶ One of the commission's recommendations, unsurprisingly, was that states should expand the period for voting before Election Day.²⁷

In addition to shortening lines on Election Day, early voting has numerous other benefits. Statistical and anecdotal data from states that utilize early voting suggest that voters value the increased convenience of the approach.²⁸ Early voting also allows election officials more time to help individuals correct registration errors that might

¹⁹ Amy Roberts, *By the Numbers: Early Voting*, CNN (Oct. 25, 2012, 6:26 PM), <http://www.cnn.com/2012/10/19/politics/btn-early-voting> [<http://perma.cc/TS2M-7YNA>]. In fact, in both 2008 and 2012, a majority of voters used early voting in Nevada, North Carolina, Tennessee, and Texas. DIANA KASDAN, BRENNAN CTR. FOR JUSTICE, *EARLY VOTING: WHAT WORKS 7* (2013), http://www.brennancenter.org/sites/default/files/publications/VotingReport_Web.pdf [<http://perma.cc/KKV5-76WD>].

²⁰ Scott Powers & David Damron, *Analysis: 201,000 in Florida Didn't Vote Because of Long Lines*, ORLANDO SENTINEL, Jan. 29, 2013, http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines-statewide-20130118_1_long-lines-sentinel-analysis-state-ken-detzner [<http://perma.cc/3SK2-R6ZZ>] (citing analysis of Theodore Allen, Associate Professor, Ohio State University).

²¹ Editorial, *Long Lines at Minority Polling Places*, N.Y. TIMES, Sept. 25, 2014, <http://www.nytimes.com/2014/09/25/opinion/long-lines-at-minority-polling-places.html>.

²² Susan Cornwell, *Complaints About Voter IDs, Ballots, Long Lines in Election*, REUTERS (Nov. 6, 2012, 4:53 PM), <http://www.reuters.com/article/2012/11/06/us-usa-campaign-irregularities-idUSBRE8A51E720121106> [<http://perma.cc/56XV-ESYD>].

²³ Editorial, *supra* note 21.

²⁴ Brentin Mock, *Why Were There Long Voting Lines in 2012? Virginia Holds Answers*, COLORLINES (Jan. 15, 2013, 9:42 AM), http://colorlines.com/archives/2013/01/unpacking_2012_virginia.html [<http://perma.cc/7BDW-TPR5>].

²⁵ See *Obama Forms Commission on Long Lines to Vote*, CNN: POL. TICKER (Mar. 28, 2013, 3:08 PM), <http://politicalticker.blogs.cnn.com/2013/03/28/obama-to-form-commission-on-long-lines-to-vote> [<http://perma.cc/9TXV-T6EH>].

²⁶ *Id.*

²⁷ See PRESIDENTIAL COMM'N ON ELECTION ADMIN., *THE AMERICAN VOTING EXPERIENCE 3* (2014), <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> [<http://perma.cc/GAD6-EFWT>].

²⁸ KASDAN, *supra* note 19, at 7.

have stopped legitimate votes from being counted.²⁹ Given the number of inaccuracies that plague state voter rolls,³⁰ this additional time is a significant benefit. Further, while many critics of early voting allege that it creates greater opportunities for fraud because it increases the timeframe for voting,³¹ these claims have been shown to be largely unfounded. Studies of recent elections have uncovered only a handful of so-called “double-voting” cases that appear to be based on actual attempts by one individual to vote two times.³² This result is unsurprising because individual election fraud seems a remarkably inefficient way to rig an election.³³

Analysis has also demonstrated that new restrictions on early voting are harmful. First, many of these restrictions disproportionately affect minority voters. The proposed restrictions on early voting in Ohio provide but one example. Analysis completed following the 2008 election in Cuyahoga County — Ohio’s most populous county (which includes Cleveland) — demonstrated that “[t]he likelihood that an [early in-person] voter was black was 56.4%, while the probability that an election day or vote-by-mail voter was black was 25.7%.”³⁴ Ohio’s proposed shortening of early voting would have cut nearly half of the

²⁹ *Id.* at 6.

³⁰ See PEW CTR. ON THE STATES, INACCURATE, COSTLY, AND INEFFICIENT: EVIDENCE THAT AMERICA’S VOTER REGISTRATION SYSTEM NEEDS AN UPGRADE 1 (2012), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2012/PewUpgradingVoterRegistrationpdf.pdf [<http://perma.cc/B2EC-VMSP>] (“Approximately 24 million — one of every eight — voter registrations in the United States are no longer valid or are significantly inaccurate.”).

³¹ See, e.g., Josh Mitchell, *Early Voting Supporter Dismisses Lawmakers’ Voter Fraud Concerns*, MISSOURIAN (June 8, 2014, 7:00 AM), http://www.emissourian.com/local_news/county/article_d752c1e2-edae-11e3-97d8-001a4bcf887a.html [<http://perma.cc/4J2Y-NGGE>].

³² See, e.g., JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 12 (2007), <http://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf> [<http://perma.cc/UYB9-RX2R>]; Press Release, Senator Dianne Feinstein, Senate Rules and Administration Committee Holds Hearing on Voter Fraud (Mar. 12, 2008), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=a54053fo-fe19-69db-6028-2e0768ab87f3> [<http://perma.cc/JB7C-96YG>] (“Despite a major effort by the Bush Administration to investigate charges of voter fraud, and after millions upon millions of voters cast ballots in 2002, 2004, and 2006, no federal cases of impersonation voter fraud have been successfully prosecuted.”).

³³ See *In-Person Voter Fraud: Myth and Trigger for Disenfranchisement?: Hearing Before the S. Comm. on Rules & Admin.*, 110th Cong. 7 (2008) (statement of Justin Levitt, Counsel, Brennan Center for Justice), <http://www.brennancenter.org/sites/default/files/legacy/Democracy/3.12.8%20senate%20rules%20testimony.pdf> [<http://perma.cc/A2EU-CZ3C>] (“In-person impersonation fraud is an extremely inefficient means to influence an election. For each act of in-person impersonation fraud in a federal election, the perpetrator risks 5 years in prison and a \$10,000 fine under federal law, in addition to any penalties assessed under state law. In return, the perpetrator gains at most one incremental vote.” (footnote omitted)).

³⁴ NORMAN ROBBINS & MARK SALLING, RACIAL AND ETHNIC PROPORTIONS OF EARLY IN-PERSON VOTERS IN CUYAHOGA COUNTY, GENERAL ELECTION 2008, AND IMPLICATIONS FOR 2012, at 1, <http://nova-ohio.org/Racial%20and%20ethnic%20proportions%20of%20early%20in-person%20voting.pdf> (last visited Nov. 23, 2014) [<http://perma.cc/9BEM-68ZG>].

early voting time periods, during which African Americans were a majority of voters.³⁵ As to weekend voting, which often comes under specific attack, African Americans made up fifty-six percent of weekend voters in the 2008 election, but just twenty-eight percent of the county's population.³⁶ The statistics for early voting in North Carolina are similar.³⁷

The fact that many of these laws disproportionately burden minorities might lead some to suggest litigation: surely these laws must violate the Equal Protection Clause of the Fourteenth Amendment or section 2 of the VRA. And indeed, voting rights advocates have enjoyed some success in challenging the most onerous proposed laws. Recently, the Sixth Circuit affirmed an Ohio district court's grant of a preliminary injunction that prevented the state from implementing new laws for the 2014 election that would have sharply curtailed early in-person voting and eliminated many of the state's weekend early voting hours.³⁸ The court found that the plaintiffs had shown a substantial likelihood of success on the merits of their claims that these laws violated both the Equal Protection Clause and section 2 of the VRA.³⁹ In particular, the court noted expert findings offered by the plaintiffs that showed that "African American voters in Ohio utilize[d] [early in-person] voting at higher rates than white voters in recent elections"⁴⁰ and that research on "restrictions on early voting in Florida [found] that it deterred participation of black voters."⁴¹ The Supreme Court, however, issued a stay of the preliminary injunction pending the filing and disposition of a petition for certiorari.⁴² Whatever the ultimate disposition of the case, Ohio's new restrictions were in place for the 2014 midterm elections.

However, some of the litigants challenging early voting restrictions have not even enjoyed preliminary success. In North Carolina, a federal district judge denied a petition for a preliminary injunction

³⁵ See *id.*

³⁶ Sabrina Eaton, *Marcia Fudge Says Black Voters Cast 56 Percent of Greater Cleveland's Early Weekend Ballots in 2008*, POLITIFACT (Sept. 14, 2012, 6:00 AM), <http://www.politifact.com/ohio/statements/2012/sep/14/marcia-fudge/marcia-fudge-says-black-voters-accounted-56-percent> [<http://perma.cc/YP4J-TW29>].

³⁷ See Michael Bitzer, *Republicans Would Hurt Themselves if They End Early Voting*, WFAE (July 11, 2013, 3:33 PM), <http://wfae.org/post/republicans-would-hurt-themselves-if-they-end-early-voting> [<http://perma.cc/K8AR-QA3B>] ("In 2012, of the 1 million-plus registered black voters who cast ballots [in North Carolina], 70% of them voted early.")

³⁸ See *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 529 (6th Cir. 2014).

³⁹ *Id.* at 549, 560.

⁴⁰ *Id.* at 534.

⁴¹ *Id.* at 535 (internal quotation marks omitted).

⁴² *Husted v. Ohio State Conference of the NAACP*, No. 14A336, 2014 WL 4809069 (U.S. Sept. 29, 2014).

against the state's new voting law⁴³ — allowing the law to go into effect for the 2014 midterms. While the Fourth Circuit partially reversed the district court, it allowed a number of the law's challenged provisions to stand for the 2014 elections — including a provision that reduced the state's early voting period.⁴⁴

These rulings show but one pitfall of a strategy that focuses on litigation. Beyond the potential for varied rulings concerning restrictive legislation, there are at least two other major concerns. The first is that voters in those states where the racially discriminatory impact of early voting cutbacks is less obvious lack the legal means to effectively challenge these new barriers to access. Although some would argue that the primary motivation for these restrictions is a partisan attempt to limit turnout,⁴⁵ the law currently lacks an effective means for individual voters to litigate claims that alterations to voting access are driven solely by partisan motivation.

The problem of access to the courts is also an issue for voters in those states that lack early voting entirely. Even assuming that the failure to adopt early voting in these states has a racially discriminatory impact, voters still cannot use the Equal Protection Clause or the VRA to compel states to adopt early voting in the same way that litigants in states where previously allowed early voting has been restricted can challenge these restrictions.

States have proven unwilling to address the problem of a lack of early voting on their own. Voting rights advocates have made many suggestions for best practices to improve state voting laws.⁴⁶ If broadly employed, these changes would likely increase voter turnout and lessen many of the problems that hamper elections today. The problem, however, is a lack of implementation. For example, of those states noted above where long lines for voting were reported in 2012, only Florida and Maryland — which both allow some form of early voting — changed their laws to expand access to early voting following that election.⁴⁷ Pennsylvania, South Carolina, and Virginia, which were also plagued by long lines but do not allow early voting, did not alter their laws to allow for early voting. This says nothing of the numerous other states where early voting is prohibited. While early voting is an issue that requires action, it appears that those places where it is most needed are also the least likely to implement suggested best practices. Action beyond suggesting best practices is needed.

⁴³ N.C. State Conference of the NAACP v. McCrory, 997 F. Supp. 2d 322, 334 (M.D.N.C. 2014).

⁴⁴ See League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 230 (4th Cir. 2014).

⁴⁵ See, e.g., Issacharoff, *supra* note 11 (manuscript at 5).

⁴⁶ See, e.g., KASDAN, *supra* note 19, at 1.

⁴⁷ *Id.* at 1, 19 n.1.

B. Why Focus on Early Voting and Not Voter Registration or Voter Identification?

While restrictions on early voting are problematic, they are but one of the problems that currently hamper access to voting. Both state voter identification laws and restrictions on the timing and availability of voter registration unquestionably also diminish the vote. And again, the burdens of many of the new restrictions in these realms also appear to fall disproportionately on minorities.⁴⁸ It seems appropriate to ask, then, why this Note advocates for federal legislation to make national standards for early voting but does not suggest similar legislation to combat other restrictions on the right to vote.

The answer to this question lies in a combination of Supreme Court precedent and current federal law, which either prevents or preempts the formulation of helpful new legislation in those areas. As to state voter identification laws, the Supreme Court has consistently found that the Constitution grants Congress limited authority to determine who is entitled to vote, even in federal elections.⁴⁹ While some Justices of the Supreme Court have occasionally argued that the Constitution's grant of power to Congress in this realm should be read more expansively,⁵⁰ a fairly uniform consensus seems to have emerged that providing for the qualifications of electors is a power reserved to

⁴⁸ JON C. ROGOWSKI & CATHY J. COHEN, BLACK YOUTH PROJECT, TURNING BACK THE CLOCK ON VOTING RIGHTS 1 (2012), <http://research.blackyouthproject.com/files/2012/09/Youth-of-Color-and-Photo-ID-Laws.pdf> [<http://perma.cc/Z8ZN-FY3N>] (“Our estimates indicate that overall levels of turnout among young people of color are likely to be reduced by large numbers — between 538,000 and 696,000 in total — in the states that have passed [laws requiring photo identification] . . .”).

⁴⁹ See U.S. CONST. art. I, § 2, cl. 1 (providing that electors for the House of Representatives in each state “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”); *id.* art. II, § 1, cl. 2 (providing that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,” presidential electors). The Seventeenth Amendment adopts the same criterion for senatorial elections that section 4 of Article I requires for electors for the House of Representatives. See *id.* amend. XVII.

⁵⁰ See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 123 (1970) (Black, J., announcing the judgments of the Court) (“[T]he Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them.”); *United States v. Classic*, 313 U.S. 299, 315 (1941) (“While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution ‘to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.’” (citations omitted) (quoting U.S. CONST. art. I, § 8, cl. 18)).

the states.⁵¹ This consensus would appear to doom any federal law that attempted to impose uniform voter qualifications on the states.

The path to combat voter identification laws, then, likely lies in litigation. The Supreme Court's decision in *Crawford v. Marion County Election Board*⁵² makes litigation to combat voter identification laws under the U.S. Constitution problematic because the Court found a state's concern with voter fraud — despite little to no evidence on the record of any voter fraud in the state — was a sufficiently weighty interest to justify a voter identification law.⁵³ Despite this holding, Professor Joshua Douglas has suggested that state constitutions may provide litigants with greater protections of the right to vote.⁵⁴ Litigation under state constitutions seems more likely to lead to success than any broad federal legislation that the Supreme Court would likely overturn.

As to voter registration, Congress's power to legislate was affirmed by the Supreme Court in *Inter Tribal Council*.⁵⁵ Any proposed broad legislation in the registration realm, however, would likely be duplicative of many of the provisions of the National Voter Registration Act

⁵¹ See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257–58 (2013) (“One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly. ‘It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.’” *Id.* at 2258 (quoting *Mitchell*, 400 U.S. at 210 (Harlan, J., concurring in part and dissenting in part))).

⁵² 553 U.S. 181 (2008).

⁵³ In *Crawford*, voters in Indiana challenged the constitutionality of a statute that required in-person voters to show government-issued identification. *Id.* at 185 (plurality opinion). The plaintiffs alleged that this law substantially burdened their right to vote in violation of the Fourteenth Amendment. *Id.* at 187. Justice Stevens, writing for himself, Chief Justice Roberts, and Justice Kennedy, rejected the plaintiffs' challenge to the law, noting that while “rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications . . . ‘evenhanded restrictions that protect the integrity and reliability of the electoral process itself’ are not invidious.” *Id.* at 189–90 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). In any evaluation of a voter identification law, then, a court must “identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* at 190. Under this standard, Justice Stevens found Indiana's interests, including preventing voter fraud, to be sufficiently weighty to justify the burdens the law placed on voters. *Id.* at 202–03. Justice Scalia, concurring in the judgment for himself, Justice Thomas, and Justice Alito, believed that the balancing approach urged by Justice Stevens placed too high a burden on the state. See *id.* at 204–05 (Scalia, J., concurring in the judgment). Justice Scalia believed Indiana need show only “important regulatory interests” to justify its law, which it had demonstrated. *Id.* at 204 (internal quotation marks omitted). Given that any future state litigant would likely also cite voter fraud as the rationale for its law, *Crawford* makes success in challenging such laws seem doubtful.

⁵⁴ See generally Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014) (arguing that state constitutions confer greater voting rights protections than the U.S. Constitution).

⁵⁵ See *infra* pp. 1238–40. *Inter Tribal Council* does, however, seem to leave open the question of whether Congress or a state would prevail if, hypothetically, there were an irreconcilable conflict between Congress's power to regulate registration and a state's power to determine the qualifications of electors. See *The Supreme Court, 2012 Term — Leading Cases*, 127 HARV. L. REV. 198, 206–07 (2013).

of 1993⁵⁶ (NVRA), and thus unlikely to be enacted. The NVRA requires that, whatever other methods of voter registration a state offers, the state must also allow voters to register at the DMV, offer voter registration opportunities at all offices that provide public assistance, and permit individuals to register to vote by using mail-in forms developed by each state and the Election Assistance Commission (EAC),⁵⁷ a federal body created by the Help America Vote Act of 2002⁵⁸ (HAVA) whose duties include enforcing the provisions of the NVRA. HAVA additionally requires “that EAC test and certify voting equipment, maintain the National Voter Registration form and administer a national clearinghouse on elections that includes shared practices, information for voters and other resources to improve elections.”⁵⁹

The problem in the realm of registration, then, lies not in the lack of legislation but rather in the legislation’s effectiveness. The EAC is made up of four commissioners, who are appointed by the President with the advice and consent of the Senate.⁶⁰ Due to partisan gridlock, the EAC has been without any commissioners since December 2011.⁶¹ While EAC employees continue to operate under the last EAC guidelines — passed in 2005 — the Commission is powerless to announce new guidelines.⁶² The EAC is still providing recommendations about best voting practices that does not include almost a decade of research. Putting new EAC commissioners in place — and strengthening the EAC’s enforcement authority — could go a long way toward solving these problems.⁶³ Such reforms seem preferable to new legislation.

Unlike registration and voter identification, early voting both is amenable to federal legislation and has not been the subject of previous legislation. Historically, however, states have controlled the times and places where their citizens can vote, even in federal elections.

⁵⁶ 42 U.S.C. §§ 1973gg to 1973gg-10 (2012).

⁵⁷ *About the National Voter Registration Act*, U.S. DEP’T JUST., http://www.justice.gov/crt/about/vot/nvra/activ_nvra.php (last visited Nov. 23, 2014) [<http://perma.cc/ZY2Q-JTB8>].

⁵⁸ 42 U.S.C. §§ 15301–15545.

⁵⁹ *Help America Vote Act*, U.S. ELECTION ASSISTANCE COMMISSION, http://www.eac.gov/about_the_eac/help_america_vote_act.aspx (last visited Nov. 23, 2014) [<http://perma.cc/DT97-VM8F>].

⁶⁰ 42 U.S.C. § 15323(a)(1).

⁶¹ See Dave Levinthal, *Kill the Election Assistance Commission?*, CENTER FOR PUB. INTEGRITY (May 12, 2014, 1:20 PM), <http://www.publicintegrity.org/2013/12/12/13993/kill-election-assistance-commission> [<http://perma.cc/37HJ-UTXC>].

⁶² See Abby Rapoport, *Want to Rock the Vote? Fill the Election Assistance Commission*, AM. PROSPECT (Jan. 9, 2014), <http://prospect.org/article/want-rock-vote-fill-election-assistance-commission> [<http://perma.cc/HDJ6-DZEA>].

⁶³ See Steny Hoyer & Robert Brady, *The Abandonment of the Election Assistance Commission*, HUFFINGTON POST (Nov. 18, 2012, 5:12 AM), http://www.huffingtonpost.com/rep-steny-hoyer/the-abandonment-of-the-el_b_1890793.html [<http://perma.cc/YRY9-4XP4>].

This fact raises the obvious question: would congressional legislation to regulate early voting in federal elections be constitutional?

II. CONGRESSIONAL AUTHORITY TO REGULATE THE TIMES, PLACES, AND MANNER OF FEDERAL ELECTIONS

Once it is established that early voting is important, the next question is what power Congress possesses to legislate in the early voting arena. This Part considers that question. It first addresses the expansive authority given to Congress under the Supreme Court's decision in *Inter Tribal Council*. It then proceeds to demonstrate why any potential federal legislation would not face difficulties under *Shelby County*.

A. *Arizona v. Inter Tribal Council of Arizona, Inc.*

Although it has long been settled that states retain the power to determine who is qualified to vote in both federal and state elections,⁶⁴ the precise scope of Congress's authority over the mechanics of federal elections remained unclear until recently. This ambiguity existed because the Elections Clause of the U.S. Constitution not only grants states the authority to regulate the "Times, Places and Manner" of federal elections, but also allows Congress to "by Law make or alter such Regulations."⁶⁵ The question previously left unanswered was whether the second portion of this clause granted Congress near-absolute authority to regulate the mechanics of federal elections when it chose to do so, or if the Elections Clause operated on a constitutional theory of dual federal and state sovereignty similar to that which governs preemption analysis under the Supremacy Clause.⁶⁶

The Supreme Court's 2013 decision in *Inter Tribal Council* answered these questions and provided a resounding mandate for congressional authority over elections. The case arose from a conflict between the NVRA and Arizona's Proposition 200, an initiative passed by Arizona voters in November 2004 that enacted various revisions to

⁶⁴ See *supra* pp. 1235–36.

⁶⁵ U.S. Const. art. I, § 4, cl. 1.

⁶⁶ See Lyle Denniston, *Argument Preview: Election Integrity, or Voter Suppression?*, SCOTUSBLOG (Mar. 15, 2013, 9:03 AM), <http://www.scotusblog.com/2013/03/argument-preview-election-integrity-or-voter-suppression> [<http://perma.cc/ZNB2-8Q5W>] (noting, pre-*Inter Tribal Council*, that the Ninth Circuit's analysis of federal preemption under the Elections Clause — an analysis the Supreme Court adopted in full — "may have been a little too imaginative in suggesting that very little was left to the states in the Elections Clause"). The Court could have said that "Times, Places and Manner" apply only to an election's procedural aspects. Indeed, it appears that the Supreme Court and lower federal courts have read the Elections Clause more narrowly in other contexts. See, e.g., *Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9th Cir. 2000) (noting that the Supreme Court has rejected "a broad reading of the Elections Clause" regarding requirements for candidates running for office).

the state's election law.⁶⁷ The NVRA requires that states "accept and use" a uniform federal form (the "Federal Form") when registering voters for federal elections.⁶⁸ This form's content is prescribed by the EAC; rather than requiring documentary evidence of citizenship, the form demands only that an applicant swear that she is a U.S. citizen.⁶⁹ The relevant modifications made by Proposition 200 required that: (1) the County Recorder "'reject' any application for [voter] registration, including a Federal Form, that is not accompanied by concrete evidence of [United States] citizenship,"⁷⁰ and (2) voters present specified forms of identification at the polls.⁷¹

The Supreme Court affirmed the Ninth Circuit's finding that Proposition 200 conflicted with the NVRA. In doing so, the Court painted the federal government's Elections Clause power in broad strokes. The majority noted that time, place, and manner are "comprehensive words," which "embrace authority to provide a complete code for congressional elections."⁷² The scope of this authority was particularly apparent when Justice Scalia, writing for the Court, compared the congressional prerogative to preempt state regulations under the Elections Clause with congressional authority to preempt state regulations under the Supremacy Clause. Justice Scalia first noted that the Elections Clause's structure shows that the assumption that Congress is reluctant to preempt state law — critical to the dual sovereignty nature of Supremacy Clause preemption analysis — is not relevant under the Elections Clause.⁷³ This result is because the federalism concerns are weaker in this context.⁷⁴ Unlike the states' police powers, "the States' role in regulating congressional elections — while weighty and worthy of respect — has always existed subject to the express qualification that it 'terminates according to federal law.'"⁷⁵

Such a reading of the Elections Clause provides broad congressional authority for the regulation of elections. Coupled with the Court's previous rulings, the Elections Clause has now been extended to cover

⁶⁷ See *Gonzalez v. Arizona*, 485 F.3d 1041, 1047 (9th Cir. 2007).

⁶⁸ 42 U.S.C. § 1973gg-4(a)(1) (2012).

⁶⁹ *Id.* § 1973gg-7(b)(2).

⁷⁰ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013).

⁷¹ *Id.* at 2252.

⁷² *Id.* at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)) (internal quotation marks omitted). Justice Scalia provided extensive support for his broad reading of "Times, Places and Manner," citing *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972) and *United States v. Classic*, 313 U.S. 299, 320 (1941). Further, he claimed that Congress's power to regulate the times, places, and manner of congressional elections "is paramount, and may be exercised at any time, and to any extent which [Congress] deems expedient." *Inter Tribal Council*, 133 S. Ct. at 2253–54 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)) (internal quotation mark omitted).

⁷³ See *Inter Tribal Council*, 133 S. Ct. at 2256–57.

⁷⁴ See *id.* at 2257.

⁷⁵ *Id.* (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)).

registration, recounts, and primaries.⁷⁶ Professor Samuel Issacharoff argues that the Court's willingness to extend the Elections Clause in this manner likely means that Congress has the power under the Elections Clause to reach many of the voting rights issues that have made headlines in the past few years.⁷⁷ Given that times, places, and manner are "comprehensive words," "embrac[ing] authority to provide a complete code for congressional elections,"⁷⁸ this power no doubt includes the authority to set minimum early voting standards nationwide.

B. *Shelby County v. Holder*

Although *Inter Tribal Council* grants Congress broad authority to regulate federal elections, would a system of mandatory early voting be constitutionally problematic under the Court's decision in *Shelby County*? *Shelby County* rested on two key notions. First, the Court found that equal sovereignty among the states was offended by the disparate treatment afforded to states under the preclearance regime mandated by section 5 of the VRA.⁷⁹ From this notion the Court concluded that congressional action seeking to treat states differently must pass a high bar to be constitutional.⁸⁰ Second, the Court pointed to the means-ends idea that remedial legislation under the Constitution's enforcement mandates must conform to Congress's actual findings.⁸¹

Neither consideration would be at issue in precisely the same way with regard to legislation mandating minimum early voting standards nationwide. A federal program that treated all states equally — that set standards for how long early voting must last and how many polling places must be located in a district — would not interfere with equal sovereignty among the states. Moreover, using Congress's authority under the Elections Clause to enact such a program would seem to insulate it from the Court's traditional means-ends analysis. Indeed, given the plain language of the Elections Clause — Congress

⁷⁶ See *Roudebush*, 405 U.S. at 24–25 (recounts); *Classic*, 313 U.S. at 320 (primaries).

⁷⁷ See Samuel Issacharoff, *The Supreme Court, 2012 Term — Comment: Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 112–13 (2013).

⁷⁸ *Inter Tribal Council*, 133 S. Ct. at 2253 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)) (internal quotation marks omitted).

⁷⁹ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2618–19 (2013).

⁸⁰ *Id.* at 2630 (noting that a formula for determining which counties and states need to have their voting laws precleared "is an initial prerequisite to a determination that exceptional conditions still exist justifying such an 'extraordinary departure from the traditional course of relations between the States and the Federal Government'" (quoting *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 500–01 (1992))).

⁸¹ See *id.* at 2629 ("The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. . . . Congress — if it is to divide the States — must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." (citation omitted)).

“may at any time by Law make or alter” regulations related to “[t]he Times, Places and Manner” of federal elections⁸² — the most significant barrier to federal early voting legislation appears to be garnering the congressional willpower to enact it.⁸³

III. THE FRAMEWORK FOR UNIFORM EARLY VOTING REGULATIONS IN FEDERAL ELECTIONS

What would successful regulation in the early voting arena look like? This Note suggests that the most effective legislation would involve mandatory federal guidelines regarding the timing of early voting and the number of early voting polling places per district based on population. This Part details the preferred content of such guidelines by using the Brennan Center for Justice’s 2013 recommendations for best practices as an initial template.⁸⁴ It then proceeds to explain the process that should be used in implementing such legislation as well as why the Civil Rights Division of the DOJ would be the best entity to task with evaluating requests to vary from the guidelines.

The Brennan Center’s 2013 comprehensive study of early voting contains recommendations of norms that all states should adopt as effective voting practices.⁸⁵ While these recommendations are framed as best practices for states rather than mandatory federal norms,⁸⁶ there is no reason why these insights could not form the basis for federal legislation. Taking the conclusions of that study as mandatory norms that should be adopted, this Note recommends that Congress pass a bill: (1) requiring early voting in federal elections to begin nationwide two weeks before Election Day; (2) stating that all early voting polling

⁸² U.S. CONST. art. I, § 4, cl. 1.

⁸³ Alternatively, it is possible that the Court might alter its reading of the Elections Clause were a case to emerge asking it to consider the constitutionality of the legislation proposed here. Indeed, some would suggest that the broad reading of the Elections Clause in *Inter Tribal Council* — had it been properly applied to the VRA in *Shelby County* — would have made many of the VRA’s preclearance requirements constitutional. See, e.g., Daniel Tokaji, *Shelby County v. Holder: Don’t Forget the Elections Clause*, SCOTUSBLOG (Feb. 13, 2013, 11:43 AM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-dont-forget-the-elections-clause> [http://perma.cc/7UXE-HNUM]. Given that the Court struck down these preclearance requirements in *Shelby County* without reference to the Elections Clause, the precise breadth of Congress’s Elections Clause power remains unclear. Nonetheless, a plain reading of the Court’s current Elections Clause jurisprudence would seem to render constitutional legislation of the type proposed here.

⁸⁴ See KASDAN, *supra* note 19, at 10–16.

⁸⁵ Among these are: (1) beginning early in-person voting a full two weeks before Election Day; (2) providing weekend voting, including the weekend before Election Day; (3) setting minimum daily hours for early voting and providing extended hours outside standard business hours; and (4) distributing early voting places fairly and equitably. *Id.* These suggestions closely resemble the principal recommendations of the bipartisan commission appointed by President Obama. See PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 27, at 5.

⁸⁶ See KASDAN, *supra* note 19, at 18.

places must be open for a minimum of, for example, ten hours a day and on both of the weekends before Election Day; and (3) providing a minimum number of early voting polling places based on the population of a congressional district. Within such a framework, the federal government could allow states that want to vary from these guidelines in ways that would increase voting options to do so freely, but require those states who want to shorten early voting or reduce the number of polling places per district to present these requests to a federal authority. Such an approach would preserve flexibility for those states that could show compelling reasons for variations while still maintaining a national standard of early voting for the vast majority of citizens.

What entity would be tasked with evaluating such requests? Previous congressional legislation on election issues presents at least two options: an agency to administer the law and evaluate state requests to vary from federal provisions, or preclearance by the Civil Rights Division of the DOJ. As to the first option, such an agency could be similar to the Federal Election Commission (FEC), an independent agency established by Congress in 1974 to enforce the Federal Election Campaign Act of 1971,⁸⁷ which concerns campaign finance issues.⁸⁸ Similarly, in the voter registration realm, Congress established the EAC through HAVA.⁸⁹

The problem with the agency approach is that political infighting dulls these agencies' effectiveness. In the example of the FEC, this can be seen in the over two hundred votes that have deadlocked three-to-three in the past six years.⁹⁰ Since the FEC requires four votes to issue an advisory opinion or impose a punishment, this deadlock has essentially given outside groups and candidates free rein to undertake many of the abusive practices the law was meant to counteract.⁹¹ While judicial review of agency deadlock on a complaint to the FEC is theoretically available, judicial precedent has established broad deference to FEC Commissioners;⁹² a decision changing a three-to-three ruling is exceedingly unlikely. At the EAC, as noted above, partisan gridlock has left the Commission without any commissioners since De-

⁸⁷ Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.).

⁸⁸ 2 U.S.C. § 437c (2012). The FEC has six voting members — three from each political party — who serve staggered six-year terms. *Id.* § 437c(a).

⁸⁹ See *Help America Vote Act*, *supra* note 59.

⁹⁰ Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES, Aug. 25, 2014, <http://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html>.

⁹¹ See *id.*

⁹² See, e.g., *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (“[W]e note that the [FEC] is precisely the type of agency to which deference should presumptively be afforded.”).

ember 2011.⁹³ Without more robust protections against partisan gridlock, the delegation to a commission or creation of an agency to supervise federal early voting legislation would likely run into similar problems.

Due to these difficulties, the second alternative — requiring preclearance by the Civil Rights Division of the DOJ — seems more attractive. Pre-*Shelby County*, states and local jurisdictions subject to the preclearance requirements of section 5 of the VRA were required to submit all changes involving voting and elections to either the Civil Rights Division or the U.S. District Court for the District of Columbia;⁹⁴ historically, the majority of preclearance decisions went through the DOJ rather than the court.⁹⁵ Before *Shelby County*, the Civil Rights Division dealt with between 14,000 and 20,000 of these requests annually, with a sixty-day window in which to respond to any request for review.⁹⁶ The DOJ evaluated each change by considering the totality of the circumstances, and was also tasked with making a determination as to whether there was a “reasonable and legitimate” justification for the change and whether the jurisdiction followed objective guidelines and procedure when adopting the change.⁹⁷ Such a standard would likely also be effective and just in evaluating requests for changes to a federal early voting statute.⁹⁸ Given that the apparatus and officials needed to undertake such a regime still exist within the Civil Rights Division, creating and implementing such a regime relatively quickly would be far less difficult than giving new authority to the EAC or FEC, or creating a new agency whose officials would have to be exposed to the rigors of confirmation proceedings.⁹⁹

⁹³ Levinthal, *supra* note 61.

⁹⁴ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011).

⁹⁵ See *About Section 5 of the Voting Rights Act*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Nov. 23, 2014) [<http://perma.cc/5NZ3-8ZBU>].

⁹⁶ *Id.*

⁹⁷ 28 C.F.R. § 51.57(a)–(b) (2014).

⁹⁸ See Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 79, 128 (2006) (analyzing preclearance decisions to demonstrate that “the Justice Department has enforced the Section 5 preclearance requirement in a vigorous and principled manner” utilizing standards “fully in accord with relevant decisions of the Supreme Court and the District Court for the District of Columbia”).

⁹⁹ Some may question whether the DOJ Civil Rights Division, as presently constituted, could handle the burden of additional requests that such a program might bring. As there is no way to realistically calculate how many requests the DOJ would field, or how burdensome such requests would be, it is hard to evaluate such a criticism. Nonetheless, it is certainly possible that this system may overtax the DOJ as currently formulated and might demand that additional resources be placed with DOJ.

IV. CRITICISMS AND HURDLES

Any potential early voting legislation would face many obstacles to implementation. These obstacles include arguments against the effectiveness of such legislation, as well as arguments about whether passing such legislation would truly be viable. This Part considers both types of arguments.

A. Effectiveness

There are numerous arguments that might be raised about the effectiveness of the proposed legislation. This section considers two of the most salient criticisms: the possibility of states allowing early voting only for federal elections and requiring voters to vote on Election Day for state elections, and the necessity of early voting at all.

One seemingly relevant criticism of the effectiveness of any potential federal early voting legislation is that such a reform would run only to federal elections. States could allow early voters to vote only in federal elections, and require individuals who wanted to vote in state elections to either vote only on Election Day or vote both early in the federal election and on Election Day in the state election. While such an action might at first blush seem unlikely, Arizona has adopted a similar system in the registration context in the wake of the Court's ruling in *Inter Tribal Council*: although citizens who complete the Federal Form and do not present government-issued identification can register for federal elections, their registration is not valid for state elections.¹⁰⁰

There would be much less justification for a dual system in the early voting context. Arizona asserts that its identification requirement is meant to guard against fraud, and that — even if the federal government refuses to combat fraud in its elections — Arizona will still require identification in order to ensure that its elections are not decided by fraudulent electors.¹⁰¹ Early voters who are properly registered, however, are seemingly as legitimate as voters who choose to vote on Election Day, so fraud is a less legitimate concern should a state take this route in the early voting context.

Furthermore, the administrative costs of allowing voters who come to federally required early voting centers to also vote for state elections

¹⁰⁰ See Erik Eckholm, *U.S. Court to Hear Case on Voting Restrictions as Arizona Prepares for Polls*, N.Y. TIMES, Aug. 23, 2014, <http://www.nytimes.com/2014/08/24/us/politics/us-court-to-hear-case-on-voting-restrictions-as-arizona-prepares-for-polls.html>.

¹⁰¹ See Fernanda Santos & John Eligon, *2 States Plan 2-Tier System for Balloting*, N.Y. TIMES, Oct. 11, 2013, <http://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html> (quoting Tom Horne, Arizona's attorney general, as saying that "[i]f you require evidence of citizenship, it helps prevent people who are not citizens from voting, and I simply don't see a problem with that").

would likely be minimal. The administrative costs and difficulty in imposing a two-tier system where certain electors could vote only in certain elections, however, would seem to be high. The cost and aggravation of any such system would likely dampen a state's ardor to engage in it over time.¹⁰² And even if some states were to take this route, the result nationwide would still be better than the status quo. Even individuals in those states who could only vote early in federal elections would be better off than those who currently cannot vote early at all.

As to criticisms raising concerns about the usefulness of early voting at all, the principal arguments seem to be: (1) "early voting threatens the basic nature of citizen choice in democratic, republican government" because it allows some voters to cast their vote with less evidence than others;¹⁰³ (2) while our votes should be private, a key part of civic engagement is going to polling places and showing others that we are voting;¹⁰⁴ and (3) if people are not willing to take the time to go cast a vote on Election Day, perhaps their indifference — which likely reflects a similar ambivalence toward becoming an informed voter — means we should be comfortable with them not voting.¹⁰⁵

As to the first contention, there are two key responses to this argument. First, this point seems to ignore how long the election cycle has become. For example, in the 2008 election, then-Senator Barack Obama announced his candidacy on February 10, 2007,¹⁰⁶ approximately twenty-one months before Election Day. It seems unlikely that, with this much time to evaluate candidates before an election, there are still important secrets to be uncovered about the candidates with only two weeks left before Election Day. In addition, evidence suggests that early voters are generally the voters who are most partisan

¹⁰² Indeed, the history of the NVRA provides a good example of the dulling of state intransigence to federal election regulations in a similar context. Following the passage of the NVRA, a number of states attempted dual registration systems for federal and state elections. See ESTELLE H. ROGERS, AM. CONSTITUTION SOC'Y, THE NATIONAL VOTER REGISTRATION ACT: FIFTEEN YEARS ON 1 (2009), https://www.acslaw.org/sites/default/files/Rogers_-_NVRA_at_15.pdf [<http://perma.cc/LP2T-45MM>]. These states "quickly learned that creating a dual registration system was unduly complicated and costly. Consequently, for all practical purposes, the NVRA is used by the states to govern voter registration across the board." *Id.*

¹⁰³ Eugene Kontorovich & John McGinnis, *The Case Against Early Voting*, POLITICO MAGAZINE (Jan. 28, 2014), <http://www.politico.com/magazine/story/2014/01/early-voting-the-case-against-102748.html> [<http://perma.cc/77N6-BYSA>].

¹⁰⁴ David Lewis Schaefer, *The Case Against Early Voting*, NAT'L REV. ONLINE (Nov. 19, 2008, 4:00 AM), <http://www.nationalreview.com/articles/226335/case-against-early-voting/david-lewis-schaefer> [<http://perma.cc/WH4Q-EZJ8>].

¹⁰⁵ *Id.*

¹⁰⁶ Adam Nagourney & Jeff Zeleny, *Obama Formally Enters Presidential Race*, N.Y. TIMES, Feb. 11, 2007, <http://www.nytimes.com/2007/02/11/us/politics/11robama.html>.

and sure of their votes.¹⁰⁷ It seems even less likely that an occurrence in the last two weeks of an election would alter these voters' ballots. Second, this contention seems much more relevant to early voting that begins more than two weeks before Election Day. Professors Eugene Kontorovich and John McGinnis, who have made this argument, point to the example of early voting beginning forty-six days prior to an election.¹⁰⁸ This example is a far cry from a fourteen-day mandatory minimum.

The next contention involves the idea that Americans show civic engagement by going to polling places on the same day.¹⁰⁹ This argument might hold true for those people who can make the time to participate on Election Day, but it says nothing of those whose workplace or family commitments will not let them take the time to stand in line and wait to vote. Voting is widely considered one of the most basic forms of civic engagement, yet voter turnout is a measure by which the United States has frequently trailed behind many other developed nations.¹¹⁰ The benefits of increasing civic engagement by giving more Americans the opportunity to have a voice in the selection of their leaders plainly outweigh whatever alleged, tenuous emotional benefit might be lost by not having the entire country go to the polls on the same day.

Finally, there is the assertion that the government should not make accommodations for those individuals who are unwilling to take the time to vote on Election Day.¹¹¹ This contention seems classist. Statistical evidence suggests that early voters generally tend to be those "of lower income and education attainment."¹¹² A study by the Ray C. Bliss Institute of Applied Politics at the University of Akron found that early voters in Akron, Ohio, "tend[ed] to have lower income than election-day voters" with the difference "most noticeable among people with annual incomes of less than \$35,000."¹¹³ This proposition intuitively makes sense: lower-paid workers "are more than twice as likely to lack access to paid leave or workplace flexibility than their high-

¹⁰⁷ REBECCA B. MORTON & KENNETH C. WILLIAMS, *LEARNING BY VOTING* 45 (2001).

¹⁰⁸ Kontorovich & McGinnis, *supra* note 103.

¹⁰⁹ Schaefer, *supra* note 104.

¹¹⁰ See RAFAEL LÓPEZ PINTOR ET AL., *INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, VOTER TURNOUT SINCE 1945*, at 78 fig.11 (2002), http://www.idea.int/publications/vt/upload/VT_screenopt_2002.pdf [<http://perma.cc/422G-CMKR>] (showing the United States to be, out of 169 countries surveyed, the country with the 120th lowest percentage of voter turnout from 1945 to 2001).

¹¹¹ Schaefer, *supra* note 104.

¹¹² RAY C. BLISS INST. OF APPLIED POLITICS, *UNIV. OF AKRON, A STUDY OF EARLY VOTING IN OHIO ELECTIONS 1* (2010), <http://www.uakron.edu/bliss/research/archives/2010/EarlyVotingReport.pdf> [<http://perma.cc/EDX5-BABV>].

¹¹³ *Id.* at 15.

wage counterparts.”¹¹⁴ In fact, preliminary returns from the 2014 mid-term elections suggest that there were many registered voters who chose not to vote simply because they could not get time off from work.¹¹⁵ It seems unfair to ask an individual living paycheck-to-paycheck to take off work to vote on Election Day when there are viable alternatives.

B. Viability

What issues might arise in trying to pass early voting legislation? Most recent federal legislation that has sought to expand access to voting has suffered from criticism regarding the potential for voter fraud. Fears of fraud might be where any legislation of this nature would also face pushback. Indeed, President George H.W. Bush initially vetoed the NVRA in 1992, citing fears that — by permitting broad registration through so many different arenas — the law was “an open invitation to fraud and corruption.”¹¹⁶ In the early voting context, as noted above, the fraud argument seems to be that giving people more time to vote would open up the possibility of one person voting numerous times.¹¹⁷ Given that early voting has been employed in thirty-six states with scarcely any verifiable evidence of “double-voting,”¹¹⁸ however, one would hope that this criticism would not persuade the American public.

The other consideration regarding any potential legislation seems to be the viability of such legislation. This Note does not suggest that passing legislation of this nature given the current partisan divide in Congress would be easy. But even the introduction of such legislation and debate about its merits would have some tangible benefits. First, beginning a national conversation about the right to vote and ensuring that a broader swath of the population is given the opportunity to exercise that right can only lead — if not to legislation as robust as that proposed here — to improvements in election administration. Almost all Americans believe voting is one of the most important rights in a democracy,¹¹⁹ and framing debates about the right to vote as a nation-

¹¹⁴ Deb Fischer & Angus King, Op-Ed., *Why Families Now Must Have Paid Time Off*, CNN (July 16, 2014, 8:33 AM), <http://www.cnn.com/2014/07/16/opinion/king-fischer-paid-leave> [<http://perma.cc/4AZU-7JKA>].

¹¹⁵ PEW RESEARCH CTR., *LITTLE ENTHUSIASM, FAMILIAR DIVISIONS AFTER THE GOP'S BIG MIDTERM VICTORY* 21 (2014), <http://www.people-press.org/files/2014/11/11-12-14-Post-election-release.pdf> [<http://perma.cc/ED3B-PPWA>].

¹¹⁶ TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION* 64 (2012).

¹¹⁷ See Mitchell, *supra* note 31.

¹¹⁸ See sources cited *supra* note 32; *Absentee and Early Voting*, *supra* note 15.

¹¹⁹ Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 *FORDHAM URB. L.J.* 1519, 1533–34 figs.1–2 (2003) (finding that 93.2% of survey

al discussion rather than a state-by-state one has historically led to substantial change for the better.¹²⁰

Furthermore, the importance that almost all Americans place on voting suggests that a substantial majority would be against laws that functioned more or less as outright voter suppression. Numerous studies commissioned to examine the problem,¹²¹ and several judges that have considered the issue,¹²² have suggested that voter fraud is an exceedingly rare problem in the United States. Despite this mountain of evidence, however, the myth of widespread voter fraud persists.¹²³ As Justice Louis Brandeis observed, “[s]unlight is said to be the best of disinfectants.”¹²⁴ A national discussion about legislation such as that proposed here may highlight for more Americans the reality that voter fraud in the United States is a myth. Indeed, this effect can already be seen today on a smaller scale, as it seems that the increased attention on voter identification laws has caused a number of prominent national Republicans to admonish states for their attempts to restrict the right to vote even when the stated justification for these measures was an attempt to curtail voter fraud.¹²⁵

respondents believe the right to vote is the most or one of the most important rights in a democracy).

¹²⁰ For example, many credit the Mississippi Freedom Summer of 1964 with focusing national attention on the problem of voter suppression in the southern United States, and this increased national attention eventually helped lead to the passage of the VRA. See, e.g., John Blake, *Retracing a Summer of Terror — And Freedom*, CNN (June 20, 2014, 10:35 AM), <http://www.cnn.com/2014/06/20/us/freedom-summer-anniversary-documentary> [<http://perma.cc/46E7-JXKW>]; Jeffrey Toobin, *Freedom Summer, 2015*, NEW YORKER (Oct. 28, 2014), <http://www.newyorker.com/news/daily-comment/freedom-summer-2015> [<http://perma.cc/D2GR-7PYC>].

¹²¹ See, e.g., LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* (2010); sources cited *supra* note 32.

¹²² See, e.g., Frank v. Walker, Nos. 14-2058, 14-2059, 2014 WL 5326463, at *12 (7th Cir. Oct. 10, 2014) (Posner, J., dissenting from denial of rehearing en banc) (“As there is no evidence that voter impersonation fraud is a problem, how can the fact that a legislature says it’s a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?”); Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at *6 (S.D. Tex. Oct. 9, 2014) (“In the ten years preceding SB 14, only two cases of in-person voter impersonation fraud were prosecuted to a conviction — a period of time in which 20 million votes were cast.”); Frank v. Walker, Nos. 11-CV-01128, 12-CV-00185, 2014 WL 1775432, at *8 (E.D. Wis. Apr. 29, 2014) (“In the present case, no evidence suggests that voter-impersonation fraud will become a problem at any time in the foreseeable future. As the plaintiffs’ un rebutted evidence shows, a person would have to be insane to commit voter-impersonation fraud.”).

¹²³ Brendan Nyhan, *Voter Fraud Is Rare, but Myth Is Widespread*, N.Y. TIMES: UPSHOT (June 10, 2014), <http://www.nytimes.com/2014/06/11/upshot/vote-fraud-is-rare-but-myth-is-widespread.html> [<http://perma.cc/829U-9CXM>].

¹²⁴ Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WEEKLY, Dec. 20, 1913, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf [<http://perma.cc/3YP3-WQ3M>].

¹²⁵ See, e.g., Jeremy W. Peters, *Paul Diverges from His Party Over Voter ID*, N.Y. TIMES, May 9, 2014, <http://www.nytimes.com/2014/05/10/us/politics/paul-says-gop-push-on-voting-laws-is-alienating-blacks.html>; Tal Kopan, *Colin Powell Slams North Carolina Voting Law*, POLITICO

Mandatory early voting legislation would also have the advantage of turning another of the arguments frequently deployed by voting rights opponents on its head. In addition to concerns about voter fraud, voting rights opponents frequently cite uniformity as a reason for implementing harsh regulations.¹²⁶ If uniformity were the goal, a mandatory federal system of early voting nationwide would logically comply with this reasoning.

These benefits suggest why such legislation should be introduced in Congress and advocated for by the President. While President Obama certainly raised the profile of voting issues with his 2013 State of the Union Address and subsequent commission,¹²⁷ a sustained push for legislation to increase voting rights nationwide would do much more. The time to act is now, and Congress's constitutional power to pass such legislation is clear.

CONCLUSION

The case for early voting is compelling. Evidence suggests that it provides numerous benefits for both voters and election administrators. Despite this mounting evidence, however, the trend in states nationwide appears to be toward restrictions on early voting. Congress must act to blunt these attempts and reverse the trend toward shorter periods for early voting or a lack of early voting entirely. Through its Elections Clause power, Congress has the ability to compel states to require a minimum level of early voting. A system that embraces best practices and puts the DOJ Civil Rights Division in charge of assessing state requests to vary from these requirements would allow for the benefits of early voting to be more widely shared while requiring that those states that want to lessen early voting opportunities provide tangible, legitimate reasons for their reductions. Moreover, the discussion about such legislation would further help to bring issues related to voter suppression and the availability of the franchise to all Americans into the national spotlight. Given the compelling need for action, it is time for Congress to add its voice to this conversation.

(Aug. 22, 2013, 2:51 PM), <http://www.politico.com/story/2013/08/colin-powell-north-carolina-voting-law-95813.html> [<http://perma.cc/L3V7-BQ3Q>].

¹²⁶ See, e.g., Steven Yaccino & Lizette Alvarez, *New G.O.P. Bid to Limit Voting in Swing States*, N.Y. TIMES, Mar. 29, 2014, <http://www.nytimes.com/2014/03/30/us/new-gop-bid-to-limit-voting-in-swing-states.html> ("Republicans defend the measures, saying Democrats are overstating their impact for partisan reasons. The new rules, Republicans say, help prevent fraud, save money and bring greater uniformity to a patchwork election system.")

¹²⁷ See *supra* p. 1231.

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