Federal Voting Doctrine

By: Evan Zimmerman†

I. Introduction

The United States was founded on the basis of governance by representative system. There are elections for local, state, and federal officials for posts including governors, congressmen, judges, sheriffs, and the President. Municipalities and states generally determine the laws surrounding these elections without federal intervention. This is because the United States, in addition to being founded on republicanism, is based on a federalist system in which there are different domains of law, each with its own legislative bodies that write rules for themselves but are also governed by predefined standards structuring their interactions. That is, no legislature is entitled to write law in place of another.

With the notable exception of the Voting Rights Act of 1965, for the entirety of the history of the United States the regulation of federal elections has mostly been considered the domain of the states. The notion that the Congress of one domain might legislate for another is a direct violation of the concept of separate legal domains, which forms the bedrock of any federalist system. Yet, that is exactly the way the United States operates right now. There is vast historical precedent favoring this regime, but the precedent is wrong. Federal elections are a case of federal law.

One must then undeniably conclude that state regulations regarding federal elections violate the concept of a federalist system and are thus unconstitutional. This article will argue that there is a better way, which I will call Federal Voting Doctrine ("FVD"). Simply put, FVD is a doctrine of election law in which the federal government reclaims its sovereignty over federal election law and asserts its right to be its sole author. Federal Voting Doctrine is the natural progression of federal voting law and corrects a horrendous misstep in the history of American law, a misstep perhaps unmatched in the length of time it has gone without being addressed and in the effect it has had on the nation's history.

II. History

The United States was founded on the familiar cry, "No taxation without representation!" Therefore, it is not surprising that there is a litany of elections in the U.S., even for judges.[1] There are basic guidelines for federal elections in the U.S. Constitution, such as the length of the term of Congressmen (2 years),[2] the minimum age of a senator (30 years),[3] and the method of the selection of the President of the United States (the electoral college).[4] In general, however, the particulars of governing are not laid out in the Constitution. Why would they be? There is no reason that the American Constitution, which embodies the nation's highest ideals in abstract but powerful terms, should be concerned with, say, the logistical minutiae of election procedure.

That said, the Constitution does introduce the concept of voting, outlining its importance and firmly establishing its presence in American society. Although no one is required to vote, members of Congress can only be elected, not appointed; in effect, the federal government requires the input of its citizens to operate. This puts serious power in the hands of citizens but it also creates a waypoint to this power: the election itself.

In addition to outlining the institution of voting, the Constitution embodies the spirit of federalism. Federalism is the familiar concept of state and federal offices occupying different legal jurisdictions. In a federalist system, each domain has its own legal apparatus for creating laws, along with the concomitant authority to enforce such laws. Considering that each domain is a self-governing entity, there are limits on the power that any domain might exert over another. For instance, in the American system, states may not supersede federal law.[5] However, the federal government cannot bully the

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†: Evan Zimmerman is a second-year in the College, majoring in Economics, Mathematics, and Statistics.

1: Considering the strong history of an independent judiciary in the U.S., this may come across as surprising and open to abuse. The election of judges, though common (87% of state judges stand for election today), only occurs for state and local judgeships; federal judges are always appointed. See *Guilty, Your Honour?*, The Economist (2004), online at http://www.economist.com/node/2946978.

2: See U.S. Const. art. I, § 2.

3: *Id.* § 3.

4: *Id.* art. II, § 1.

5: U.S. Const. art. VI. The Supremacy Clause states that the "Laws of the United States…shall be the supreme Law of the Land." To specify that there may be another type of law demonstrates that a federalist system is envisioned in the Constitution.

states.[6] In fact, the federal government is forbidden to even legislate within entire spheres of law, as such subject matters are considered the domain of the states.[7] Indeed, the Constitution specifically declares that any "powers not delegated" to the federal government are to be the exclusive province of the states themselves.[8] In this way, one can think of each domain of law in the entire system as a sphere in space: each is self-contained and legislates for itself,[9] interacting with other spheres only through predefined bridges.[10]

The federal government, of course, is not the only government with a constitution. Each and every state in the Union has a constitution or charter, and each of them demand some sort of voting while setting out their own unique conditions for elections. Unlike the federal Constitution, the state constitutions are concerned not with the elections for federal positions but for state officers: for such positions as governors, state cabinet members, state assemblymen, and others. Laws pertaining to state elections are

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6: See *National Federation of Independent Business v. Sibelius*, 132 S. Ct. 2566, 2601-02 (2012). See also *New York v. United States*, 505 U.S. 144, 188 (1992), where the Court states that the "Federal Government may not compel the States to enact or administer a federal regulatory program."

7: See *McCulloch v Maryland*, 4 Wheat. 159, 199 (1819). There, the Court determined that "This government is acknowledged by all, to be one of enumerated powers…the principle, that it may exercise only the powers granted to it…is now universally admitted."

8: U.S. Const. amend. X. The Amendment also reserves unenumerated powers to the People. Although theoretically intended to limit the federal government's power, in practice the scope of federal legislation has increased over time.

9: This is to say nothing of enforcement. State governments may contract the FBI for assistance in enforcing their laws. For example, see *Cooperation Among Federal, State, and Local Law Enforcement Results in Crackdown on Sex Offenders Throughout Eastern District of North Carolina*, Federal Bureau of Investigation (2013), online at http://www.fbi.gov/charlotte/press-releases/2013/cooperation-among-federal-state-and-local-law-enforcement-results-in-crackdown-on-sex-offenders-throughout-the-eastern-district-of-north-carolina. Additionally, the Army may strike a contract with private companies, which are not even government entities. In sum, there is nothing which says that the different domains of government cannot form contracts to perform favors for each other. Federalism, however, does imply that each domain write its own laws and regulations to avoid being subsumed by a greater power. The right to write federal laws is in fact exclusively reserved for Congress in the U.S. Constitution, much like how state charters reserve the analogous right for state laws to state legislatures. See U.S. Const. art. I, §1: "All legislative Powers herein granted shall be vested in a Congress of the United States."

10: One old but poignant example is the fact that, rather than being chosen by federal election, senators used to be chosen by state legislatures.

considered state election laws and are thus considered purely a state issue. In addition to voting for state offices, many states have chosen to institute other permutations of voting as well, including recalls of elected officials, referenda on laws submitted by the legislature, and polls instituted on citizen-proposed laws. These state-conceived ballot add-ons reflect and affect state law exclusively. The federal government does not legislate regarding these state voting events except in the most extreme circumstances, and even then such action is mostly unheard of.

Accordingly, if state laws are a state issue, then federal elections should clearly be considered a federal issue. After all, federal elections determine who federal legislators are, and federal legislators determine which federal laws are enacted. Moreover, as federal laws affect every citizen, the effects of federal elections can be said to cross state lines, thus placing such elections and the regulations that govern them squarely within the ambit of federal jurisdiction.[11] Yet, despite the fact that this criterion classifies federal elections as subject to federal law, it is the states that continue to write the regulations at issue. In fact, this is the only area of federal law that is dictated by the states.

This surprising feature of the American political order is not without any sort of reason. The Constitution explicitly provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State and by the Legislature thereof."[12] That is to say, the Constitution explicitly provides for states to write federal election law. This passage is the basis for the current *status quo*.

In general, this doctrine has been respected since the ratification of the U.S. Constitution.[13] The consequence is vast differences across states in voting laws. For example, eligibility laws can vary greatly across state lines.[14] Additionally,

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11: Although there are laws passed by the federal government that do not affect every citizen (for example, building a bridge in Ohio), each Congress necessarily enacts laws that do affect everyone, such as the federal budget.

12: See U.S. Const. art. I §4.

13: And, in general, this is how it remained, with the exception of 1965, when the Civil Rights Act was signed. Even then, though, it was considered "decisive action" that was only permissible due to "unique circumstances" with the hope that the Act would eventually be weakened or even expire. See *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966).

14: Some states are currently attempting to require official identification for citizens to actually vote at the place of polling. See Bill Mears, Jessica Yellin & Ashley Killough, *After Supreme Court Ruling, States See Green Light for Voter ID Laws*, CNN (2013), online at http://politicalticker.blogs.cnn.com/2013/06/25/after-supreme-court-ruling-states-see-green-light-for-voter-id-laws/. Some states bar felons from voting. See *State Felon Voting Rights*, ProCon (2013), online at

"American elections are conducted using a hodge-podge of different voting technologies".[15] This tapestry of technology can cause disenfranchisement of voters. A famous example is the 2000 presidential election, in which faulty technology in Florida caused a "hanging chads" scandal and cries for a recount, eventually ending in a federal lawsuit[16] that handed George W Bush victory over Al Gore. The fact that this scandal only happened in one state makes it a special type of injury to other Americans, as it allowed the citizens of Florida to harm the citizens of, say, New York without any form of recourse. It is here that the harmful consequences of current policy are seen most clearly. And, it is here that Federal Voting Doctrine may make meaningful contributions to American election procedure and legal doctrine.

III. Suggested Policy and Theoretical Basis

It is a very difficult task to attempt to undermine a multi-century doctrine of voting law. That said, this section will show that there is a very strong theoretical argument against the established system, and Section IV will demonstrate powerful, desirable, and practical outcomes that will flow from the abandonment of the current voting regime. Despite the profuse historical precedent in favor of the current practice, it is perfectly constitutional for the federal government to write its own laws regarding federal elections, supersede existing state laws by which it cannot abide, and preserve a crucial balance of powers by leaving implementation to the states on a limited basis. This is a sharp departure from current practice, but, as this section explains, such actions are constitutional.

Before I demonstrate that FVD is sensible, I must argue for its legality. Ostensibly, it fails to pass this threshold. As the Constitution states, the "Times, Places and Manner" of federal elections are to be prescribed by state legislatures. But, the Constitution also provides that "the Congress may at any time by Law make or alter such [electoral] Regulations,"[17] which means that the Constitution has explicitly provided for the federal government to

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http://felonvoting.procon.org/view.resource.php?resourceID=286. Either way, these laws are controversial and can affect the outcome of a federal election. They should be subject to more than just the whims of a state's government.

15: See *Residual Votes Attributable to Technology*, Caltech/MIT Voting Project 1 (2001), online at http://www.hss.caltech.edu/~voting/CalTech_MIT_Report_Version2.pdf.

16: See *Bush v. Gore*, 531 U.S. 98 (2000). Although I take no position in this article on who became President, I will often reference this election to discuss the problems with how it was conducted because it is so well known and recent.

17: See U.S. Const. art. I, § 4, cl. 1.

write law it deems prudent. It would thus be constitutional for the federal government to write its own legislation on any matter of federal elections and be within the bounds of this passage. Why does this not end the discussion? The debate continues because the "Place" where elections occur is expressly protected.[18] Namely, the federal government may not alter "the Places of chusing Senators."[19] However, this problem goes away with a small amount of reasoning.

At the time of the Constitution's ratification, Senators were not elected but were appointed by state governments.[20] So, this provision, as written, essentially provides that the federal government cannot determine where state legislatures are to conduct their business.[21] But, considering that today's senators are popularly elected,[22] this clause appears now to be a non-issue, a moot and antiquated vestige of a different age whose literal interpretation is no longer relevant.

Of course, some may be uncomfortable with such a loose reading of this section. But, even if one assumes for the sake of argument that this clause still has modern applicability, it is clear that the Constitution nevertheless bestows broad power on the federal government to regulate all federal elections. Specifically, to return to the language, the federal government is only bound

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18: Although this may seem trivial, the placement of polling stations is actually a very significant issue. There are serious equality of access issues relating to the density of polling stations throughout the various states. See Scott Powers & David Damron, *Analysis: 201,000 in Florida Didn't Vote Because of Long Lines,* Orlando Sentinel (2013), online at http://articles.orlandosentinel.com/2013-01-29/business/os-voter-lines-statewide-20130118_1_long-lines-sentinel-analysis-state-ken-detzner.

19: U.S. Const. art. I, § 4, cl. 1.

20: See *Id*. art. I, § 3, cl. 1. This changed with the passage of Amendment XVII, which established the direct election of senators. This amendment was enacted to break up the "millionaires club" of the Senate during a time in which a millionaire meant a very different thing than it did now (Goldman Sachs CEO Lloyd Blankfein's $18 million salary would not qualify). Today, Senators are elected in much same way that House members are. Although, instead of being elected for a portion of the population every 2 years, they are elected every 6 years in a statewide election.

21: This is a wonderful example of a federalist system restricting the right of impingements on the rights of the legislature to write law for its own domain. Since, when the Constitution was written, it could take days to weeks to travel to a different town, allowing the federal Congress to determine the location of state legislatures could create a serious impediment to any legislation. Even today, it would be a serious hassle for time-sensitive legislation.

22: U.S. Const. amend. XVII.

insofar as it may not regulate "the Places of chusing Senators."[23] This section simply means that the federal government may not write laws that alter other laws regarding where Senators are chosen, but the federal government is under no obligation based on these words to be otherwise bound by the states. As an example, since states place House and Senate elections on the same ballot, the federal government is free to make laws that affect the polling stations for these ballots, considering that state legislatures are free to respond by separating the elections for the House and Senate. The federal government could choose to pass laws governing most aspects of a federal election and still truly be within its Constitutional bounds.

Now, the final task concerns proving that FVD is wise doctrine. Federalism provides the strongest theoretical defense of FVD. To link voting law and federalism, we must realize that federal voting laws are a federal issue. Federalism, as explained before, has its crucial element in the legislating apparatus rather than the judicial or enforcement means of the domain of law in question. That is, federal judges may rule on states' laws, and state police may be authorized to make arrests for federal infractions, but no state legislator is entitled to vote on federal law. The states' laws must not be able to dictate the outcome of a federal election and, as a result, federal law. Federal voting law very clearly affects the outcome of federal elections.[24] Thus, allowing states to write federal voting law gives them an effective voice in who the legislators are, which should be considered undue influence over federal legislation not permitted by federalism. Furthermore, the fact that these elections have effects across state lines makes them governed by federal rather than state law, as shown earlier. For these two reasons, state control of regulations for federal elections is a blatant violation of federalism. Therefore, at least for the sake of intellectual consistency, it is appealing to adopt FVD.

In addition to being appealing from an intellectual, abstract perspective of fitting with the federalist philosophy, Federal Voting Doctrine is practically likely to reduce the chance for political abuse and minimize the possibility of states harming other states. It is very difficult to actually launch a suit regarding voting rights abuses by the state. Commonly in such lawsuits, over six thousand man hours are spent acquiring documents, and state voting officials exhaust ample opportunities to slow down the process.[25] For a citizen, this makes it prohibitively expensive and time-consuming to seek

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23: *Id.* art. I, § 4, cl. 1.

24: In fact, it cannot even be argued that it is insignificant in its scale; often, such laws, such as the density of polling stations, can be the difference between victory and loss for a candidate.

25: See *South Carolina v. Katzenbach*, 383 U.S. at 313.

judicial redress, ensuring he has no reasonable form of recourse for a political harm that may be inflicted upon him by a state. Let there be no question; historically, states have engaged in such abuses.[26] With FVD, federal election laws are standardized. Any rights violations will be much easier to detect, prove, and litigate because they will necessarily be more widespread and the laws governing such violations, by being more common, will be more widely understood. Furthermore, because any problematic law would affect every state, there will be people detecting problems and solving them with the resources of multiple states rather than just one. This increases the chances that such problems will be fixed, let alone identified.

Additionally, considering that state oversight has been notoriously unsatisfactory, entrusting meaningful enforcement and review to, say, the generally competent Justice Department, which has almost 50 years of experience managing elections due to its civil rights obligations, cannot make the situation worse.[27] Additionally, the DOJ has significantly more resources than any state's Attorney General, which would provide additional support to citizens who are currently harmed. Combined with the previous effects generated above, it is clear that there are practical benefits to states and citizens that stem from the adoption of FVD.

Finally, there is one additional intellectually appealing benefit to FVD. As mentioned before, if election law is odious in one state and not another, then one state can be said to be harming another, as well as its own citizens. However, states cannot sue each other on the basis that they do not like each other's laws or doubt their constitutionality.[28] Therefore, there is no recourse

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26: See *Shelby County v. Holder*, 133 S. Ct. 2612, 2651-52 (2013) (Ginsburg, J., dissenting).

27: Examples of mismanagement by states abound. For example, in recent years Florida attempted to erase hundreds of thousands of voters from its rolls; in Ohio some counties claim to have a voting population greater than their actual population; in the 2012 election some counties had over 5-hour waits for the ballot; in the first half of the 20th century racist states instituted poll taxes or literacy tests; and more are easily found. In fact, state mishandling of elections is so widespread that there is a limited federal bureaucracy dedicated to handling these complaints: the Election Assistance Commission, online at http://www.eac.gov/inspector_general/report_fraud_waste__abuse.aspx.

28: 28 U.S.C. § 1251 provides that controversies involving multiple states fall within the Supreme Court's original and exclusive jurisdiction. However, states may not successfully initiate such actions simply because they disagree with the laws that another state has on its books. Rather, such suits must meet the standing requirements of Article III. See *Warth v. Seldin*, 422 U.S. 490, 501 (1974). The claimant state must show that it "is immediately in danger of sustaining a direct injury." That is, it may not sue based on an abstract interest

for the type of harm these states suffer. Yet, if it is recognized that states cannot write federal law, then they would not be able to write the type of law that would harm another state by unduly influencing federal elections. Therefore, FVD eliminates an entire avenue of harm and adds an extra layer of protection to federalism.

IV. Corollaries: Practical Application of Federal Voting Doctrine

This section will outline how current voting laws established by states violate FVD and what the effects will be of terminating and replacing these laws. More concretely, FVD will be applied here in a less abstract sense to give the reader a greater sense of FVD in practice. The result is that many potential laws become trivial[29] applications of the federal Congress' power to regulate elections. They would no longer be laws that, as traditionally has been the case, carry presumptive marks of constitutional infirmity for meddling with states' election regulations. For example, if FVD is adopted, any new lawsuits attacking the Voting Rights Act of 1965[30] could not be lawsuits challenging the government's right to legislate elections, as that power will already be clearly established and asserted.[31] This section takes the form of a "before-and-after," examining a current problem and how FVD provides the solution.

Felons: In some states, felons are not allowed to vote. This would change substantially if FVD is adopted.[32] Most obviously, either felons will be

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in constitutional law or in hopes of proving an imagined, distant, or speculative form of injury that has not even happened yet.

29: By trivial, I mean that there is no pressing legal question. These laws become just routine regulations, like BPA laws concerning water bottles.

30: This statement does not apply to Section IV, which has faced legal challenges and was stricken down due to its arbitrariness. See, generally, *Shelby County v. Holder*, 133 S. Ct. at 2612. In truth, FVD could make the Civil Rights Act of 1965 apply to every state, as it would be the supreme law of the land: federal law.

31: This is not to say that the Voting Rights Act of 1965 could not face legal challenges; like any law, there could be lawsuits regarding the arbitrariness of the law or whether the technical aspects have a constitutionality issue, for example. However, disentangling these challenges from the issue of the right to regulate an election makes any legal question much more straightforward and interesting, as well as possibly more broad.

32: In general, the case against taking away felons' rights to vote are many, and in my view most of them are correct. The phrase "right to vote" appears five times in the Constitution, as well as in the various amendments, implying that voting is a constitutional right. See U.S. Const. amend. XIV, XV, XIX, XXIV,

able to vote in every state or in no states. Currently, only *two* states, Maine and Vermont, permit felons to vote by absentee ballot. Only 13 states and Washington, D.C. allow felons to vote again once they have served their term. 23 states do not allow felons to vote after they have been incarcerated if they still have some restriction, like parole. And a full 12 states may take away a felon's right to vote permanently.[33] Considering that Florida is one of the states that restricts felon voting, that George W. Bush defeated Al Gore in the state by approximately 900 votes, and that there are more than 900 felons in that state, it is possible that this policy affected the outcome of that particular election.[34] This is clear evidence that federal election law is consequential and that differences across state lines allow states to harm other states.

For FVD, the primary concern here is that the states have no right to decide whether felons should vote in federal elections. Since voter eligibility is one of the most basic building blocks of an election, one's qualifications should be secured logically and transparently.[35] And it should not be up to the states to decide who is entitled to pick the electors of a different legislative domain; after all, the federal government has no right to say who may vote for governor. Moreover, as the solution to this problem would be federal law, the solution would have to be universally applied.[36] FVD makes each state

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& XXVI. This would imply that it cannot be taken away from felons, much like how due process rights of felons might still be impinged by state actors. Additionally, there are disparate impact and political corruption concerns. See *Should Felons Have The Right To Vote?*, NPR (2012), online at http://www.npr.org/2012/07/16/156855043/should-ex-felons-have-the-right-to-vote. Also, consult *Felony Disenfranchisement Laws in the United States*, The Sentencing Project (2013), online at http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Jun2013.pdf. That said, here I am merely showing how the current regime is contradicted by FVD, and hope that the offense against the federal government by these policies is made obvious.

33: See *State Felon Voting Rights* (cited in note 14).

34: At the time, there were 827,000 felons denied their right to vote. See Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (2006).

35: As I explained in Part II, the Constitution clearly outlines that voting is a crucial part of the character of the United States and is the effective route to power. It should therefore be very greatly considered before a person's right to vote is taken away. Making the issue of who can vote a federal one may make it more difficult to pass any such law in the first place, which is a positive outcome.

36: By this I do not mean that either felons could vote in every state or no state. What I mean is that every standard applies to the same state, such as with the Section IV of the Voting Rights Act.

and voter equal by creating uniform rules so that a person's right to vote is the same no matter where she may be. The enactment of a single set of regulations will make the system simpler, resulting in greater efficiency stemming from less confusion from a myriad of eligibility laws.

Technology: Technology varies greatly across state lines. There is a vast and separate debate on whether votes should be submitted electronically or via pen and paper. Some believe that indelible ink should be used as well. Although I take no position in this debate, some technologies are clearly flawed and open to abuse, such as the infamous "hanging chads" of the 2000 Presidential election. More importantly, differences in technology cause confusion and make the vote counts of some states unreliable compared to others. In the process, citizens are harmed, as they face the possibility that voting may be complicated and confusing or that their vote may be voided due to a technological error.

FVD addresses this issue by allowing the federal government to establish guidelines or even demand the use or abolition of specific voting technologies, allowing voters to be familiar with how to vote no matter where they are and ensuring voters that their votes bear the same risks as those of their peers. Ensuring uniform risk is essential for creating fairness for American voters, and one very important way to do that is to standardize voting technology.

Redistricting: Every 10 years, the federal government takes a census.[37] Based on that census, the number of Congressional seats are redistributed based on population, although no state may have less than a single Representative.[38] In order to decide who votes for which representative, the state map is cut up into districts in a process called "redistricting." This task is left to the states to address in a manner of their choosing.[39] Redistricting is highly flawed and open to abuse as Congressmen curry favor to redraw district lines so that their neck of the woods is filled with as many of their own supporters as possible, locking out competitors structurally, in a process called "gerrymandering."[40]

37: See U.S. Const. art. I, § 1, cl. 3.

38: Originally, the Constitution provided that there would be one representative for every 30,000 people. See U.S. Const. art. I, § 2, cl. 3. This ratio has changed over time as the population has grown ever larger. Today, the House has only 435 seats. But, with a population of 313.9 million, there would be 10,463 house members with the old system. See Reapportionment Act of 1929, 2 U.S.C. § 2(a).

39: See *Census Redistricting Data Program*, Census Bureau (2013), online at http://www.census.gov/rdo/.

40: See *Gerrymandering, Pure and Corrupt*, New York Times (2009), online at

A full 34 states allow their own state-level legislatures, with their party politics and pro-incumbency tendencies, to draw the map themselves. Furthermore, state legislators tend to favor their own party, redistricting in a way that makes it difficult for a would-be Congressman of a different—or even no—party to be elected, regardless of the will of the community. This is a practical problem that cannot be ignored and that makes elections less free and unambiguously more unfair. The federal government, if empowered through the adoption of FVD, could easily set up an independent commission to make sure that no Congressman could cheat the system for his or her own benefit.[41]

In truth, the Voting Rights Act of 1965 addresses this issue without any more intervention necessary from FVD.[42] The VRA establishes a "preclearance" mechanism by which "trouble states" with a history of racial discrimination must have the Justice Department approve any federal election law prior to its implementation. Preclearance could address the issue of redistricting broadly and generally, although most likely either every state or no states would have to be precleared. The only input from FVD is to free the DOJ from the civil rights imperative of preclearance.[43] Redistricting, like felon voting rights, happens to be an issue of eligibility; in this case, at issue is not who is eligible to vote in a federal election, but which federal election one is eligible to vote in. That makes redistricting an issue of the highest importance, which explains why the process is so contested. The adoption of FVD creates an opportunity to avoid arbitrary redistricting and adopt a consistent, equitable, rules-based system that limits untoward political influence.

To implement these measures and any others that may arise, it would be wise to establish a U.S. Department of Voting. The new USDV would relate to FVD as the EPA does to the Clear Air Act; it would be a bureaucracy with more flexible powers to address additional issues related to its subject matter as they arise in an unpredictable future. Simply, there ought to be some bureaucracy that deals with this matter. The USDV fulfills this role. The importance of individual voting rights justifies the creation of a specific

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http://www.nytimes.com/2009/11/12/opinion/12thu1.html?_r=0. Gerrymandering is named after Massachusetts governor Elbridge Gerry, who drew a district to favor his party that was so absurd that it looked like a salamander.

41: California, for example, has adopted such a system, and it is widely acclaimed. See Voters FIRST Act, Cal. Gov. Code. § 8251. The fact that so few states do this is another example of how "hodge-podge" policies hurt voters. Only seven other states have such a system.

42: See Voting Rights Act of 1965, 42 U.S.C § 1973.

43: There is no reason, of course, that removing the civil rights mission of the Voting Rights Act would bar any civil rights case regarding voting policy.

new agency charged with their explicit protection. In fact, the USDV could also free the DOJ from the tedious job of managing the details of elections to focus on its primary mandate: to pursue the interests of the United States, as a national community, in enforcing the substantive goals of federal criminal and civil laws.

V. Conclusion

There are many, many issues relating to voting law. I did not discuss such issues like absentee voting, for example, or whether there should be a national day off of work during elections; those are issues of optimal voting policy. But again, the 2000 Presidential Election is the perfect example that fair voting policy still needs to be addressed too. In this case, the laws regarding voter eligibility and technology determined the outcome of a national election. One candidate was defeated by a slim margin, a margin close enough that Florida alone determined the outcome. That outcome was highly consequential. The nation's forty-third President faced the 9/11 terror attacks, Hurricane Katrina, and the Great Recession and, among other milestones, led the nation into the Iraq and Afghanistan Wars, aided Israel during the Second Intifada, enacted TARP and the auto bailout, and passed No Child Left Behind. It is a matter of opinion whether these actions were good; it is a matter of fact that they affected everyone in the United States and will continue to affect them for the foreseeable future. An electoral lead of 900 votes and a refusal to recount 70,000 more should not have determined who led the country during such trying and consequential times. Reforming election doctrine and implementing FVD will remove an entire mode for such degradations of the democratic process to occur ever again.

The federal government should implement the FVD and establish a Department of Voting in order to properly regulate federal elections. That the citizens of, say, Connecticut should be affected by what, say, Mississippi has decided to do for its citizens gives undue influence to a single state over the affairs of another. It violates federalism. The current scope states are given to write federal election law ought to be greatly narrowed. The effects will allow a great number of issues to be tackled, including voting rights of felons; technology discrepancies across states; absentee balloting rules; redistricting after the census; equality of access regarding polling station density and hours across districts; and more. FVD opens up the possibility of a fairer and intellectually satisfying division of legislative powers. The regime it faces is old and established, but it is also outdated, illogical, and harmful, making it choice for replacement.